

# Gagan Agarwal vs The Competition Commission Of India on 10 November, 2022

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL  
PRINCIPAL BENCH, NEW DELHI  
Competition Appeal (AT) No. 38 of 2019

IN THE MATTER OF:

Sahuwala Cylinders Pvt. Ltd. & Anr. ...Appellants

Versus

Competition Commission of India & Anr. ...Respondents

Present:

For Appellants : Mr. Jaiveer Shergil, Mr Ankur Sood and Ms Bhumi  
Goyal, Ms Romila Mandal, Advocates

For Respondents : Mr. Arjun Krishnan, Mr Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI  
Ms Shweta Gupta, RA, CCI

With

Competition Appeal (AT) No. 40 of 2019

IN THE MATTER OF:

Om Containers & Ors. ...Appellants

Versus

Competition Commission of India & Anr. ...Respondents

Present:

For Appellants : Mr. Jaiveer Shergil, Mr Ankur Sood and Ms Bhumi  
Goyal, Ms Romila Mandal, Advocates

For Respondents : Mr. Arjun Krishnan, Kaustav Som and

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Ms. Khushboo Mittal, Advocates for R-1 (CCI)

Mr. Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 41 of 2019

IN THE MATTER OF:

Mauria Udyog Ltd.

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Amol Sinha, Mr. Kshitiz Garg and Mr. Rahul  
Kochar, Advocates

For Respondent : Mr Davander Prasad, Dy. Director CCI.

With  
Competition Appeal (AT) No. 44 of 2019

IN THE MATTER OF:

Intel Gas Gadgets Pvt. Ltd.

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Amol Sinha, Mr. Kshitiz Garg, Advocates  
Mr. Rahul Kochar, Advocate.

For Respondent : Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 45 of 2019

IN THE MATTER OF:

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Jesmajo Industrial Fabrications  
Karnataka Pvt. Ltd. & Anr.

...Appellants

Versus

Competition Commission of India

...Respondent

Present:

For Appellants : Mr. O.P. Gaggar and Mr. Sachindra Karn, Advocates  
For Respondent : Mr. Arjun Krishnan, Kaustav Som and Ms.  
Khushboo Mittal, Advocates for R-1 (CCI) Mr  
Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 46 of 2019

IN THE MATTER OF:  
Shakti Cylinders Pvt. Ltd ...Appellant  
Versus  
Competition Commission of India ...Respondent  
Present:

For Appellant : Mr. Amol Sinha, Mr. Kshitiz Garg and Mr. Anshum  
Jain, Mr. Rahul Kochar, Advocates  
For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI) Mr  
Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 47 of 2019

IN THE MATTER OF:  
Raghupati Synergy Pvt. Ltd. ...Appellant  
Versus  
Competition Commission of India ...Respondent  
Present:

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For Appellant : Mr. Amol Sinha, Mr. Kshitiz Garg and Mr. Anshum  
Jain, Mr. Rahul Kochar, Advocates

For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI) Mr  
Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 49 of 2019

IN THE MATTER OF:  
Prestige Fabricators Pvt. Ltd. ...Appellant

Versus

Competition Commission of India ...Respondent

Present:

For Appellant : Mr. Amol Sinha, Mr. Kshitiz Garg and Mr. Anshum Jain, Mr Rahul Kochar, Advocates

For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 50 of 2019

IN THE MATTER OF:  
S. M. LPG Cylinders Pvt. Ltd. ...Appellant

Versus

Competition Commission of India ...Respondent

Present:

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For Appellant : Mr. Amol Sinha, Mr. Kshitiz Garg and Mr. Anshum Jain, Mr Rahul Kochar, Advocates

For Respondent : Mr Davander Prasad, Dy. Director CCI  
With  
Competition Appeal (AT) No. 52 of 2019

IN THE MATTER OF:  
International Cylinders Pvt. Ltd. ...Appellant

Versus

Competition Commission of India ...Respondent

Present:

For Appellant : Mr. Amol Sinha, Mr. Kshitiz Garg and Mr. Anshum Jain, Mr Rahul Kochar, Advocates

For Respondent : Mr. Arjun Krishnan, Kaustav Som and

Ms. Khushboo Mittal, Advocates for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 53 of 2019

IN THE MATTER OF:  
Andhra Cylinders & Anr.

...Appellants

Versus

Competition Commission of India

...Respondent

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Present:

For Appellants : Mr. Pradeep Aggarwal, Mr Arjun Aggarwal, Mr.  
Karan Khanna and Mr. Aniket Bhattacharya,  
Advocates.

For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 54 of 2019

IN THE MATTER OF:  
Confidence Petroleum India Ltd & Ors.

...Appellants

Versus

Competition Commission of India

...Respondent

Present:

For Appellants : Mr. Pradeep Aggarwal, Mr Arjun Aggarwal, Mr.  
Karan Khanna and Mr. Aniket Bhattacharya,  
Advocates.

For Respondent : Mr Davander Prasad, Dy. Director CCI  
With

Competition Appeal (AT) No. 55 of 2019

IN THE MATTER OF:

Faridabad Metal Udyog Pvt. Ltd. & Anr.

...Appellants

Versus

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Competition Commission of India

...Respondent

Present:

For Appellants : Mr. Pradeep Aggarwal, Mr Arjun Aggarwal, Mr.  
Karan Khanna and Mr. Aniket Bhattacharya,  
Advocates.

For Respondent : Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

With

Competition Appeal (AT) No. 56 of 2019

IN THE MATTER OF:

Tirupati Containers Pvt. Ltd. & Anr.

...Appellants

Versus

Competition Commission of India

...Respondent

Present:

For Appellants : Mr. Pradeep Aggarwal, Mr Arjun Aggarwal, Mr.  
Karan Khanna and Mr. Aniket Bhattacharya,  
Advocates.

For Respondent : Mr Davander Prasad, Dy. Director CCI

With

Competition Appeal (AT) No. 57 of 2019

IN THE MATTER OF:

JKB Gas Pvt. Ltd. & Anr.

...Appellants

Versus

Competition Commission of India  
Present:

...Respondent

For Appellants : Mr. Manas Kumar Chaudhuri, and Mr. Ebaad Nawaz  
Khan, Mr Aman Singh Baroka, Advocates

For Respondent : Mr Davander Prasad, Dy. Director CCI  
With  
Competition Appeal (AT) No. 58 of 2019

IN THE MATTER OF:  
Kurnool Cylinders Pvt Ltd.

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr Praveen Mahajan, Advocate.

For Respondent : Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 59 of 2019

IN THE MATTER OF:

Winfab Equipments Pvt Ltd.

...Appellant

Versus

Competition Commission of India  
Present: ...Respondent

For Appellant : Mr Praveen Mahajan, Advocate.

For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 60 of 2019  
IN THE MATTER OF:  
Saboo Cylinders Pvt Ltd. ...Appellant

Versus

Competition Commission of India ...Respondent

Present:

For Appellant : Mr Praveen Mahajan, Advocate.

For Respondent : Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 61 of 2019  
IN THE MATTER OF:  
Surya Shakti Vessels Pvt Ltd & Anr. ...Appellants

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Versus

Competition Commission of India ...Respondent

Present:

For Appellants : Mr Praveen Mahajan, Advocate.



For Respondent : Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 62 of 2019

IN THE MATTER OF:  
Punjab Gas Cylinders Ltd & Ors. ...Appellants

Versus

Competition Commission of India ...Respondent  
Present:

For Appellants : Mr Praveen Mahajan, Advocate.

For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 63 of 2019

IN THE MATTER OF:  
Sunrays Engineers Pvt Ltd & Anr ...Appellants

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Versus

Competition Commission of India ...Respondent

Present:

For Appellants : Mr Praveen Mahajan, Advocate.

For Respondent : Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 64 of 2019

IN THE MATTER OF:

Mahaveer Cylinders Ltd & Anr

...Appellants

Versus

Competition Commission of India

...Respondent

Present:

For Appellants : Mr Praveen Mahajan, Advocate.

For Respondent : Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 65 of 2019

IN THE MATTER OF:

Universal Cylinders Ltd & Anr.

...Appellants

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Versus

Competition Commission of India

...Respondent

Present:

For Appellants : Mr Praveen Mahajan, Advocate.

For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

With

Competition Appeal (AT) No. 66 of 2019

IN THE MATTER OF:

Vidhya Cylinders Pvt Ltd & Anr.

...Appellants

Versus

Competition Commission of India

...Respondent

Present:

For Appellants : Mr Praveen Mahajan, Advocate.

For Respondent : Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 67 of 2019

IN THE MATTER OF:  
GDR Cylinders Pvt Ltd.

...Appellant

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Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr Praveen Mahajan, Advocate.

For Respondent : Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 68 of 2019

IN THE MATTER OF:  
Balaji Pressure Vessels Pvt Ltd & Anr.

...Appellants

Versus

Competition Commission of India

...Respondent

Present:

For Appellants : Mr Praveen Mahajan, Advocate.

For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

With

Competition Appeal (AT) No. 69 of 2019

IN THE MATTER OF:

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Southern Cylinders Pvt Ltd & Anr. ...Appellants

Versus

Competition Commission of India ...Respondent

Present:

For Appellants : Mr Praveen Mahajan, Advocate.

For Respondent : Mr Davander Prasad, Dy. Director CCI  
Mr. Arjun Krishnan and Ms Khushboo Mittal,  
Advocates for CCI

With

Competition Appeal (AT) No. 70 of 2019

IN THE MATTER OF:

Prathima Industries Pvt Ltd & Ors. ...Appellants

Versus

Competition Commission of India ...Respondent

Present:

For Appellants : Mr. P Venkat Reddy, Mr. Prashant Tyagi and Mr P.  
Srinivas Reddy, Advocates.

For Respondent : Mr. Arjun Krishnan, Kaustav Som, Ms Anita  
Kanungo, and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

With

Competition Appeal (AT) No. 71 of 2019

IN THE MATTER OF:  
Hyderabad Cylinders Pvt Ltd. ...Appellant

Versus

Competition Commission of India ...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Advocate.  
For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 72 of 2019

IN THE MATTER OF:  
Nandi Cylinders Pvt Ltd. ...Appellant

Versus

Competition Commission of India ...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Advocate.  
For Respondent : Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 73 of 2019

IN THE MATTER OF:  
Bhiwadi Cylinders Pvt. Ltd. & Anr. ...Appellants

Versus

Competition Commission of India

...Respondent

Present:

For Appellants : Mr Rahul Kochar, Advocate.  
Mr Praveen Mahajan, Advocate.

For Respondent : Mr Davander Prasad, Dy. Director CCI, Mr. Arjun  
Krishnan, Ms Khushboo Mittal, Advocates.

With

Competition Appeal (AT) No. 74 of 2019

IN THE MATTER OF:

Dinesh Goyal

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Advocate.  
Mr Praveen Mahajan, Advocate.

For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

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With

Competition Appeal (AT) No. 75 of 2019

IN THE MATTER OF:

Sanghvi Cylinders Pvt. Ltd.

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Mr Rahul  
Kochar, Advocates  
Mr Praveen Mahajan, Advocate.  
For Respondent : Mr Davander Prasad, Dy. Director CCI  
With  
Competition Appeal (AT) No. 76 of 2019

IN THE MATTER OF:  
Arun Goyal

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Advocate.  
Mr Praveen Mahajan, Advocate.  
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For Respondent : Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 77 of 2019

IN THE MATTER OF:  
R.M. Cylinders Pvt. Ltd.

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates

Mr Rahul Kochar, Advocate  
Mr. Praveen Mahajan, Advocate.  
For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

With

Competition Appeal (AT) No. 81 of 2019

IN THE MATTER OF:  
Puneet Gupta

...Appellant

Versus

Competition Commission of India

...Respondent

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Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Advocate.  
Mr Praveen Mahajan, Advocate.  
For Respondent : Mr Davander Prasad, Dy. Director CCI  
Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)

With

Competition Appeal (AT) No. 82 of 2019

IN THE MATTER OF:

N.K. Sureka

...Appellant

Versus

Competition Commission of India

...Respondent



Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Advocate.  
Mr. Praveen Mahajan, Advocate.  
For Respondent : Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 83 of 2019  
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IN THE MATTER OF:  
C.P. Bhartia ...Appellant

Versus

Competition Commission of India ...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Advocate.  
Mr Praveen Mahajan, Advocate.  
For Respondent : Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 84 of 2019

IN THE MATTER OF:  
Pankaj Gupta ...Appellant

Versus

Competition Commission of India ...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Mr Rahul  
Kochar, Advocates

Mr Praveen Mahajan, Advocate.

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For Respondent : Mr Davander Prasad, Dy. Director CCI  
Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)

With  
Competition Appeal (AT) No. 85 of 2019

IN THE MATTER OF:  
Sandeep Bhartia ...Appellant

Versus

Competition Commission of India ...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Mr Rahul  
Kochar, Mr Praveen Mahajan, Advocates  
For Respondent : Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)

With  
Competition Appeal (AT) No. 86 of 2019

IN THE MATTER OF:  
M.B. Koyakutty ...Appellant

Versus

Competition Commission of India ...Respondent

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Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Mr Praveen Mahajan, Advocates.  
For Respondent : Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)

With  
Competition Appeal (AT) No. 87 of 2019

IN THE MATTER OF:  
Sanjay Bhartia ...Appellant

Versus

Competition Commission of India ...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Mr Praveen Mahajan, Advocates.  
For Respondent : Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)

With  
Competition Appeal (AT) No. 88 of 2019

IN THE MATTER OF:  
Sanjay Rathi ...Appellant

Versus

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Competition Commission of India ...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Mr Praveen Mahajan, Advocates.  
For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 89 of 2019

IN THE MATTER OF:  
Davish Jain

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Mr Rahul  
Kochar, Mr Praveen Mahajan, Advocates

For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)  
Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 90 of 2019

IN THE MATTER OF:  
Naveen Bhartia

...Appellant

Versus

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Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Mr Praveen Mahajan, Advocates.

For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)

With  
Competition Appeal (AT) No. 91 of 2019

IN THE MATTER OF:  
Rajkumar Bhartia

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Mr Praveen Mahajan, Advocates.  
For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)

With  
Competition Appeal (AT) No. 92 of 2019

IN THE MATTER OF:  
North India wires Ltd (Howrah Unit) ...Appellant  
Versus

Competition Commission of India ...Respondent

Present:

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For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Mr Praveen Mahajan, Advocates.  
For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)

With  
Competition Appeal (AT) No. 93 of 2019

IN THE MATTER OF:  
Allampally Brothers Ltd. ...Appellant

Versus

Competition Commission of India ...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Mr Praveen Mahajan, Advocates.  
For Respondent : Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)

With

Competition Appeal (AT) No. 94 of 2019

IN THE MATTER OF:

A.P. Sapra

...Appellant

Versus

Competition Commission of India

...Respondent

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Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Mr Praveen Mahajan, Advocate.  
For Respondent : Mr Davander Prasad, Dy. Director CCI  
Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)

With

Competition Appeal (AT) No. 95 of 2019

IN THE MATTER OF:

D.V. Rajasekhar

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Mr Praveen Mahajan, Advocates.  
For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)  
Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)

With

Competition Appeal (AT) No. 96 of 2019

IN THE MATTER OF:

Tirupati Cylinders Ltd.

...Appellant

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Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Mr Praveen Mahajan, Advocates.  
For Respondent : Mr Davander Prasad, Dy. Director CCI  
Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)

With

Competition Appeal (AT) No. 97 of 2019

IN THE MATTER OF:  
Vijay Sanghvi

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Mr Praveen Mahajan, Advocates.  
For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)  
Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)

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With

Competition Appeal (AT) No. 98 of 2019

IN THE MATTER OF:

Ramesh Sanghvi

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Mr Praveen Mahajan, Advocates.

For Respondent : Mr Davander Prasad, Dy. Director CCI  
With

Competition Appeal (AT) No. 99 of 2019

IN THE MATTER OF:

Yogesh Sanghvi

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Mr Praveen Mahajan, Advocates.

For Respondent : Mr Davander Prasad, Dy. Director CCI

With

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Competition Appeal (AT) No. 100 of 2019

IN THE MATTER OF:

Carbac Holdings Ltd.

...Appellant

Versus

Competition Commission of India

...Respondent



Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Mr Praveen Mahajan, Advocates.  
For Respondent : Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)

With  
Competition Appeal (AT) No. 101 of 2019

IN THE MATTER OF:  
Haldia Precision Engineering Pvt Ltd. ...Appellant

Versus

Competition Commission of India ...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Mr Praveen Mahajan, Advocates.  
For Respondent : Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)

With  
Competition Appeal (AT) No. 102 of 2019  
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IN THE MATTER OF:  
Daya Industries ...Appellant

Versus

Competition Commission of India ...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Mr Praveen Mahajan, Advocates.  
For Respondent : Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 103 of 2019

IN THE MATTER OF:  
Ritesh Sanghvi ...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Mr Praveen Mahajan, Advocates.  
For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)

With

Competition Appeal (AT) No. 104 of 2019  
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IN THE MATTER OF:

Tirupati LPG Industries Pvt Ltd.

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Mr Praveen Mahajan, Advocates.  
For Respondent : Mr Davander Prasad, Dy. Director CCI

With

Competition Appeal (AT) No. 105 of 2019

IN THE MATTER OF:

Sarthak Industries Ltd.

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates

For Respondent : Mr. Rahul Kochar, Mr Praveen Mahajan, Advocates.  
: Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)

With

Competition Appeal (AT) No. 106 of 2019  
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IN THE MATTER OF:  
Aradhana Bhartia

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr Rahul Kochar, Mr Praveen Mahajan, Advocates.  
For Respondent : Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)

With

Competition Appeal (AT) No. 107 of 2019

IN THE MATTER OF:  
Asia Fab Tec Ltd.

...Appellant

Versus

Competition Commission of India & Anr.

...Respondents

Present:

For Appellant : Mr. R. Satish Kumar, Mr P Srinivas, Mr Vinay  
Kumar Sharma, Advocates.

For Respondents : Ms. Anita Kanungo, Advocate for R-1 (CCI)

With

Competition Appeal (AT) No. 108 of 2019

33

IN THE MATTER OF:  
BTP Structural India Pvt Ltd. ...Appellant

Versus

Competition Commission of India ...Respondent

Present:

For Appellant : Mr. Amol Sinha and Mr. Kshitiz Garg, Advocates  
Mr. Rahul Kochar, Advocate.  
For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)

With

Competition Appeal (AT) No. 109 of 2019

IN THE MATTER OF:  
Sri Sai Balaji Cylinders Pvt Ltd.& Anr. ...Appellants

Versus

Competition Commission of India & Anr. ...Respondents  
Present:

For Appellants : Mr K Krishna Kumar, Advocate.

For Respondents : Mr. Arjun Krishnan, Kaustav Som and  
Ms. Khushboo Mittal, Advocates for R-1 (CCI)

With

Competition Appeal (AT) No. 110 of 2019

IN THE MATTER OF:  
Lite Containers Pvt Ltd. ...Appellant

34

Versus

Competition Commission of India & Anr. ...Respondents

Present:

For Appellant : Mr K. Krishna Kumar, Advocate.

For Respondents : Ms. Anita Kanungo, Advocate for R-1 (CCI)

With  
Competition Appeal (AT) No. 111 of 2019

IN THE MATTER OF:  
AKMN Cylinders (P) Ltd & Anr. ...Appellants

Versus

Competition Commission of India & Anr. ...Respondents

Present:

For Appellants : Mr K Krishna Kumar, Advocate.

For Respondents : Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 02 of 2020

IN THE MATTER OF:  
Gagan Agarwal ...Appellant

Versus

35

Competition Commission of India ...Respondent

Present:

For Appellant : Mr. Ashvini Kumar and Mr. Abhinav Arya,  
Advocates Advocate

For Respondent : Mr Davander Prasad, Dy. Director CCI

With

Competition Appeal (AT) No. 03 of 2020

IN THE MATTER OF:  
Neelam Aggarwal

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Ashvini Kumar and Mr. Abhinav Arya,  
Advocates Advocate

For Respondent : Mr Davander Prasad, Dy. Director CCI

With

Competition Appeal (AT) No. 04 of 2020

IN THE MATTER OF:  
Pankaj Goel

...Appellant

36

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Ashvini Kumar and Mr. Abhinav Arya,  
Advocates Advocate

For Respondent : Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 05 of 2020

IN THE MATTER OF:  
Kamal Goel

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Ashvini Kumar and Mr. Abhinav Arya,  
Advocates Advocate

For Respondent : Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 06 of 2020

IN THE MATTER OF:  
Vijay Kumar Aggarwal

...Appellant

37

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Ashvini Kumar and Mr. Abhinav Arya,  
Advocates Advocate

For Respondent : Mr Davander Prasad, Dy. Director CCI

With  
Competition Appeal (AT) No. 07 of 2020

IN THE MATTER OF:  
Kushagra Aggarwal

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Ashvini Kumar and Mr. Abhinav Arya,  
Advocates Advocate

For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)

With

Competition Appeal (AT) No. 08 of 2020

IN THE MATTER OF:

38

B.B. Patil

...Appellant

Versus

Competition Commission of India

...Respondent

Present:

For Appellant : Mr. Ashvini Kumar and Mr. Abhinav Arya,  
Advocates Advocate

For Respondent : Ms. Anita Kanungo, Advocate for R-1 (CCI)

JUDGEMENT

(10th November, 2022) DR. ASHOK KUMAR MISHRA (MEMBER TECHNICAL)

1. All the above stated cases were heard together as all of them are against the same impugned order i.e. order dated 09.08.2019 passed in Case No.1/2014 by the Competition Commission of India (hereinafter referred to as 'CCI'). The appeals as stated above have been filed on various dates from October, 2019 to February, 2020. The appeals are filed under Section 53B of the Competition Act,



2002 against the above stated impugned order dated 09.08.2019 under Section 27 of the Competition Act, 2002. The appeals have been filed by various tenderers including individual involved in the conduct of the business of the Company. These cases were heard together on multiple dates commencing from 10th August, 2022 to 23rd September, 2022. At the outset the parties were asked to commence from the lead case and thereafter whoever feel factually some additional issues involved in their case which have been left over by the lead learned counsel are also permitted to make their submissions on those issues or additionally on any issues which has been left over by the lead submitter learned counsel. Since the number of cases were bulky, the Bench also directed the learned counsel to fix time limit for advancing various submissions including Reply and Rejoinder.

After fixing the time frame work for submission by the interested parties, the Bench commenced hearing on 10th August, 2022.

2. The reliefs sought in general as stated in the Appeal Paper Book are as follows:

a) To set aside the impugned order dated 09.08.2019 passed by the CCI under Section 27 of the CCI Act, 2002.

b) To set aside the impugned order dated 02.01.2014 passed by CCI.

c) To set aside the penalty imposed on the appellants/tenderers/appellant including the individual

conducting the affairs of the company/tenderer etc.

3. Since the appellants have also prayed for setting aside the order dated 2nd January, 2014 passed by the CCI. The same is depicted below for getting the issues explicitly clear:

"An anonymous information dated 25.04.2013 ("Information") was received by the Commission wherein it was alleged that there was a cartel operating in tenderers floated by Hindustan Petroleum Corporation Ltd ("HPCL")

2. The relevant facts gathered from the Information and from HPCL are as under:

2.1. HPCL floated an e-tender dated 28.10.2011 for supply of 45 lakh 14.2 kg LPG cylinders ("Tender 1"). It is alleged that orders placed to vendors after finalising Tender 1 was at a price much higher than the procurement price of other oil companies with the same vendors during the same period. It is also contended that at the time of filing the Information cylinders continued to be procured at higher rates (INR 60 approx. per cylinder) and that HPCL may have incurred losses running in crores by placing orders at the higher rates. 2.2 HPCL floated another e-tender dated 24.01.2013 under the two bid system (unpriced and priced bids) for supply of 40 lakh

14.2 kg LPG cylinders fitted with SC valves (Tender 2"), HPCL stated that due to certain internal deliberations, finalisation of Tender 2 was delayed. The unpriced bids were opened on 15.02.2013 and it was found that 66 bidders had participated. While technical evaluation of the bids was in progress, 51 out of the total 66 bidders withdrew their bid.

While some stated reasons such as power cuts, labour problems, etc. for withdrawal, some did not provide any reason. HPCL decided to proceed with the evaluation of the remaining bidders and found that 5 bidders were from "existing vendor category" and 10 bidders from "new vendors category". Tender rates were finalised based on L-1 rates obtained from bids of 4 bidders from "existing vendors category". 2.3. HPCL stated that since there was a delay in finalising the price bids of Tender 2, to meet the market requirement in the meantime, purchase orders ("POS") were placed on existing vendors at L-1 rates under Tender 1. According to HPCL, the price bids of Tender 2 were opened on 31.05.2013 and POs based on new price bids were being placed since then.

3. In the Information, it is alleged that the vendors were involved in collusive bidding in contravention of section 3(3) of the Act. It is contended that the rate finalised in Tender 1 was substantially higher than the procurement rates finalised with other oil companies by the same vendors. A comparison of the price bids submitted by vendors for each of the 18 states showed a similarity of pattern in the price bids submitted by 53 vendors. Further many vendors had submitted exactly the same or similar bids in most of the 18 states. This pattern indicates a possible collusion amongst the bidders and a concerted action. It is to be noted that around 45 bidders out of the total 78 bidders of Tender 1 were found to have infringed the provisions of section 3(3) of the Act in the tenders concerned in suo moto case 03/2011(In re: suo moto case against LPG cylinder manufacturers).

4. With respect to Tender 2, the L-1 rates were finalised based on the price bids of 4 bidders from the "existing vendors category". It is observed that the rates quoted in Tender 2 are lower than the rates quoted in Tender 1. A comparison of the price bids submitted by these 4 bidders reveals that they submitted bids in a close range and 2 bidders out of these 4 bidders (that is Krishna Cylinders, Haryana and Gopal Cylinders, Haryana) submitted same price bids for 7 out of 8 states that they both had submitted bids. Around 40 bidders out of the total 66 bidders of Tender 2 were found to have contravened the provisions of section 3(3) of the Act in suo moto case 03/2011, 51 bidders withdrew their bids for no justifiable reasons. The collective withdrawal of bids by 51 bidders lends credence to the allegation of the existence of an understanding or arrangement amongst the bidders.

5. In view of the above, the Commission is of the opinion that prima facie a case of contravention of the provisions of section 3 of the Act, as noted above, is made out.

6. Accordingly, the Commission directs the Director General ("DG") to cause a thorough investigation to be made into the matter and to complete the investigation within a period of 60 days from receipt of this order. If during the course of investigation, violation of other provisions of the Act or involvement of any other party is found, the DG shall also investigate the same.

7. The DG is also directed to investigate the role (if any) of the persons who were in charge of, and were responsible to the companies for the conduct of the businesses of such companies which are found in violation of the Act after giving due opportunity of hearing to such persons.

8. It is, however, made clear that nothing stated herein shall tantamount to an expression of final opinion on the merits of the case and the DG shall conduct the investigation without being influenced by any observations made herein.

9. The Secretary is directed to send a copy of this order alongwith with the information and the documents filed therewith to the Office of the DG forthwith."

4. The order dated 2.1.2014 in Suo Moto Case No.1/2014 is an order under Section 26(1) of the Competition Act, 2002. By this order the CCI forming prima facie opinion regarding the contravention of provisions of Section 3 of the Act directed the Director General (DG) to cause a thorough investigation into the matter and to complete the investigation within a period of 60 days from receipt of this order. It was also observed that if during the course of investigation, violation of other provisions of the Act or involvement of any other party is found, the DG shall also investigate the same including to investigate the role of any person who were incharge and were responsible to the company/bidder/tenderer for conduct of the business of such bidder or tenderer which are found in violation of the Act.

5. At the outset it was submitted by the learned counsels of the appellants that DG was supposed to furnish the Report within sixty days in terms of the order of the Commission. Though, the Regulation 20(3) provides that CCI on getting an application made by the DG and if it is satisfied with the reasons for extension, can grant extension. However, the appellants were not given any opportunity to look at those reasons or extension's approval. DG has submitted the Report in approximately 948 days and such hopelessly time barred delay is fatal and cannot be cured even by the Commission.

6. The Appellant (Competition Appeal (AT) No.54/2019 vide Annexure A- 11, Volume II Page 403-415) has attached copy of the order which he alleges to be cut, copied and paste and did not give any reasons for extension sought after every sixty days in stereotyped manner.. For a ready reference the 1st order dated 09.09.2014 and the last order for extension dated 11.8.2016 are given hereinbelow which has been approved by the six Members in case of last Meeting and in case of 1st Meeting by four Members.

"09.09.2014 In re: Cartel supply of LPG Cylinders procured through tenders by HPCL.

ORDER The Commission considered the matter in its ordinary meeting held today. This matter was referred to the Director General (DG) vide order dated 02.01.2014 under section 1) of the Competition Act, 2002 for investigation with directions to submit the investigation report within a period of 60 days from the receipt of the order. The DG vide letter no. DG/CCV/IW/1/39/2013/6123 dated 26.8.2014 has

sought fourth extension of time for 60 days beyond 29.08.2014 for submitting the investigation report in the matter. The Commission after considering the reasons explained by the DG and finding them sufficient agreed to grant extension of time for 60 days for submission of investigation report beyond 29.08.2014. The DG is advised to submit the investigation report within the stipulated time.

The Secretary is directed to communicate to the DG accordingly."

"11.08.2016 In re: Cartel supply of LPG Cylinders procured through tenders by HPCL.

ORDER The Commission considered the matter in its ordinary meeting held today. This matter was referred to the Director General (DG) for investigation vide order dated 25 January 2014, passed under Section 26 (1) of the Competition Act, 2002 (Act), with directions to submit the investigation report within a period of 60 days from the receipt of the order:

Earlier the Commission, vide order dated 16 June, 2016, had granted extension of time by 60 days for submission of the investigation report by the DG.

Now the DG, vide letter no DG/CCI/W/1/09/2013 dated 3 August 2016, has sought sixteenth extension of time by 60 days beyond 18th August, 2016, for submission of the investigation report on the matter. The Commission after considering the reasons explained by DG, agreed to grant extension of time by 60 days beyond 18 August, 2016, for submission of the investigation report. The DG is directed to submit the investigation report within the stipulated time. The Secretary is directed to communicate to DG accordingly."

7. On the issue of the DG investigation report dated 6th December, 2018, it was stated by the learned counsel of the appellant that the investigation report dated 6th December, 2018 is time barred in view of Regulation 20(2) and 20(3). It was also pointed out by them that by order dated 19th February, 2018, CCI directed the DG to complete investigation and submit its report within 45 days (Annexure 18 of the Appeal Paper Book- Competition Appeal (AT) No.54/2019). It was argued by the learned counsel for the Appellant that the 1st summon itself was issued after a gap of 77 days of the order dated 19th February, 2018, the delay is unexplained. Thus the entire proceeding is time barred in absence of explanation of delay in the Report. In argument it was also pointed out that the last summon dated 5.11.2018 for examination of the witness was issued almost after 214 days from the date of order of CCI for examination i.e. 19th February, 2018. The examination of the witness as argued by the appellant was done between 4th July, 2018 to 13.11.2018. It has been argued that no notice was given to the appellants while granting extension to DG, though it was a right of the appellants to contest the reasons. Hence the process of investigation and report itself is time barred.

8.

a) The Appellant/Bidder are the manufacturers and suppliers of LPG cylinders and they are the manufacturers of such gas cylinder of a particular specification having capacity of 14.2 kg which are needed for use by Respondent No.2/HPCL, a public sector company. HPCL Respondent No.2 has invited two tenders of particular specification of 14.2 kg cylinders - one tender was Tender No.11000083 dated 28th October, 2011 due on 23rd November, 2011 for a quantity of 45 lakhs (may be called as Tender No.1) and 2nd Tender No.120000147 dated 24.01.2013 due on 15.02.2013 for 40 lakhs cylinders (called as Tender No.2) were floated by HPCL.

b) The fact that HPCL is engaged in the field of production and supply of oil and natural gas around the country. The tender NO.2 dated 24.1.2013 was due for opening on 15.02.2013. However, the price bid was not opened by HPCL on the due date and no reasons were assigned by HPCL/Respondent for not opening Tender No.2 on 15.2.2013. HPCL has although did not open the price bid on 15.2.2013 but they approached all the manufacturers including the existing approved suppliers who made bid for 2nd Tenders/appellants to supply the cylinders on the existing price thereby extending Tender No.1. From the details available in the Competition Appeal (AT) No.54/2019, Page 265 to 268 as also submission made by the learned counsel of the Appellants it is evident that parties had given consent for repeat of the purchase order for same quantity for one year more with the same terms and conditions to the Chief Manager, EPNP (LPG), HPCL. The reasons stated for withdrawal of the price bid in Tender No.2 vide their letter of March, 2013 was naturally in some cases common and some cases reasons related to their own problems like capacity constraint or other reasons. As the Tender No.2 was not opened by the HPCL and HPCL extended the existing purchase order by one year it has been argued that naturally the appellants withdrew their price bid and the appellants are treating it as there is no fault with the appellants as they cannot supply the Tender No.2 quantity beyond their capacity for which they applied for Tender No.2 while HPCL has already extended the 1st Tender. The tenderer have also mentioned that while the tender condition stipulates action as deemed fit by HPCL only if withdrawal of offer is done after opening of price bid or any other breach of tender terms and conditions at any stage during the validity period of offer/contract. Hence the appellant had withdrawn the offer before opening of price bid and accordingly no action can be taken by HPCL / Respondent 2 (COMPETITION APPEAL(AT) NO 38 of 2022. Furthermore, the withdrawal of bid had been accepted by the buyer HPCL and no breach of tender terms and conditions have been done by the bidder.

c) Generic submissions made by the learned counsel for the appellants are as follows:

(i) Constitution of CCI is not in accordance with law. The impugned order has been passed by three Members of CCI which does not include a Judicial Member nor any body possess professional qualification with substantial experience in practice of law while the powers of CCI are adjudicatory. Hence such order passed by CCI are without jurisdiction and is liable to be set aside. The appellant have cited few judgements which are given below:

Mahindra Electric Mobility Ltd Vs CCI & Anr (2019) SCC Online (Del) 8032 (Para 212) "212. In view of the findings of this Court, in the previous parts of this judgment, the following conclusions are recorded and directions issued:

(i) Section 22(3) of the Competition Act (except the proviso thereto) is declared unconstitutional and void;

(ii) Section 53E (prior to the amendment in 2017) is declared unconstitutional and void: however, this is subject to the final decision of the Supreme Court in the writ petitions challenging the Finance Act, 2017;

(iii) All other provisions of the Competition Act are held to be valid subject to the following orders:

(a) The CCI shall frame guidelines with respect to the directions contained in para 179 of this judgment, i.e. to ensure that one who hears decides is embodied in letter and spirit in all cases where final hearings are undertaken and concluded. In other words, once final hearings in any complaint or batch of complaints begin, the membership should not vary- it should preferably be heard by a substantial number of 7 or at least, 5 members.

(b) The Central Government shall take expeditious steps to fill all existing vacancies in the CCI, within 6 months;

(c) The CCI shall ensure that at all times, during the final hearing, the judicial member (in line with the declaration of law in *Utility Users Welfare Association*, (supra) is present and participates in the hearing;

(d) The parties should in all cases, at the final hearing stage, address arguments, taking into consideration the factors indicated in *Excel Crop Care* (supra) and any other relevant factors; they may also indicate in their written submissions, or separate note, of submissions, to the CCI, why penalty should not be awarded, and if awarded, what should be the mitigating factors and the quantum- without prejudice to their other submissions.

(iv) Since the petitioners had not availed the remedy of appeal (and had approached this Court) it is open to such of them who wish to do so, to approach the Appellate Tribunal, within 6 weeks; in such eventuality, the Appellate Tribunal shall entertain their appeals and decide them on their merits in accordance with law, unhindered by the question of limitation."

CCI Vs SAIL (2010) 10 SCC 744 (Para 9)

9. The various provisions of the Act deal with the establishment, powers and functions as well as discharge of adjudicatory functions by the Commission. Under the scheme of the Act, this Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and to a limited extent even advisory jurisdiction. Vast powers have been given to the Commission to deal with the complaints or information leading to invocation of the provisions of Sections 3 and 4 read with

Section 19 of the Act. In exercise of the powers vested in it under Section 64, the Commission has framed Regulations called The Competition Commission of India (General) Regulations, 2009 (for short, the 'Regulations').

State of Gujarat Vs Utility Users (2008) 6 SCC 21-Para 121.

121. We are, thus, of the unequivocal view that for all adjudicatory functions, the Bench must necessarily have at least one member, who is or has been holding a judicial office or is a person possessing professional qualifications with substantial experience in the practice of law and who has the requisite qualifications to have been appointed as a Judge of the High Court or a District Judge.

9. It has been emphatically argued by learned counsel for the appellant that CCI cannot assume jurisdiction on an anonymous complaint as the proceeding itself has been initiated based on an anonymous information dated 25.04.2013 received by the Commission wherein it was alleged that there was a cartel operating in tender floated by HPCL/Respondent. This anonymous complaint cannot assume jurisdiction of a suo moto case. The learned counsel for the appellant have strongly submitted that Section 19(1)

(a) provides for receipt of information and the manner the same has to be filed which does not reflect that anonymous information can be taken into consideration for initiation of investigation as per Act and related regulations. Regulation 15 provides for procedure for scrutiny of information and removal of defect. Regulation 10 provides for contents of information. Regulation 11 provides for signing of information. Regulation 12 provides procedure for filing of information etc. Even under Section 26(1) also provides procedure for enquiry under Section 19 which also did not mention about the anonymous complaint and/or anonymous information. The Learned counsel for the appellant also stated that the order of CCI dated 2nd January, 2014 is time barred. They cited Regulation 21(1) which provides Secretary to place the report of DG before the CCI within 7 days. It was also brought to the notice of the Tribunal during the course of the hearing that an anonymous complaint is 1 ½ page complaint without any collaborative details and if CCI moves on such an anonymous complaint then no economic development can happen and consumer will have to pay through noses.

10. Director General Report dated 16.10.2016 and cross examination report dated 6th December, 2018 and time taken by CCI after report, are all time barred and violates Regulation 20(3) and hence proceeding have to be dropped alone on this ground.

11. The appellants did not engage in any bid rigging and they only withdrew their bid in tender No.2 which was permissible under the terms of the tender as was stated by the learned counsel in general for the appellant. In the course they also submitted that it is monoposony market as the purchaser of such cylinders are restricted Public Sector Govt Company like HPCL, IOC, BPCL and the suppliers are also restricted as the suppliers has to be the manufacturers of such cylinders duly approved by these agencies. The Learned Counsel even went on to state that these government companies are keeping a tight control on manufacturing and marketing of such cylinders as it is given to the general public having virtually no knowledge in general and any deficiency in quality will lead

unimaginable loss of public life and property.

12. It was stated by the learned counsel that these three Oil Marketing Companies (OMC's) give a tight control on certification and the manufacturer is supposed to supply such cylinders of 14.2 kg LPG cylinders only to these 3 companies. Proceeding further in the matter, they further state that HPCL who had invited the Tender No.2 is engaged in the business of distribution of gas cylinders to various consumers throughout the territory of India. These appellants apart from other approved manufacturers are instructed to work for manufacturing of the specified gas cylinder under the terms and conditions stipulated in the contract and entered into between the parties. It was brought to the notice of the Bench that for more than last 50 years these OMC's including HPCL have been supplying the LPG filled in the specified gas cylinders to the consumers throughout India.

13. The modus operandi for the supply of the liquefied petroleum gas is as under:

a. OMCs including HPCL purchase gas cylinders for their bottling plants across the country from the manufacturers spread in various parts of the country.

b. The gas cylinders in which LPG gas is filled and marketed by OMCs including HPCL are their ownership and property and the consumers are made to pay a refundable interest free security deposit against the gas cylinder which is more than or equal to the procurement price of the cylinders: However, irrespective of the difference in procurement cost the security deposit is uniform throughout the country. c. OMCs including HPCL claim depreciation on the entire cost of the gas cylinders and take income tax benefit year after year. d. The monies representing the refundable interest free security deposit is used by OMCs including HPCL in their working capital and other financial requirements.

e. The entire cost of the gas cylinders is recovered in 5 to 6 years whereas the expected life of the gas cylinder is more than 20 years. The statutory re-testing is due only after first 10 years and, therefore, there is no maintenance expenditure during this period.

14. Govt. of India through MOP&NG devised a formula which ensured procurement of the gas cylinders at a uniform price and a reasonable return to the manufacturer and as such in the year 1982, the formula of the MOP&NG was "X/40" Le "X" is the variation in price of steel over the base price Le price of 1982 and "40" is the dividing factor of the variation. All cylinder manufacturers were offered the same price and all of them had to supply at the uniform price under the formula and the only variation permitted was the freight charged on the Steel by the Steel Authority of India Ltd. (SAIL) from the manufacturer.

15. Since the earlier X/40 formula of fixing prices of cylinders was not viable, sometime in 1994, the OMCs including HPCL proposed a cost plus basis formula, which was approved by MOP&NG known as the "The New Pricing Formula" (hereafter referred to as "New MOP&NG Formula"), which was effective since 1.4.1994.



16. A new formula with uniform pricing to all manufacturers known as the PWC formula based on the study undertaken collectively by the OMCs through Price Water House Coopers was finalized in January 2001 and was made applicable w.e.f 1.7.1999 till 31.3.2001. The procurement of the gas cylinders at a pre-fixed price was a policy uniformly followed by the OMCs. Such a policy was evolved by the OMCs as a basis of procurement and pre- fixed price of gas cylinders to ensure that competition is not wiped off and the gas cylinders are made available and the manufacturers co-exist. Thus, the policy which had a mechanism of calculating the price (based on steel price, RBI Indices of various inputs and other factors) was followed by the manufacturers while applying for the Tenders as the same had a past history and basis, right from the X/40 formula fixed by MOP&NG, the New Pricing Formula as well as pre-fixed price on the basis of the PWC report, which the OMCs had been accepting as the basis of the procurement.

17. In the year 2000-2001, the OMCs including HPCL floated Tenders for procurement of gas cylinders. The shift of the OMCs from the policy of procurement on the basis of cost plus formula to the tender system was followed by all the OMCs together and this became effective for procurement from the year 2001-2002 onwards.

18. The OMCs including HPCL floated yearly tenders (sometimes the Tender floated in the previous year was extended to cover the subsequent year also) for the purposes of procuring the gas cylinders from the Appellants and other manufacturers. The terms of the yearly tenders of the OMCS including HPCL were almost identical except that there were some minor changes in respect of the Tender of particular OMC. The terms of the subsequent yearly Tenders floated by the OMCs including HPCL were more or less the same as the one in the preceding year. The bids by the Appellants and other manufacturers were evaluated by the OMCS on the basis of their own in-house working with regard to the rates at which procurement of cylinders had been arriving and pre-fixing the prices by outside consultants or by their own staff, employees etc. as the OMCs had in-depth knowledge of each and every element of cost in manufacturing of a cylinder through various studies over a period of 3 decades. It is only thereafter that OMCS held negotiations in respect of the bids submitted by the Appellants manufacturers.

19. When the Tender system was initially introduced from 2001, it is learnt that orders were not placed on all the manufacturers and as the gas cylinder manufacturers were totally and fully dependent on the orders by the OMCs, various manufacturers closed down their manufacturing units. Due to lack of orders many gas cylinder manufacturers became sick units and as such the number of manufacturers drastically reduced to less than 40 within a span of 3 to 4 years due to unhealthy competition and unworkable prices the procurement of this essential commodity was severely disrupted.

20. In view of this situation the OMCs encouraged healthy competition and uniformity of prices to ensure orders to maximum number of suppliers. The following facts would demonstrate that the OMCS including HPCL followed a consistent policy of procurement of cylinders and pre-fixed the price of procurement of cylinders

21. The OMCs acted in concert and unison in respect of the procurement and price

22. HPCL floated Tenders Tender No. 11000083-HD-12001 dated 28.10.2011 due on 23 11 2011 at 15.00 Hrs for procurement of 45 lacs of 14.2 Kg capacity LPG cylinders with SC valves.

23. Various terms and conditions were provided, which would reflect and prove that the rates in the Tender were indicative and the terms shows that HPCL was in a dominant position. The Commission has observed that in Tender No.1 in general the manufacturers/appellant have not violated the provisions of Section 3 of the Act. The matter was settled by the Hon'ble Supreme Court in Rajasthan Cylinders & Containers Ltd. Vs. Union of India & Anr. (2020) 16 Supreme Court Cases 615.

24. Since the requirements of 14.2 Kg cylinders was continual, HPCL floated another Tender in the year 2013 for procurement of 40 lakh 14.2 Kg. cylinders being e-Tender No. 12000147-HD-12001 dated 24.01.2013, which was due on 15.2 2013 (hereinafter referred to as "Tender No. 2).

25. The Learned Counsel also went on to present the followings which are a few salient terms having much relevance with the present case:-

a. The Tender is issued in two part i.e. Unpriced and price bid The Tender was on e-procurement platform and the interested bidders had to participate only thorough the internet and website. Due date for submission of e-tender-Unpriced/Price Bid is 15.2.2013 upto 15.00 Hrs. b. Date of opening (Unpriced Bid) is also on 15.2.2013 at 15.15 hrs i.e, within 15 minutes of the due date and time for submission of the e-tender c. Amongst others, the Tender No. 2 provided the condition with regard to the withdrawal of the bids, which is Clause 15 of the terms and conditions as follows:

"15. In case of withdrawal of offer after opening of price Bid or any other breach of tender terms and conditions at any stage during the validity period of offer/contract. Corporation reserves the right to take action as deemed fit which may be inclusive of putting the manufacturer under suspension/holiday."

(bold and underlined for emphasis) d. Clause 2(c) of Annexure II of the Tender No.2 provides as follows:

"2(c)Quantities are not guaranteed as this is basically a rate contract. However, estimated quantity as per best estimate is given in the tender."

e. Clause 6(c)of Annexure II of the Tender No.2 provides as follows:-

"6(c) Tender may be cancelled for a particular stte or fully at the sole discretion of the Corporation."

f. Clause 8 of Annexure V of the Tender No.2 provides as follows:

"RISK PURCHASE HPCL reserves the right to curtail or cancel the order either in full or part thereof if successful tenderer fails to comply with the delivery schedule and other terms and conditions of the purchase order/contract. HPCL also reserves the right to purchase the same or similar material through other sources at the entire risk, cost and consequences of the successful tenderer.

g. The Appellants submitted their price bids in Tender No.2 through internet on or about 15.02.2013.

h. On the one hand the bids had to open on 15.2.2013 as per the Tender No.2 and the price bids were not opened by HPCL on that date or thereafter and no reasons were informed till date as to why the price bids were not opened either on 15.02.2013 or thereafter, while on the other hand, HPCL approached the Appellants and other manufacturers and requested them to supply 14.2 kg cylinders as a repeat order of the Tender No.1 further period of one year.

A few extracts from the Appeal Paper Book are also reproduced below for confirming the repeat of the same purchase order for same quantity for one more years as given below:

"(a) Relevant portion of the letter dated 18.02.2013 of Confidence Petroleum India Ltd addressed to HPCL (annexed as Annexure 7 to the letter dated 26.07.2016 -Pg 31-35 of Vol. III & III-Letter at Pg 125 of Vol. III of III of Ld. DG report):-

"This is with reference to above mentioned subject. In this regard, we would like to inform you that we hereby agree and accept for repeat of the same Purchase Order for same quantity for one year more, with the same terms and conditions.

So we request your good selves to kindly give us schedule/obligation against the above tender/PO and oblige."

"(b) Relevant portion of the letter dated 18.02.2013 of say Appellant Confidence Petroleum India Ltd (CA(AT) No.54 of 2019) addressed to HPCL (annexed as Annexure 7 to the letter dated 26.07.2016 -Pg 31-35 of Vol. III & III-Letter at Pg 126 of Vol. III of III of Ld. DG report):-

"This is with reference to above mentioned subject. In this regard, we would like to inform you that we hereby agree and accept for repeat of the same Purchase Order for same quantity for one year more, with the same terms and conditions.

So we request your good selves to kindly give us schedule/obligation against the above tender/PO and oblige."

26. The letters dated 18.02.2013 written by the Appellants to the HPCL are admitted by HPCL and even by the Ld. CCI. No questions have ever been asked about the correctness of the contents of these letters. It is pertinent to mention that once HPCL has given repeat orders, the Appellants cannot be asked to keep their bids alive in respect of Tender No.2, thereby over-committing themselves to supply more than the capacity, finances and other facts which are taken into consideration while submitting price bids. It was submitted by the learned counsel for the appellants that these aspects/evidence etc have totally been ignored by the Ld. CCI and hence the impugned order is perverse.

27. Learned counsel for the appellant also stated that manufacturers being suppliers have to work within the terms and conditions of the Tender and they are not responsible for the action taken by HPCL who has also taken the decision based on their requirement and went on to state as follows:-

a. State any reasons as to why they do not open the price bids either on 15.02.2013 at 15.15 hrs or anytime thereafter (being the Tender opening date as mentioned in the Tender No.2) b. Did not inform the Ld. CCI in the hearing on 7.3.2019 as to why they had to place repeat orders and why they did not open the Tender No.2 on an urgent basis of the requirements was urgent.

c. Whether by placing repeat orders, sufficient indication had been given that the Appellants and other manufacturers could, if they choose, withdraw their price bids from Tender No.2 which withdrawal would be in terms of the Tender No.2 and that the bidders were not expected to over-sply or over commit.

d. Did not inform the Ld. CCI even in the hearing on 7.3.2019 that they had suffered any monetary loss or there was a shortage of cylinders on account of non-supply and/or that they would have required cylinders under Tender No.2 even after repeat orders placed on the bidders and Appellants.

e. If there was any urgent requirement of HPCL as is being stated in the letter dated 26.07.2016 sent by HPCL to Ld. DG (Pg 31-35 of Vol. III of III of DG report), then instead of placing repeat orders, HPCL could have finalised Tender No.2 on priority basis.

28. It was also submitted by the Learned Counsel for the Appellant that the impugned order does not make any assessment regarding the existence of any appreciable adverse effect on competition. The appellant side confirmed that the withdrawal of their bid did not have any adverse impact or any appreciable adverse effect on competition. It was also submitted by the Learned counsel that while imposing the penalty on the Company and on the individual initially the CCI has not followed the prescribed legal principle. More so imposing such heavy penalty without any Judicial Member present in the Commission is not in accordance with the laid down legal principle. CCI is performing the adjudicatory function and while doing so in the present case the Judicial Member was not associated.

29. They also submitted that as per Section 3 read with Section 19(3) of the Act, the existence of any "appreciable adverse effect on competition"

must also be established having due regard to the following factors:

a. Creation of barriers to new entrants in the market; b. Driving existing competitors out of the market; c. Foreclosure of competition by hindering entry into the market.

d. Accrual of benefits to consumers;

e. Improvement in production or distribution of goods or provision of services;

f. Promotion of technical, scientific and economic development by means

of production or distribution of goods or provisions of services. None of these factors are attracted in the present case. There is no material on record to indicate that any of the factors set out in Section 19(3) are met; all evidence is to be contrary.

30. It was also brought to the notice of the Bench that in some of the cases no good were procured from those appellants. Four parties retained their bid in Tender No.2 and did not withdraw. These parties were considered sufficient by HPCL for proceeding with the Tenders and awarding the contract. HPCL/R2 did in fact continue with the Tender and awarded the work order/contract. The weighted average rate for Tender No.2 was lower than the estimate by 8.51% and lower than the estimate by 5.66%. It is also lower than BPCL rate by 2.96% and than IOC rate by 2.72%. The notice inviting tender itself contains clauses and conditions regarding cartelisation. These provisions have not been invoked by Hindustan Petrol Corporation Ltd in case of Tender No.2. This shows even HPCL does not treat the actions of the appellants as bid rigging, collusion or cartelisation. The Commission had also acknowledged that the HPCL/Oil Company have control over rate for procurement of cylinders. They also referred the following findings of the Commission.

a. The Impugned Order itself records and acknowledges that HPCL/ Oil Companies have control over rates for procurement of cylinders. In this context, reference may be made to the following findings:(Para No.43 of the Impugned order) The Commission notes that as stated by HPCL existing procurement cost of HPCL and the industry rates as compared to the price bids submitted by the parties to HPCL is taken into consideration, besides other factors. Thus, it is not that HPCL does not take into consideration the rate quoted by the bidders; rather what emerges from HPCL's response is that it is just one of the factors and that too taken into account or in comparison with the industry rates. Thus, HPCL is neither constrained nor dependent on the rates quoted by the bidders and acts independently regardless of the rates quoted by the bidders. In fact HPCL for finalising the L-1 rate also enters into negotiation with the bidders.

b. This position was also acknowledged by the Hon'ble Supreme Court in *Rajasthan Cylinders v. UOI* 2018 SCC OnLine SC 1718. It was held that: (Para No.89 (iii)) 89(iii) The manner in which the tenders are floated by IOCL and the rates at which these are awarded, are an indicator that it is the IOCL which calls the shots insofar as price control is concerned. It has come in evidence that the IOCL undertakes the exercise of having its internal estimates about the cost of these cylinders. Their own expert arrived at a figure of Rs. 1106.61 paisa per cylinder, All the tenders which have been accepted are for a price lesser than the aforesaid estimate of IOCL itself. That apart, the modus adopted by the IOCL is that that final price is negotiated by it and the contract is not awarded at the rate quoted by bidder who turns out to be L 1. Negotiations are held with such a bidder who is L-1 which generally leads to further reduction of price than the one quoted by L-1.

c. The prices and placement of orders, in fact the entire market, is strictly controlled by HPCL/ PSU Oil Companies as per their requirements and best judgment with little or no power in the hands of the cylinder manufacturers. In the circumstances, there is simply no possibility of any alleged action of the Appellants causing an "appreciable adverse effect on competition". This is evident from the following factors:

(i) The tender conditions effectively render the bids redundant because in all the cases the contract is finally awarded at a price that is acceptable to HPCL. The oil companies are the sole customers and a failure to secure orders will automatically result in the Appellants operating substantially below capacity. Any blacklisting or negative action by HPCL will have a serious knock-on impact vis-a-vis the entire market and the Appellants simply cannot afford this. As such, HPCL is completely dominant and its decisions have to be accepted by all the parties.

(ii) HPCL's policies ensure that the entire decision making regarding the price and quantities is in the hands of HPCL. HPCL holds a strong bargaining position and dictates the price of the tender. The distribution and price, therefore, is as per terms accepted and approved by HPCL.

(iii) One of the policy measures employed by the oil companies is to determine the price of cylinders as per the report of the consultant appointed by them. This acts as a check against over pricing and also under-pricing [so that there is no shortage of supply on account of withdrawal by any party). Thus, the Appellants even collectively are not in a position to determine the prices. Even in the present case, after the bids were received, HPCL negotiated rates with the bidders based on the benchmark rate determined by the consultant. In almost every supply sector, the final price was based on the price determined by HPCL and the bidders had to agree to the price on account of HPCL's strong bargaining position. Thus, it is clear that HPCL was in a position to and actually did determine the final prices based on its own studies and analyses.

(iv) The manufacturers are captive to the oil companies and have no other avenue for supplying the cylinders. As such, HPCL is the dominant party and dictates the

selection as well as terms as per its requirements.

Practically, the manufacturers have no option but to accept the terms offered by HPCL because their only sales can be to oil companies.

(v) The cost and price data has not been considered at all. In fact, the Impugned Order does not reflect any consideration whatsoever of the costing of the cylinder manufacturers

(vi) The tender terms are specifically designed to ensure the entry of new players. The tender document makes special provisions for new entrants and there is a quota for new entrants. The new entrants do not even compete with the other bidders. A special dispensation has been made for the new entrants and they are insulated from any influence from the actions of the other bidders. The rules of the game are completely different for new entrants. Irrespective of all conditions, the quantity for new entrants is fixed. New manufacturers are not permitted to participate in the general category. New manufacturers only provide technical bids and are evaluated only on the technical criteria. In the present tender itself, various new bidders were awarded contracts. This aspect of the matter has not been examined by the CCI.

(vii) The industry is highly regulated and almost every aspect of the production is regulated in terms of the LPG (Regulation Supply and Distribution) Order, 2000 dated 26.4.2000 issued under the Essential Commodities Act, 1955. On the demand side, the entire demand is of the 3 oil marketing PSUs and the rules are laid down by them. In the circumstances, the industry is not market driven and the normal principles of competition are inapplicable.

(viii) The CCI in its judgment dated 30.11.2010 in case no. 1/2010 held that:

The Commission finds itself in agreement with the contention of the sugar federations and sugar mills. that in the midst of various control and regulations, the dynamics of the market place would not be able to determine the behaviour of the market players. When a sector itself is controlled and regulated, it would also be insulated from the competitive forces to a large extent....

The Commission further observes that in such a regulated sector as sugar industry, the possibility of successful cartelisation of super prices is remote because the releases in the market are not in the hands of sugar mills and additionally there is pressure to make timely payment of sugarcane.

(ix) In this connection, reference may also be made to an expert report dated 27.4.2012 prepared by Dr. R.. Khemani (who has over 35 years of international experience in competition law). The report confirmed the following facts with regard to the industry and the bidding process of oil companies:

(a) The bidding process is not a market driven process,

(b) There is no chance of over-charging or excess profits being earned by the bidders since the oil companies enjoy a dominant position in the market.

(c) The increase year on year in LPG cylinder prices is minimal to non-existent and significantly lower than the annual inflation rate of 8 to 9%.

(x) In the present case, the normal market forces do not operate on account of the peculiar position of the industry. The Impugned Order should have taken this aspect into consideration. The normal competitive forces do not apply in the market; the entire market is regulated by the legal rules under the Essential Commodities Act or by the principles put in place by the oil marketing PSUs. Thus, there is no possibility of successful cartelisation or bid rigging or of the alleged actions of the Appellants causing any appreciable adverse effect on competition" since the entire market is driven and controlled by the Oil Companies.

(xi) From a bare reading of the Impugned Order, it is evident and clear that it does not deal at all with "appreciable adverse effect on competition". This is an essential aspect in the absence of which it is impossible to impose any penalty on any party. The CCI has committed a fatal error by completely by-

passing this issue. Importantly, the tender conditions and other policies of HPCL are specifically designed to ensure that there is no effect whatsoever on competition irrespective of any collusion or attempts at bid-rigging. Given the market structure and the complete dominance of the PSU oil companies, it is impossible for the parties to collude in any manner or achieve any end through collusion. These important facets of the matter have not been considered in the Impugned Order.

(xii) The Learned counsel even went on to state that only a minimum or token penalty could have been imposed even if it is established that the Appellant have committed any violation and stated as under:

Without prejudice to the aforesaid, it is submitted that only a minimum or token penalty should be imposed even if it is found that the Appellants have committed any violation. It is well settled that the following principles should be taken into account in determining any penalty:

(a) The penalty should only be based on the "relevant turnover, i.e. only the revenues from the tender in question. The penalty cannot be based on the total turnover.

(b) The mitigating factors cannot be simply be brushed aside and have to be duly taken into account.

(c) The fact that the Appellants are small scale units has to be given due weightage and credence while determining the penalty.



(d) Any penalty determined should not be directed at teaching a lesson, but should be reformatory and aimed at preventing practices having an adverse effect on competition.

The determination of the penalty should be made based on and after taking into consideration the aforementioned criteria. It is submitted that in a case of this nature a zero penalty with a warning or a notional penalty would be sufficient to the act as a deterrent and a reformatory measure.

The most important aspects that deserve consideration in determining the nature of penalty applicable are:

- (i) The dominant position of companies/ HPCL and the lack of any loss to them on account of the alleged acts
- (ii) The lack of any intent to contravene any provision of the Act.
- (ii) The precarious financial position and the status as a small industry.
- (iii) Lack of any supernormal profit.

Lack of intent to violate: Without prejudice to the fact that there was no violation of the Act, it is stated that:

- (i) All of the actions were undertaken without any intention to contravene the provisions of the Act or any other existing law.
- (ii) The Appellants are not large firms or big industrial house with an extensive legal department advising on commercial/ economic laws.

They are small scale units running a small operation with very limited staff. Whatever actions were taken were without any intention to violate any law and without any knowledge of the provisions of the Act.

Financial Hardship:

- (i) A stringent penalty would also impose great financial hardship in certain cases even lead to the closure of the business of the Appellants. The Hon'ble Competition Appellate Tribunal has in the matter of MDD Medical Systems India Pvt. Ltd. v. Foundation for Common Cause and People Awareness (Judgment dated 25th February 2013 in Appeal 93/2012 and other connected matters) in Para 28 and 29 held these to be relevant mitigating factors to be taken into account while determining the penalty. The Appellants are a small scale industry and are in a precarious financial position. The imposition of a heavy penalty will likely compel a closure of operations. This is not the intended goal of imposing penalty under the

competition regime. (ii) The Hon'ble Competition Appellate Tribunal in the order dated 01.03.2016 has held and recognised that the financial health of the company and the likelihood of the company being closed down on account of the harsh penalty are matters that should be considered and taken into account while determining the penalty. It is respectfully prayed that the precarious financial position of the company should be taken into account and in view of this, a lenient approach may be adopted by imposing a NIL or nominal penalty.

Lack of any super-normal profits:

(i) One of the characteristics of cartelisation is the existence of supernormal profits. In the present case, the Appellants are operating on minimal profits and did not make any supernormal profits from the subject tender. This is a strong economic indicator of the fact that none of our alleged actions have distorted the market forces in any manner. The lack of any economic impact or market distortion is an important factor to be taken into account and no penalty should be imposed for this reason as well.

(ii) In any event, the net impact of the alleged actions of the Appellants was NIL. The penalty imposed should be based and factored on the basis of the NIL impact.

1.2 Moreover, it is important to delineate and consider the relevant turnover for the purpose of imposition of penalty. When imposing penalty, only the business under Tender No.2 can be taken into account since the violation is limited to this tender alone. Applying the test of relevant turnover, the penalty if any should be restricted to the turnover arising from the cylinder business with HPCL under Tender No.2. The turnover arising from other business/ items should not be treated as part of the 'relevant turnover. Any other interpretation or that which encompasses other income would amount to penalising perfectly legal activities of the Appellants.

The CCI has failed to take into account well settled principle of doctrine of proportionality and imposed a heavy penalty, which will cause grave harm to the Appellants

31. Learned counsel for the appellants apart from making the generic submissions as noted above have raised the following additional issues:-

a) These tenders are in the nature of rate contract.

b) It was also a tender condition that in the event the Corporation receives the same rate for any State/States from two or more bidders. The Corporation reserves the right to believe that these bidders have formed a cartel and the rate quote as cartel rate may be accepted or rejected or will not be reckoned such rate/offered quantity/States participated/ranking etc of such offer. The Corporation further reserves the right to follow the negotiation process with such bidder if deem fit and amend the order/distribution criteria/ratio best suited to the interest of the

Corporation. This was followed in L-1 tender to reduced rate by HPCL/R2 did not invoke integrity pact. It was also pointed out that the total demand of 14.2 kg LPG cylinder of all these OMCs-

HPCL, BPCL, IOCL was from 205.23 lakh in 2011-12 to 355.74 lac in 2015-16 while installed capacity of all LPG cylinders manufacturers were 27.8.98 lac in 2011-12 to 383.01 lakh in 2015-16. It was also submitted by the Learned Counsel that HPCL has also informed the Commission on 26th April, 2019 that it finalises price per cylinder prior to award of tender to various parties as per following methodology:

"The internal estimate of HPCL prior to floating of tender is one of the guiding factors in finalizing the price per cylinder. The internal estimate is arrived at by considering the price of Body steel, steel for foot ring and VP Ring, Bung, SC Valve and cost of consumables like paint, welding rods, inert gas, Zinc wire furnace Oil, iron shoots/grits, flux (SAW welding), DD compound, cost for spares, stores etc. BIS marking fee, PESO fee, packing charges, loading/unloading charges etc. manufacturing cost like labor cost, electricity cost, administrative charges etc and steel transportation costs finished cylinder, transportation costs, taxes, working capital, profit margin etc. The existing procurement cost of HPCL and industry rates compared to the price bids submitted by the parties to HPCL and the time the existing tenders of industry were finalised is another factor taken into consideration during.

32. The Learned Counsel for the Appellant also submitted that the Indian LPG Cylinder Manufacturers Association vide its letter Reg No.177/2004 dated May 20, 2013 had submitted various price determining factor in procurement of cylinders in years to come and save LPG cylinder manufacture from ruin due to unworkable prices. It is thought prudent to reproduce the same as given below:-

33. They particularly stressed that LPG Cylinder manufacturers are mostly MSME and if they are levied such huge penalty it will be a graveyard for those organisation and in the result finally the OMC will be in trouble and lastly consumers will be in much difficulty. What was submitted by learned counsel while handing over this letter across the Board. This letter reflects that there was some meeting in HPCL/R2 and in that Meeting it was pointed out that few of the manufacturers have quoted very low and it is a predatory pricing and it will result in jeo pardising the total procurement process for the required year as most of the manufacturers are already operating at a very competitive rate and any further reduction will push them to financial losses. It further added that the study for establishing a fair price being done by an independent agency KPMG appointed by RO/HPCL may also get jeopardised. It was also stated that KPMG has already visited number of units verified and collected relevant data for establishing a fair and reasonable price and it was suggested to R2 to wait till the whole study is completed by KPMG and report submitted. In this background they suggested for increase in repeat order which at that time was in the range of 50 to 60 percent of the full quantity requirement. They also cited the judgement of Hon'ble Apex Court in the case of Rajasthan Cylinder (supra) and referred to para 15, 77, 81, 90 to 99 and 102 to 104.

15) The COMPAT after discussing the findings of the CCI and also taking note of the arguments of the appellants which were advanced before the CCI, proceeded with its own discussion. It started with the admitted facts of the case, and took note of the following such facts:

(A) The tender offers were to be made at Mumbai on 03.03.2010.

Admittedly there were meetings in Hotel Sahara Star, Mumbai on 1st and 2nd March, 2010 which were attended by some of the appellants. The D.G. has held that 19 appellants were represented by various persons in that meeting. The fact of the meeting having been held was not disputed.

Though some of the appellants stated that they did not attend the meeting and those who attended the meeting maintained that nothing was discussed about the tender, the same was not believed by the COMPAT and it held that these meetings did relate to the tender offers which were to be submitted on 03.03.2010. This finding is premised on the basis that nobody came with the explanation as to what transpired in the meeting or gave any proof that prices were discussed. Minutes of the meeting were also not produced. (B) There is an association of the cylinder manufacturers. All the parties, except few competing with each other, stated that they were not the members of that association. A feeble argument was also raised by some appellants that though they were the members but they were not the active members thereof. Some of the appellants also argued that they had abandoned the membership by not contributing the subscription in the later years. However, the appellants could not deny the position that there was an association called Indian LPG Cylinder Manufacturers' Association.

It was a registered association, its Memorandum of Association provided that one of the objectives was to protect common interest and welfare of LPG cylinder manufacturers. According to COMPAT, there was a definite platform available for all cylinder manufacturers and practically all the appellants appear to be the members of that Association.

(C) A common written reply was submitted by as many as 44 parties. Further, the appellants had nominated six agents for depositing bids on their behalf. These common agents were instructed to keep a close watch on the price quoted by the competitors in a particular State.

Though some of the appellants had contended that they had not appointed the common agents, the plea was not accepted by the COMPAT. The COMPAT, therefore, proceeded on the 'admitted grounds' that there was an association of cylinder manufacturers; practically all the appellants were members of the said association; this association was an active association; it held meetings on the eve of entry tender obviously for discussing tenders, its conditions etc.; these meetings were attended by representatives of at least 19 appellants; and these appellants had six common agents at Mumbai who were instructed to watch the prices offered by the others. A dinner meeting as also a lunch were held and one Mr. Chandi Prasad Bhartia of M/s. Haldia Precision Engineering Private Limited paid the bill for the same. Dinner and lunch held in Sahara hotel were attended by about 50 persons in all. From this the COMPAT inferred that there was no reason to disbelieve that the parties had an access to each other through their association which was an active association. The existence of such an association under the aegis of which meetings took place just before the

submission of tender has been noted as a very relevant factor by the COMPAT in affirming the findings of CCI on cartelisation and it summed up the position in the following manner:

"26. What is important is not whether a particular appellant was a member of the association or not. The existence of an association is by itself sufficient, as it gives opportunity to the competitors to interact with each other and discuss the trade problems. There will be no necessity to prove that any party actually discussed the prices by actively taking part in the meeting. If there is a direct evidence to that effect that is certainly a pointer towards the fact that such party had a tacit agreement with its competitors. However, the existence of an association and further holding of the meetings just one or two days prior to the last date of making offers and further admission that the parties had appointed common agents with the instructions to keep watch on the prices quoted by the competitors would go a long way in providing plus factors in favour of the agreement between the parties. All these factors would form a back drop, in the light of which, the further evidence about agreement would have to be appreciated. We have seen the comments of Director General as also the findings of the CCI. We are convinced that CCI has not committed any error in considering all these factors as plus factors to come to the conclusion that there was a concerted agreement between the parties on the basis of which the identical or near identical prices came to be quoted in tenders for the supply of cylinders to the 25 States. In view of this, we need not dilate on the individual claims by some of the appellants that they were not the members of the association or that they were only the dormant members or that they had abdicated their membership. We also need not go on the claim that while the meeting was attended by the 19 parties as held by the D.G. and confirmed by the CCI, it was not attended by the rest of the appellants because that would be of no consequence. Once there was a meeting, there was every opportunity to discuss or to communicate to each other whatever transpired in the meeting.

27. We have seen the order of the CCI and while commenting about the meeting, the CCI has painstakingly noted the details of that meeting. The CCI has referred to the evidence of Mr. Dinesh Goyal, who was an active member of the Indian LPG Cylinder Manufacturers' Association and noted that he had attended the meeting. He has also referred to the statement of Mr. Sandeep Bhartia of Carbac Group though initially he denied to have organized the conference, he later on had confirmed about such a conference having been held along with Mr. Sandeep Bhartia of Carbac Group. The CCI also noted that he admitted that in such meetings there were discussions on pre-bid issues. He also admitted that though there are about 50 competitors, in fact about 25 persons control the whole affairs. From this evidence, the CCI correctly deduced that pre-bid issues were discussed in that meeting. The CCI has then referred to the evidence of Mr. Manvinder Singh of Bhiwadi Cylinders Limited, Mr. Chandi Prasad Bhartia of Haldia Precision Engineering P. Ltd., Mr. Vijay Kumar Agarwal of SM Sugar Pvt. Ltd., Mr. S. Kulandhaiswamy, MD of Lite Containers Pvt. Ltd. and Secretary of the Association, Mr. Ramesh Kumar Batra, Director of Surya Shakti

Vessels Pvt. Ltd. and on that basis came to the correct conclusion that not only was the meetings held on 1st and 2nd March, but thorough discussions went on in those meeting on the pre-bid issue of the concerned tender. The CCI has also correctly noted about the agenda of the meeting and has also referred to an admission made by one of the witnesses that the matching of the quotation was a matter of co-incidence and telephonic discussions do take place amongst the parties regarding the trends. We are thus thoroughly convinced about holding of the meeting, the discussion held therein and also the discussion regarding the pre-bid issue having been taken place in that meeting."

77) Though the expression 'collusive bidding' is not defined in the Act, it appears that both 'bid rigging' and 'collusive bidding' are overlapping concepts. This position stands accepted in Excel Crop Care Limited case which should be found from the following discussion therefrom:

"38. Mr Neeraj Kishan Kaul, learned Additional Solicitor General, refuted the aforesaid submission with vehemence by urging that bid rigging and collusive bidding are not mutually exclusive and these are overlapping concepts. Illustratively, he referred to the findings of CCI, as approved by COMPAT, in the instant case itself to the effect that the appellants herein had "manipulated the process of bidding" on the ground that bids were submitted on 8-5-2009 collusively, which was only the beginning of the anti-competitive agreement between the parties and this continued through the opening of the price bids on 1- 6-2009 and thereafter negotiations on 17-6-2009 when all the parties reduced their bids by same figure of Rs 2 to bring their bid down to Rs 386 per kg from Rs 388 per kg. From this example, he submitted that on 8-5-2009 there was a collusive bidding but with concerted negotiations on 17-6-2009, in the continued process, it was rigging of the bid that was practiced by the appellants. We are inclined to agree with this pellucid submission of the learned Additional Solicitor General.

39. Richard Whish and David Bailey [Competition Law, 7th Edn., p. 536.] , in their book, have given illustrations of various forms of collusive bidding/bid rigging, which include:

- (a) Level tendering/bidding (i.e. bidding at same price -- as in the present case).
- (b) Cover bidding/courtesy bidding.
- (c) Bid rotation.
- (d) Bid allocation.

40. Even internationally, "collusive bidding" is not understood as being different from "bid rigging". These two expressions have been used interchangeably in the following international commentaries/glossaries and websites of competition authorities: (a) UNCTAD Competition

Glossary dated 22-6-2016 "Bid rigging or collusive tendering is a manner in which conspiring competitors may effectively raise prices where business contracts are awarded by means of soliciting competitive bids. Essentially, it relates to a situation where competitors agree in advance who will win the bid and at what price, undermining the very purpose of inviting tenders which is to procure goods or services on the most favourable prices and conditions."

(b) OECD Glossary of Industrial Organisation Economics and Competition Law "Bid rigging is a particular form of collusive price-fixing behaviour by which firms coordinate their bids on procurement or project contracts. There are two common forms of bid rigging. In the first, firms agree to submit common bids, thus eliminating price competition. In the second, firms agree on which firm will be the lowest bidder and rotate in such a way that each firm wins an agreed upon number or value of contracts. Since most (but not all) contracts open to bidding involve Governments, it is they who are most often the target of bid rigging. Bid rigging is one of the most widely prosecuted forms of collusion."

Collusive bidding (tendering) -- See "bid rigging". (This shows collusive bidding and bid rigging are treated as one and the same.)

(c) OECD Guidelines for fighting bid rigging "Bid rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process."

(d) United States Office of the Inspector General, Investigations (Fraud Indicators Handbook) "Collusive bidding, price fixing or bid rigging, are commonly used interchangeable terms which describe many forms of an illegal anticompetitive activity. The common thread throughout all these activities is that they involve any agreements or informal arrangements among independent competitors, which limit competition. Agreements among competitors which violate the law include but are not limited to:

- (1) Agreements to adhere to published price lists.
- (2) Agreements to raise prices by a specified increment.
- (3) Agreements to establish, adhere to, or eliminate discounts.
- (4) Agreements not to advertise prices.

- (5) Agreements to maintain specified price differentials based on quantity, type or size of product."

(e) Australian Competition and Consumer Commission "Bid rigging, also referred to as collusive tendering, occurs when two or more competitors agree they will not compete genuinely with each other for tenders, allowing one of the cartel members to 'win' the tender. Participants in a bid rigging cartel may take turns to be the 'winner' by agreeing about the way they submit tenders, including some competitors agreeing not to tender."

41. As the Liegeman of the law, it is our task, nay a duty, to give proper meaning and effect to the aforesaid "Explanation". It can easily be discussed that the legislature had in mind that the two expressions are interchangeably used. It is also necessary to keep in mind the purport behind Section 3 and the objective it seeks to achieve:

41.1. Sub-section (1) of Section 3 is couched in the negative terms which mandates that no enterprise or association of enterprises or person or association of persons shall enter into any agreement, when such agreement is in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services and it causes or is likely to cause an appreciable adverse effect on competition within India.

It can be discerned that first part relates to the parties which are prohibited from entering into such an agreement and embraces within it persons as well as enterprises thereby signifying its very wide coverage. This becomes manifest from the reading of the definition of "enterprise" in Section 2(h) and that of "person" in Section 2(l) of the Act. The second part relates to the subject-matter of the agreement. Again it is very wide in its ambit and scope as it covers production, supply, distribution, storage, acquisition or control of goods or provision of services. The third part pertains to the effect of such an agreement, namely, "appreciable adverse effect on competition", and if this is the effect, purpose behind this provision is not to allow that. Obvious purpose is to thwart any such agreements which are anti-competitive in nature and this salubrious provision aims at ensuring healthy competition. Sub-section (2) of Section 3 specifically makes such agreements as void. 41.2. Sub-section (3) mentions certain kinds of agreements which would be treated as ipso facto causing appreciable adverse effect on competition. It is in this backdrop and context that "Explanation" beneath sub-section (3), which uses the expression "bid rigging", has to be understood and given an appropriate meaning. It could never be the intention of the legislature to exclude "collusive bidding" by construing the expression "bid rigging" narrowly. No doubt, clause (d) of sub-section (3) of Section 3 uses both the expressions "bid rigging"

and "collusive bidding", but the Explanation thereto refers to "bid rigging" only. However, it cannot be said that the intention was to exclude "collusive bidding". Even if the Explanation does contain the expression "collusive bidding" specifically, while interpreting clause (d), it can be inferred that "collusive bidding"

relates to the process of bidding as well. Keeping in mind the principle of purposive interpretation, we are inclined to give this meaning to "collusive bidding". It is more so when the expressions "bid rigging" and "collusive bidding" would be overlapping, under certain circumstances which was conceded by the learned counsel for the appellants as well.

42. We are, therefore, of the opinion that the two expressions are to be interpreted using the principle of *noscitur a sociis* i.e. when two or more words which are susceptible to analogous meanings are coupled together, the words can take colour from each other. (See *Leelabai Gajanan Pansare v. Oriental Insurance Co. Ltd.* [Leelabai Gajanan Pansare v. Oriental Insurance Co. Ltd., (2008) 9 SCC 720], *Thakorlal D. Vadgama v. State of Gujarat* [Thakorlal D. Vadgama v. State of



Gujarat, (1973) 2 SCC 413 : 1973 SCC (Cri) 835] and M.K. Ranganathan v. State of Madras[M.K. Ranganathan v. State of Madras, (1955) 2 SCR 374 : AIR 1955 SC 604] .)"

81) We would also like to reproduce the following discussion in Commissioner of Income Tax, Bombay City I, Bombay vs. Jubilee Mills Ltd., Bombay<sup>14</sup>:

"19. At the hearing a point was raised that it has to be proved as a fact that the persons constituting the group which owns shares carrying more than seventy-five per cent of the voting power, were acting in unison. The test is not whether they have actually acted in concert but whether the circumstances are such that human experience tells us that it can safely be taken that they must be acting together. It is not necessary to state the kind of evidence that will prove such concerted actings. Each case must necessarily be decided on its own facts. The exclusion of "public" in the manner indicated generally from more than 75% of the shares and the concentration of such a holding in a single person or a group acting in concert is what attracts Section 23(A)."

90) The manner in which tendering process takes place would show that in such a competitive scenario, the bid which the different bidder would be submitting becomes obvious. It has come on record that just a few days before the tender in question, another tender was floated by BPCL and on opening of the said tender the rates of L-1, L-2 etc. came to be known. In a scenario like this, that obviously becomes a guiding factor for the bidders to submit their bids.

91) When we keep in mind the aforesaid fact situation on the ground, those very factors on the basis of which the CCI has come to the conclusion that there was cartelization, in fact, become valid explanations to the indicators pointed out by the CCI. We have already commented about the market conditions and small number of suppliers. We have also mentioned that 12 new entrants cannot be considered as entry of very few new suppliers where the existing suppliers were only 50. Identical products along with market conditions for which there would be only three buyers, in fact, would go in favour of the appellants. The factor of repetitive bidding, though appears to be a factor against the appellants, was also possible in the aforesaid scenario. The prevailing conditions in fact rule out the possibility of much price variations and all the manufacturers are virtually forced to submit their bid with a price that is quite close to each other. Therefore, it became necessary to sustain themselves in the market. Hence, the factor that these suppliers are from different region having different cost of manufacture would lose its significance. It is a situation where prime condition is to quote the price at which a particular manufacturer can bag an order even when its manufacturing cost is more than the manufacturing cost of others. The main purpose for such a manufacturing would be to remain in the fray and not to lose out. Therefore, it would be ready to accept lesser margin. This would answer why there were near identical bids despite varying cost.

92) Insofar as meeting of bidders in Mumbai just before the date of submission of tender is concerned, some aspects pointed out by the appellants are not considered by the CCI or the COMPAT at all. No doubt, the meeting took place a couple of days before the date of tender. No doubt, the absence of agenda coming on record would not make much difference. However, only 19

appellants had attended that meeting. Many others were not even members or did not attend the meeting. In spite thereof, even they quoted almost same rates as the one who attended the meeting. This would lead us to the inference that reason for quoting similar price was not the meeting but something else. The question is what would be the other reason and whether the appellants have been able to satisfactorily explain that and rebut the presumption against them?

93) The explanation is market conditions leading to the situation of oligopsony that prevailed because of limited buyers and influence of buyers in the fixation of prices was all prevalent. This seems to be convincing in the given set of facts. The situation of oligopsony can be both ways. There may be a situation where the sellers are few and they may control the market and by their concerted action indulge into cartelization. It may also be, as in the present case, a situation where buyers are few and that results in the situation of oligopsony with the control of buyers.

94) To recapitulate, the two prime factors against the appellants, which are discussed by the CCI, are that there was a collusive tendering, which is inferred from the parallel behaviour of the appellants, namely, quoting almost the same rates in their bids. The parameters on the basis of which these aspects are to be judged are stated in Excel Crop Care Limited as follows:

"50. It needs to be emphasised that collusive tendering is a practice whereby firms agree amongst themselves to collaborate over their response to invitations to tender. Main purpose for such collusive tendering is the need to concert their bargaining power, though, such a collusive tendering has other benefits apart from the fact that it can lead to higher prices. Motive may be that fewer contractors actually bother to price any particular deal so that overheads are kept lower. It may also be for the reason that a contractor can make a tender which it knows will not be accepted (because it has been agreed that another firm will tender at a lower price) and yet it indicates that the said contractor is still interested in doing business, so that it will not be deleted from the tenderer's list. It may also mean that a contractor can retain the business of its established, favoured customers without worrying that they will be poached by its competitors.

51. Collusive tendering takes many forms. Simplest form is to agree to quote identical prices with the hope that all will receive their fair share of orders. That is what has happened in the present case. However, since such a conduct becomes suspicious and would easily attract the attention of the competition authorities, more subtle arrangements of different forms are also made between colluding parties. One system which has been noticed by certain competition authorities in other countries is to notify intended quotes to each other, or more likely to a Central secretariat, which will then cost the order and eliminate those quotes that it considers would result in a loss to some or all members of the cartel. Another system, which has come to light, is to rotate orders. In such a case, the firm whose turn is to receive an order will ensure that its quote is lower than the quotes of others.

52. We are here concerned with parallel behaviour. We are conscious of the argument put forth by Mr Venugopal that in an oligopoly situation parallel behaviour may not, by itself, amount to a concerted practice. It would be apposite to take note of the following observations made by European Court of Justice in Dyestuffs:

"By its very nature, then, the concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants. Although parallel behaviour may not itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not respond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market. Such is the case especially where the parallel behaviour is such as to permit the parties to seek price equilibrium at a different level from that which would have resulted from competition, and to crystallise the status quo to the detriment of effective freedom of movement of the products in the [internal] market and free choice by consumers of their suppliers."

(emphasis supplied) At the same time, the Court also added that the existence of a concerted practice could be appraised correctly by keeping in mind the following test:

"If the evidence upon which the contested decision is based is considered, not in isolation, but as a whole, account being taken of the specific features of the products in question."

Having regard to the aforesaid principles in mind, we deal with the argument on oligopsony raised by the appellants.

95) Monopsony consists of a market with a single buyer. When there are only few buyers the market is described as an oligopsony. What is emphasised is that in such a situation a manufacturer with no buyers will have to exit from the trade. Therefore, first condition of oligopsony stands fulfilled. The other condition for the existence of oligopsony is whether the buyers have some influence over the price of their inputs. It is also to be seen as to whether the seller has any ability to raise prices or it stood reduced/eliminated by the aforesaid buyers.

96) On a holistic view of the matter, we find that the appellants have been able to discharge the onus by referring to various indicators which go on to show that parallel behaviour was not the result of any concerted practice.

97) In Dyestuffs, the European Court held that parallel behaviour does not, by itself, amount to a concerted practice, though it may provide a strong evidence of such a practice. Nevertheless, it is a strong evidence of such a practice. However, before such an inference is drawn it has to be seen that this parallel behaviour has led to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, size and volume of the

undertaking of the said market. Thus, we examine the matter from the stand point of market economy where question of oligopsony assumes relevance. Whenever there is a situation of oligopsony, parallel pricing simpliciter would not lead to the conclusion that there was a concerted practice there has to be other credible and corroborative evidence to show that in an oligopoly a reduction in price would swiftly attract the customers of the other two or three rivals, the effect upon whom would be so devastating that they would have to react by matching the cut. In Richard Whish & David Bailey in Oxford's Competition Law<sup>15</sup> discussed the "Theory of Oligopolistic Interdependence" as under:

"In an oligopoly a reduction in price would swiftly attract the customers of the other two or three rivals, the effect upon whom would be so devastating that they would have to react by matching the cut. Similarly an oligopolist could not increase its price unilaterally, because it would be deserted by its customers if it did so. Thus the theory runs that in an oligopolistic market rivals are interdependent: they are acutely aware of each other's presence and are bound to match one another's marketing strategy. The result is that price competition between them will be minimal or non-existent; oligopoly produces noncompetitive stability.....

...Oligopolists recognize their interdependence as well as their own self-interest. By matching each other's conduct they will be able to achieve and charge a profit-maximising price which will be set at a supra-competitive level, without actually communicating with one another. There does not need to be any communication: the structure of the market is such that, through interdependence and mutual self-awareness, prices will rise towards the monopolistic level....

.....The logical conclusion of the case against oligopoly is that, since it is the market structure itself which produces the problem, structural measures should be taken to remedy it by deconcentrating the market. Unless this is done, there will be an area of consciously parallel action in pricing strategies which is beyond the reach of laws against cartels and yet which has serious implications for consumers welfare.

xxx xxx xxx xxx xxx

(iii) A regulatory approach A different possibility would be to regulate the prices of undertakings that operate in an oligopolistic environment. This, however, would be a counsel of despair. As a matter of policy direct regulation should be a remedy of last resort. Competition authorities should not be price regulators; they should be the guardians of the competitive process. Where markets are oligopolistic and entry is limited, competition authorities should be concerned with the question of whether there are barriers to entry and whether the state itself, for example through restrictive licensing rules, regulation or legislation, is responsible for a lack of competition."

98) In *Theatre Enterprises v. Paramount Films*<sup>16</sup>, the Supreme Court of United States held as under: "1-3 The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. Interstate Circuit. But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offence. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely."

99) In this regard, the test laid down by the Supreme Court of United States in *Monsanto Co. v. Spray-Rite Service Corp.* is relevant and is reproduced hereunder:

"The correct standard is that there must be evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective."

102) After taking note of the test that needs to be applied in such cases, which was laid down in *Dyestuffs* and accepted in *Excel Crop Care Limited*, we come to the conclusion that the inferences drawn by the CCI on the basis of evidence collected by it are duly rebutted by the appellants and the appellants have been able to discharge the onus that shifted upon them on the basis of factors pointed out by the CCI. However, at that stage, the CCI failed to carry the matter further by having required and necessary inquiry that was needed in the instant case.

103) We are emphasising here that in such a watertight tender policy of 88 IOCL which gave IOCL full control over the tendering process, it was necessary to summon IOCL. This would have cleared many aspects which are shrouded in mystery and the dust has not been cleared.

104) We, thus, arrive at a conclusion that there is no sufficient evidence to hold that there was any agreement between the appellants for bid rigging. Accordingly, we allow these appeals and set aside the order of the Authorities below. As a consequence, since no penalty is payable, appeals of the CCI are rendered infructuous and dismissed as such. All the pending applications stand disposed

34. From the above what learned counsel for appellants have tried to stress that the Hon'ble Apex Court has determined such a frame work for bid rigging agreement and cartel. They also determined the necessary ingredients of bid rigging. The Hon'ble Apex Court has also stressed for the existence of probability and its establishment to determine collusive bidding. It has also emphasised that whether such water tight tender policy is there it is necessary to call relevant OMC. Through these issues the Hon'ble Apex Court has finally observed as follows:-

"106. We, thus, arrive at a conclusion that there is no sufficient evidence to hold that there was any agreement between the appellants for bid rigging. Accordingly, we

allow these appeals and set aside the order of the Authorities below. As a consequence, since no penalty is payable, appeals of the CCI are rendered infructuous and dismissed as such. All the pending applications stand disposed of. No orders as to costs."

35.COMPETITION APPEAL (AT) NO.41,44,46,47,49,50,52,71,72,74,75,76,77,81,82,83,84,85,86,87,88,89,90,91,92,93,94,95,96,97,98,99,100,101,103,104,105 OF 2019 Mr. Amol Sinha, learned counsel for the appellants submits that while determining the penalty the Commission should have considered the dominant position of the Company, lack of any intent to contravene any provisions of the Act, precarious financial position and lack of any super normal profit.

It was also pointed out that all the Appellant No.2 in Competition Appeal (AT) No.40/2019, the CCI has imposed penalty on the total income of the Appellant No.2 which is incorrect as per the understanding of law on the subject.

36.COMPETITION APPEAL (AT) NO.38 AND 40 OF 2019 It was also stated by the Learned Counsel Mr Ankur Sood that while determining the penalty the Commission should have considered the dominant position of the Company, lack of any intent to contravene any provisions of the Act, precarious financial position and lack of any super normal profit.

It was also pointed out that on the Appellant No.2 in case of Competition Appeal (AT) No.40 of 2019, the CCI has imposed penalty on the total income of Appellant No.2 during the time period 2013-14, 2014-15 and 2015-2016 without taking due consideration that Appellant No.2 has other businesses included in the calculation by CCI for levying penalty both under section 3 and 4 of the Competition Act etc.

37.COMPETITION APPEAL (AT) No.41 of 2019 Additionally the learned counsel Mr. Rahul Kochar, appearing for those appellants submitted that the product in both tenders was 14.2 kg LPG cylinder.

"a.The product in both the tenders was 14.2 kg LPG cylinder which is regulated by "The LPG (Regulation of Supply and Distribution) Order, 2000 issued under The Essential Commodities Act, 1955 under the Notification dated 26.04.2000 of the Ministry of Petroleum and Natural Gas. It is submitted that as per the regulatory framework of LPG distribution in India, other than the three public sector Oil Marketing Companies (PMCs), namely Hindustan Petroleum Corporation Limited, Indian Oil Corporation and Bharat Petroleum Corporation Limited the private sector is not authorised to supply LPG to domestic consumers in 14.2 kg LPG Cylinders: That only the above three Oil Marketing Companies can supply LPG in 14.2Kg LPG cylinders as per the given specification in Schedule II of the notification dated 26.04.2000 issued by the Ministry of Petroleum and Natural Gas, Government of India.

b. It is stated that the 'relevant product market in question is the supplies of 14.2 Kg LPG to HPCL which was the subject matter of investigation by the DG in its report. The relevant 'geographic market is India since the tender required supplies to be made to the bottling plants of HPCL located at different states all over India. c. That the tender as is usually floated by HPCL is on a procurement basis and the bidders can participate in the tender (unpriced and price bids) only through the website of HPCL, as per the terms and conditions stipulated in the tender document. The tender specifies the conditions for the qualification of a bidder as a new vendor or a bidder to be qualified in the existing vendor category. It is relevant to mention that the new vendors were not required to submit the price bid and were only required to submit the technical bid and were given assured orders at the negotiated L-1 price finalised by HPCL. d. After analysing the bids submitted by various bidders across the country for Tender No. 1, the Director General in its report submitted to the Respondent came to the conclusion that there is a similarity of pattern of price bids submitted by all the bidders for making supply to HPCL in different states in Tender No.1. It further concluded that the bids of a large number of parties was exactly identical or nearly identical in different states. It has further held that some of the bidders belonged to the same group and may have submitted identical rates because they can make common decisions having a common management in place. Other than this the DG has also held that the bidders have acted in a concerted manner by collectively withdrawing their bids in Tender No.2 floated by HPCL, thereby violating the provisions of Section 3 of the Competition Act, 2002. e. That in the case of Tender No.2 the DG concluded that the bidders had colluded together and collectively withdrawn from the said tender, thereby violating the provisions of Section 3 of the Competition Act, 2002. It is stated that the DG had in the said report relied upon certain factors to back its findings such as common agents involved, exchange of emails etc. f. The Appellant specifically brought to the notice of the Respondent during the course of the proceedings, representations made by it before HPCL in order to address the issue of predatory pricing followed by certain manufacturers in Tender 2 in order to push most of the bidders out of the competition and limiting the procurement only to themselves to the detriment of others.

g. That it is relevant to note that the Respondent in the impugned order has held that the formation of an association by the manufacturers was a pointer towards the fact that the manufacturers including the Appellant had collectively decided to withdraw from the said tender i.e. Tender No.2. The Respondent had in fact confined itself so much to the findings of the DG on the formation of an association that it completely overlooked and ignored the fact that the Association i.e. The Indian LPG Manufacturers Association vide various representations which also was a part of the DG report before the Respondent, had time and again requested HPCL to ascertain and implement the price band which shall ensure the fact that no manufacturer shall quote higher than the ceiling price and lower than the floor price so ascertained by the Corporation. It is further relevant to note that vide letter dated 20.05.2013, the Association had duly brought this fact before HPCL vide representation dated

21.05.2013 that a few manufacturers had quoted a price which was much below the costing of a cylinder, thereby making the rates unworkable for most of the bidders as the same would push the manufacturers to financial losses. The copy of the representations sent by the Indian LPG Manufacturers Association is annexed herewith and marked as ANNEXURE A- In fact prima facie a comparison of the rates quoted by these few parties as against the prevailing price would show that the contention of the appellant are true and correct and not an after thought h. it is stated that the Respondent completely ignored the fact that the case as highlighted by the Association was that of 'predatory pricing followed by some manufacturers namely Krishna Cylinders and Gopal Cylinders-and-which in itself was an anti competitive practice to drive out other competitors out of the market thereby limiting and greatly reducing their production and to corner the supply of the cylinders to only a few players. It is submitted that the Respondent had completely failed to appreciate and examine the fact that the act of quoting such a low price by such manufacturers was actually the real cause for the Appellant to withdraw from the said tender which was also in accordance with the terms and conditions of the said tender. It is submitted that the Appellant had in fact withdrawn from the said tender in accordance to the terms of the tender which gave the Appellant liberty to withdraw before the opening of the technical and the price bid and an act of self preservation.

i. it is stated that the Respondent as stated above had completely overlooked the fact that as per the tender terms and conditions, the participant bidder could not withdraw from the tender if the technical and the price bid of the bidder was been opened by HPCL. It is stated that if the bidder withdrew from the said tender, post the opening of the bid, HPCL had powers under the tender conditions to impose liquidated damages (LD) on such a bidder or even blacklisting a bidder from participating in the future tenders floated by the Corporation. Thus the Respondent completely ignored the fact that the Appellant instead of running into deep financial losses and face consequences enumerated by HPCL in terms of the subject tender, the rates been unworkable the Appellant chose to withdraw from the tender before the opening of the bid of the Appellant, thereby completely ousting the fact that the Appellant had formed a cartel to withdraw from the said tender in contravention of the provisions of the Competition Act, 2002. j It is relevant to note that in the representation dated 20.05.2013 the bidders had specifically requested the Corporation to restrict the opening of the tender till the price determination report of an independent consultant i.e. KPMG which would have ensured that both the Corporation and the bidders are secured in terms of the rates at which the procurement and supplies of the cylinder are made. It is stated that no finding whatsoever has been given by the Respondent to all these facts which were duly presented before it by way of oral arguments and objections. clearly showing non application of mind by the Respondent towards the facts present before it, thereby making the order holding the Appellant guilty under the provisions of Section 3 of the Competition Act, 2002 bad in law and hence liable to be set aside. In fact this very fact formed the basis for the Appellant and other bidders to withdraw from the



subject Tender, which fact has been completely skipped by the Respondent Commission, thereby making the findings incomplete and thus the impugned order is liable to be set aside.

k It is submitted that the following evidence was relied upon by the Respondent in order to hold the Appellant guilty of collectively withdrawing its bid with other bidders u/s 3(3) of the Competition Act, 2002:

- a) Common IP address amongst the bidders at the time of submission of the bid
- b) Exchange of emails amongst them
- c) Association providing a platform for the bidders l. The Appellant would like to submit that the Respondent has proceeded to rely upon such evidence gathered by the Director General in a selective manner which favours the case of the Respondent without applying its mind to the complete evidence/ facts before it. It is stated that having a common I.P. address with other bidders for the submission of the price bid had nothing to do with the issue in the present case that is the conduct of collectively withdrawing from the said tender. It is stated that the alleged issue of having a common IP address amongst the bidders could have been examined by the Respondent in the case if the conduct was to be examined qua price parallelism and not collective withdrawal as done in the present case by the Respondent.

Further nowhere in the emails as pointed out by the Respondent there were any specific instructions given by the Appellant to any other bidder to withdraw from the said tender, thereby completely making the evidence one sided, which has been interpreted by the Respondent to favour it in a selective manner. Infact, there has been nothing which has been brought on record by the Respondent to show that any such instructions by the Appellant on which the bidders could have acted could be brought about by the Respondent. m. it is submitted that the formation of an association has been held by the Respondent as a part of the evidence in holding the Appellant guilty under the provisions of the Act. In this regard it is submitted that the Respondent has completely failed to appreciate and examine the fact that the formation of an association in itself is a constitutional right given to the Appellant as envisaged under Article 19(1) (c) of the Constitution of India. It is submitted that infact there has been nothing been brought on record by the Respondent or the Director General in its report before the Respondent to show that the said association was functioning illegally or promoting anti-competitive practices. It is submitted that the association was infact duly registered and was solely made for the purposes to address the problems faced by the manufacturers also to ensure smooth competition in the LPG market. It is relevant to not that the Respondent has completely failed to examine the fact that infact it was this Association that was preventing anti-competitive practices which were been followed by a few bidders ie. the practice of predatory pricing and had duly represented before the Corporation for a solution. This fact alone clearly shows that the Respondent had failed to apply its mind to the facts of the case.

38.COMPETITION APPEAL (AT) No.108/2019 It is stated by learned counsel for Appellants, Mr Amol Sinha that the Respondent completely failed to appreciate the fact that the HPCL did not cancel the tender despite the withdrawal by the bidders, and the Corporation went ahead with the said tender, thereby the alleged cartel had no effect whatsoever on the tender.

It is stated that the electronic evidence such as emails etc relied upon by the Respondent were in violation of Section 65B of the Evidence Act and could not have been relied upon by the Respondents.

It is stated that the most of the production of the Appellant is exported and only very small portion is consumed in the domestic market. The Appellant has an installed capacity of 2.4 million cylinders per annum which is one of the largest installed capacities in India and the appellant is a government approved registered exporter, supplying to almost every MNC including SHV, TOTAL, SHELL, BP, CALTEX etc. outside India to over 40 countries and the size vary from 1.7 Kg to 50 Kg none of which are 14.2 kg cylinders.

It is stated that the penalty imposed by the Commission was grossly inappropriate, disproportionate, unjustified, arbitrary and unfair.

### 39.COMPETITION APPEAL (AT) No.106/2019

(i) The learned counsel Mr Amol Sinha for the appellants submitted that the Respondent as stated above has completely overlooked the fact that as per the tender terms and conditions, the participant bidder could not withdraw from the tender, if the price bid of the bidder was been opened by HPCL/respondent No.2. It is stated that if the bidder withdrew from the said tender, post the opening of the Price bid, HPCL had powers under the tender conditions to impose liquidated damages (LD) on such a bidder or even blacklisting a bidder from participating in the future tender floated by the Corporation. Thus the Respondent completely ignored the fact that the company instead of running into deep financial losses and face consequences enumerated by HPCL in terms of the subject tender, the rates been unworkable the company chose to withdraw from the tender before the opening of the bid, thereby completely ousting the fact that the Company had formed a cartel to withdraw from the said tender in contravention of the provisions of the Competition Act, 2002.

(ii) It is stated that the DG and the Respondent completely ignored and failed to give a finding on the fact that the Tender No.2 had been effected despite several representations made before it by a few manufacturers, in order to introduce a price band system protecting the interests of the Corporation as well as the bidders at large and in order to promote competition instead of eliminating it. It is stated that the Respondent had overlooked the fact that due to the withdrawal of the Appellant's company and other manufacturers from the said tender, there was no 'Appreciable Adverse Effect on the Competition' as the Corporation admittedly had gone ahead with the said tender with no financial loss caused to it. It is relevant to note here that in the present case the Corporation went ahead with the tender with the remaining bidders who had followed the practice of predatory pricing and therefore, no loss whatsoever was caused to the Corporation. It is further

pertinent to note that as per the Corporation's own report, it had accepted that the weighted average rate per cylinder was 8.51% lower than the weighted average rate of PR (Procurement Rate) and also the weighted average rate was lower than the existing rate, thereby completely nullifying the fact that there was any financial loss to HPCL by the alleged action of the Company.

(iii) It is relevant to note that in the representation dated 20.05.2013 the bidders had specifically requested the Corporation to restrict the opening of the tender till the price determination report of an independent consultant i.e. KPMG which would have ensured that both the Corporation and the bidders are secured in terms of the rates at which the procurement and supplies of the cylinder are made. It is stated that no finding whatsoever has been given by the Respondent to all these facts which were duly presented before it by way of oral arguments and objections, clearly showing non application of mind by the Respondent towards the facts present before it thereby making the order holding the Appellant's Company guilty under the provisions of Section 3 of the Competition Act, 2002 bad in law and hence liable to be set aside. In fact this very fact formed the basis for the Company and other bidders to withdraw from the subject Tender, which fact has been completely skipped by the Respondent Commission, thereby making the findings incomplete and thus the impugned order is liable to be set aside.

#### 40.COMPETITION APPEAL (AT) NO.54, 55 AND 56 OF 2019

(i) The learned counsel for the Appellants Mr Pradeep Agarwal in above stated Competition Appeal (AT) No.55 of 2019 at the outset provided a list of dates with events as present hereinbelow:

Appellant No. 1 is a company registered under the Companies Act, 1906 and is a registered Small Scale Industry registered with the District Industries Centre Appellant No.2 is the Director of Appellant No.1. Appellant No. 1 company has been engaged in the business of manufacturing 14.2 KG cylinders ever since 1982.

2010 Virender Kumar Jain (who was also a Director in Appellant No 1 company) started raising disputes and finally filed Suit No 185 of 2010 before the Delhi High Court against his brothers. In addition, LA No. 1305 of 2010 also came to be filed seeking relief under O XXXIX R.182 CPC, 1908 26.08.2010 The defendants in the aforementioned Suit No. 185 of 2010 sought four week's time to file their reply to LA No. 1305 of 2010 which had come to be filed by the plaintiff seeking relief under O.XXXIX R 182 CPC, 1908.

27.08.2010 The DB of the Delhi High Court issued notice on FAO (OS) No. 524/2010 which came to be preferred by the plaintiff, impugning the order dated 26 08 2010 as passed by the Ld Single Judge of the Delhi High Court.

The DB directed that status quo' be maintained.

02.05.2011 The DB of the Delhi High Court was pleased to dismiss FAO (OS) No. 524/2010 with a direction that status quo shall continue till next date of hearing ie, 20.05.2011 on which date the Ld

Single Judge would endeavour to dispose of LA. No. 1305 of 2010.

20.05.2011 Although LA No. 1305 of 2010 came to be listed before the Ld. Single Judge, for one reason or the other the same could not be argued and/or disposed off.

28.10.2011 Tender No. 11000083-HD-12001 came to be floated for procurement of 45 lakhs, 14.2 KG cylinders with SC valves by HPCL (Tender No.1).

23.11.2011 All bids under the Tender No. 11000083-HD-12001 were to be submitted and the bidding closed.

26.04.2012 The Ld Single Judge of the Delhi High Court records the settlement arrived at between the LRS of Lt Shri Bhiku Ram Jain (See Annex-A-31 Pg. No. 674 675 @ Pg. No. 674 Vol-III Appeal PB).

---- Virender Kumar Jain, made 5 baskets in respect of the properties as mentioned in Schedule A to the Suit No. 185 of 2010 Basket No 5 contained 100% of shares the Appellant company owned by Lt Shri Bhiku Ram Jain family. (See Annex-32 Pg. No. 676-680 Pg. No. 680 Vol-III Appeal PB) 21.05.2012 Ld. Single Judge of the Delhi High Court passed an order whereby, it was recorded that 5 baskets had come to be drawn and that the Defendants are willing to accept 4 out of 5 baskets prepared. (See Annex-33 Pg. No. 681 Vol III Appeal PB) 26.07.2012 Ld Single Judge of the Delhi High Court stating that disputes regarding the Suit Properties had come to be settled fully and that defendant nos 1-4 accepted baskets 1-3 & 5 Whereas, basket 4 was to go to the plaintiff therein. (See Annex-35 Pg Nos 684-686 Pg No 685 686 Vol-III Appeal PB) 30.10.2012 LA No 17701/2012 came to be filed by Virender Kumar Jain, seeking to modify the baskets as prepared. The Ld Single Judge of Delhi High Court by way of order dismissed the LA. (See Annex-36 Pg. Nos, 687-690 Pg. No. 690 Vol III Appeal PB).

14.12.2012 Although 5 baskets had been prepared and divisions made, the status quo order as passed by the DB of the Delhi High Court on 26.08.2010 continued to operate. This prompted the defendants in Suit No. 185 of 2010 to move LA No 22537 of 2012 seeking vacation of the 'status quo order. (See Annex-A-38 Pg. Nos. 728-733 Vol-III Appeal PB) 24.01.2013 HPCL floats another Tender bearing no 120000147 for procuring 40 lakh, 14.2 KG cylinders Feb 2013 During discussions it was understood that a peculiar situation had arisen due to the continuance of status quo orders Therefore, in order to resolve the present situation Virender Kumar Jain, proposed to take over basket no.5 (which included FMU) to compensate his rights arising out of property covered by the judgement of 03.12.2012 passed by the Hon'ble Supreme Court.

15.02.2013 Appellant No.1 submitted its price bid electronically. The bids although submitted were never opened.

28.02.2013 In light of the aforementioned family disputes and myriad of litigations the Appellant was advised to give up basket no.5 in an attempt to buy peace Accordingly, the advocates of the Appellant advised them to not undertake any major business commitments Therefore, Appellant No

1 was advised to withdraw from Tender No. 2 (See Annex- A-40 Pg. No. 737 Vol-IV Appeal PB) (Tender No.2) It is stated in this regard, as per Clause 15 of Annex-1, withdrawal from tender was duly provided for in the terms of the Tender itself (See Annex-A-5Pg. Nos.242-267 Pg. No. 254 Vol-II Appeal PB) A fact admitted even by HPCL (See Annex-A-4 Pg. Nos 810-996 @ Q. 27 @Pg. No. 962 in re, Sukumar Nandi; @Q 20 821 Pg. No.967 in re; Pradeep Chauhan & Q.8 @Pg.

No.973 in re, Balasubramanian of Appeal PB) 26.02.2014 The Appellant by way of letter duly informed the Respondent about the existence of family disputes between the legal heirs of Lt. Shri Bhiku Ram Jain and the pendency of various litigations before the various Court of Delhi (See Annex A13 Pg. No.289-314 @Para Nos. 3.3-3.33@ Pg. Nos. 299-311 Vol-II Appeal PB). 06.10.2016 Ld DG finalised his report and submitted the same before the Ld CCI In this report the Ld DG at S No 26 records that there was a family dispute amongst the brother which were pending before the Court and was cited as the reason for withdrawal from Tender No.2 (See DG Report @Pg. 119 Vol-I Appeal PB).

11.04.2017 Appellants filed an application praying for recall/ review the orders dated 02.01.2014 inter-alia stating therein that the investigation carried out were timebarred (See Annex-A-26 Pg. No, 485-636 @ Pg. No. 532 Vol-III Appeal PB).

Impugned Ld CCI @ Pg 189 @ Para No. 107(d) without considering Findings the orders/proceedings of the High Court at New Delhi/Tribunals records perverse findings that "Faridabad Metal Udyog Pvt Ltd should not have participated in Tender No. 2 in the first place by submitting its bid.

Ld CCI Pg. 171 @ Para No. 61 records that the letter of the Appellant was "worded similarly but was not identical to the letters of the other OPS

(ii) From the above it is very much clear that in the case of Appellant No.1, Faridabad Metal Udyog Pvt Ltd., (CA(AT) No.55 of 2019) the family dispute led to several business complications which are stated as above as a result of which although being in the business for years together they have proposed to withdraw the bid. The issue are stated as below:-

"a. Appellant Company was managed by the family members of Late Shri Bhiku Ram Jain which comprised of 5 sons ie, Ravinder Jain, Virender Jain, Narender Jain, Arvind Jain and Adarsh Jain. Withdrawal from Tender 2 was owing only to the pending litigation that cropped up after 2010 during 2012-13, with respect to the ownership and control of Appellant Company [Annex. A-26 Vol III 1 Pg 485-636531] b.. Virender Jain, who was also a Director in the Appellant Company having sizable portion of shares, had interest in other businesses started raising disputes in respect of the businesses being run by the family members. Shri Virender Jain filed Suit for Partition being Suit No. 185 of 2010 in Delhi High Court against his brothers. c. On 26.4.2012 [Annex. A-31 Vol. III | Pg.674-6751, the Ld. Single Judge was, inter-alia, pleased to record settlement that a consensus has been arrived at between parties and that Virender Jain shall make five baskets with regard to the properties and

Defendant nos, 1 to 4 will choose four baskets and remaining fifth basket will go to Virender Jain.

d. Thereafter, Virender Kumar Jain made 5 baskets [Annex. A-32 Vol III Pg.676 680] in respect of the properties in Schedule A to the Suit No. 185 of 2010. Out of the baskets made, Basket No. 5 contained 100% shares of Appellant Company owned by Bhiku Ram Jain family..

e. On 21.5.2012 [Annex A-33 Vol. III | Pg.681-6821, Ld. Single Judge passed orders recording that Plaintiff has drawn 5 baskets regarding assets and liabilities which has been placed on record, Defendants are willing to accept 4 baskets out of 5 baskets prepared. f. Orders dated 26.7.2012 of Ld. Single Judge [Annex. A-35 Vol. III Pg.684-686] stating that disputes regarding suit properties are fully and finally settled and out of 5 baskets, defendant No. 1 to 4 have accepted baskets No. 1 to 3 and 5 and basket No. 4 goes to plaintiff. g. IA 17701/2012 for modifying baskets and reframing them was move by the Plaintiff Order dated 30 10.2012 1Annex A-36 Vol | Pg.687-6901 was passed declining request of Plaintiff h Although baskets were drawn and division made, but order of status quo Division Bench granted on 26.8.2010 was not vacated, which was creating problems in day to day working etc. of companies. Defendants on 14.12.2012 filed a 1A No 22537 of 2012 for vacation of status quo orders [Annex A-38 Vol I Pg 728-733] i This led into a peculiar situation and accordingly Appellant applied in Tender of Jan of 2013 of HPCL During this period, various efforts were undertaken by Defendants to implement orders and divide baskets in furtherance to assurance given.

j. During discussions held in Feb 2013 that in order to resolve issues, Virender Jain mooted a proposal that he would be willing to take some other basket to compensate his rights in the property arising out of judgment dated 3.12.2012 of the Hon'ble Supreme Court and according to our counsel Shri Virender Jain indicated his intention to take over the basket no. 5, which included FMU.

k Thereafter, the Appellants were advised that even if they were to give basket no. 5 (which included the Appellant Company), same could be done in order to buy peace. Advocates for OPs suggested in Feb, 2013 that they should not undertake any major commitments in any of businesses including fresh orders etc. As such, Appellants were advised to withdraw from Tender and not take up any fresh substantial orders as the matter was likely to be resolved and some other basket (may be basket no. 5 which included Appellant) to be given to Plaintiff to resolve the disputes As such, Appellant had withdrawn from HPCL tender and wrote a letter dated 28.2.2013. [Annex A-40 Vol. IVI Pg.737).

l. It is pertinent to note that all these above facts alongwith all its orders/document were submitted before the DG under cover of the letter dated 26.2.2014 [Annex A-13 Vol. 1 Pg 209-3141, but the DG neither referred to the letter dated 20.2.2014 of the

annexures annexed to the said letter, which had various Court orders of High Court of Delhi etc, but DG totally ignored the letter dated 26.2.2014 and its annexures and did not mention the same in its report. m. The Ld. DG in its report at [Vol. 11 Pg. 119 of DG Report] S. No. 26 records that there was a family dispute amongst the brothers which went to Courts and Tribunals and this was the reason for withdrawal of the bid. As regards, the membership of the Association, the Appellant had [Vol 11 Pg. 183-184 of DG Report] submitted that he is not the member of the Association No reasons have been given as regards the family dispute amongst brothers and the orders/proceedings filed in the Courts and Tribunals etc. n Tender No. 2 contained a specific regard to the withdrawal of the bids at Clause 16 Annexure 1 [Annex. A-4 Vol. II Pg 242-267] (this is an admitted fact even by HPCL) as follows "16. In case of withdrawal of offer after opening of price Bid or any other breach of tender terms and conditions at any stage during the validity period of offer/contract. Corporation reserves the right to take action as deemed fit which may be inclusive of putting the manufacturer under suspension holiday."

o. In cross examination [Annex. A-47 Vol IV | Pg 810-986] (Q 23-no reason required to be given for withdrawal, Q27 & Ans of Mr. Nand, officer of HPCL) -no loss suffered on withdrawal @ Pg 962), (Q 20 & 21 of Pradeep Chauhan -officer of HPCL)-bidder could withdraw his bid prior to opening of price bid No reason are required to be given) 1 Pg.967) (08 to Bastasubramanian officer of HPCL)-no action taken as withdrawal was prior to opening of price bid [Pg.973] p. The Tender was due on 15.2.2013 but was not opened, which is an admitted fact and the price bid was withdrawn by the Appellant on 28.2.2013. The tender gave a night to the Appellant to withdraw the price bid prior to the opening of the price bid. It is submitted that the Act of 2002 does not and cannot over-ride over the contractual provisions which are binding on the parties Impugned findings of the CCI q The Ld. CCI at Pg. 189 [Internal Pg.81] of the impugned orders-Para 107(d) without considering the orders/proceedings of the Hon'ble Courts/Tribunal records a perverse finding that- Faridabad Metal Udyog Pvt. Ltd. Should not have participated in Tender No. 2 in the first place by submitting its bid....."

The Lit CCI at Para 61 (Pg. 171) records that the letter of the Appellant was worded similarly but was not identical to the letters of other Of's mentioned at Pg 171 (Internal Pg. 63) r. MITIGATING FACTORS AND IMPOSITION OF PENALTY:

No penalty ought to be imposed as Appellant had not breached the provisions of Section 3(3)(d) read with Section 3(1). It is submitted that

(a) Firstly, DG has failed to establish any collusion, which could suggest that OP had indulged in bid rigging as is being alleged.

(b) Secondly, no evidence showing nexus between OP and other parties.

(c) Thirdly, the Hon'ble Supreme Court in Rajasthan Cylinders (supra) in identical matters have set aside the orders of CCI and COMPAT and that principle ought to be

applied in the present case..

(d) Fourthly, the mitigating factors for no or negligible penalty are as follows

i) Appellant is a Small Scale Industry [Pg 241 of Appeal PB]

ii) Appellant working would be crippled/closed down if the penalty is levied

(iii) First offence - Rajasthan Cylinders case held that there is no violation.

(iv) Equity capital of Appellant is only Rs. 20 lakh. Small company.

(v) Penalty, if imposed, would adversely affect Appellant and approx.

100 employees directly and indirectly employed. Appellant would become sick and be declared a defaulter in respect of the loan taken from the Banks

(vi) Appellant not a member of any Association.

(vii) Appellant does not fall within the category of leader and has not taken any active part in any act, deed or thing. OPs had no role to play at all

(viii) Provision for the imposition of the penalties are not mandatory and are discretionary and ought not to be imposed in the present case

(ix) No penalty be imposed on the Director as he had no role to play in respect of the alleged offence complained of by the Ld. JDG

(x) Penalty, if at all, has to be imposed only in relation to turnover of the 14.2 Kg LPG cylinders supplied by Appellant to HPCL. Appellant is a multi-product company and manufactures and supplies other goods

(e) Fifthly. Appellant could withdraw legally in terms in Clause 15 of the Tender and the withdrawal was bona fide in view of family disputes which were pending in High Court of Delhi and consequent to orders passed during the said period by High Court when it was not clear to which brother, Appellant Company would go. Withdrawal was bona fide and, supported by valid and cogent justification, which was not at all considered by the DG.

Sixthly, Judgment in Excel Corp (Hon'ble Supreme Court), COMPAT and CCI have to be considered while levying penalty. In several cases no penalty has been levied. No penalty on Director under Section 48 of the Act:

(i) Observation of Ld. DG affixing liability of individual Director under section 40 cannot be sustained as penalty under Act cannot be two fold i.e. both on director and



as well upon the Company. Unified approach on turnover or profit have to followed for levy of any penalty hence the different criteria for penalty over turnover of the company and income of the Director cannot be applied.

(ii) Implicating the Director under section 48. DG has merely stated in Para 7.2 that person who in charge of affairs of the company is liable to be prosecuted. During examination of Director of Op, the Ld. DG no question was asked with the view to implicate and levy penalty upon the Director under section 48 Director of OP never confronted with proposed offence or penalty at all

(iii) To prosecute Director in vicarious capacity it is mandatory to produce clinching evidence that the concerned Director was not only involved in day to day affairs of company but also had a specific role and had a direct nexus with alleged non-compliance of the Act. Levy of penalty is not axiomatic

(iv) There is no nexus of the Director with the alleged contravention and he cannot be prosecuted under the Section 48. Levy of penalty on Director is violative of the principles of natural justice. No opportunity was given to Director to defend.

(V) OPs not involved in any bid rigging Le. Price fixing or Market allocation with respect to tender t or not involved in bid withdrawal for tender 2.

#### 41.COMPETITION APPEAL (AT) NO.56/2019

(i) The learned counsel for the appellant, Mr Pradeep Agarwal submitted further a brief in the form of Note explaining that the withdrawal of bid as also made elaborate submission on the issue, how the bid withdrawal has been considered withdrawal by unauthorised person and levying penalty based on that is total unjustified. The brief issues so presented are as under:

Date Particulars IMPORTANT "5. When person signing the documents is not the Sole Proprietor or Partner or Director of the firm, original TENDER power of Attorney or a notary certified copy thereof authorizing such person to act and sign on behalf of CONDITIONS the tenderer shall also be uploaded." Clause 5 @ 222 "15. In case of withdrawal of offer after opening of price Bid or any other breach of tender terms and conditions at any stage during the validity period of offer/contract. Corporation reserves the right to take Clause 15 @ 237 action as deemed fit which may be inclusive of putting the manufacturer under suspension/holiday,"

08.02.2013 The Appellant Company along with the Tender documents had submitted. the Board Resolution dated 8.2.2013 authorizing Shri Rakesh Singhal, the Managing Director to sign all relevant documents A5@Patge 239 pertaining to the Tender No. 2 due on 15.2.2013.

SPECIMEN SIGNATURES PROVIDED.

28.02.2013 After the submission of the bid, a withdrawal letter dated 28.2.2013 was sent by an unauthorized person. PAGE 1168 OF Evidently and admittedly, this alleged withdrawal letter was not signed by the authorized person in terms of DG Clause 5i.e. Mr. Rakesh Singhal. M.D. REPORT -VOL 5

16.05.2013 Appellant Company, gaining knowledge of the unauthorized withdrawal, wrote a letter dated A6 @ 240-244 16.5.2013 to HPCL, "SUBJECT: REQUEST FOR ACCEPT OUR OFFER" explicitly stating that (1) Withdrawal letter dated 28.02.2013 was sent without EMAIL knowledge of Management. (2) Technical and price bids already submitted at the first stage be considered. (3) Validity period of the tender could be extended till 31.07.2013.

31.05.2013 HPCL sent an email stating that the Bid submitted by the Appellant Company has not been accepted and the A7 @ 245-246 ground of rejection that the Company was not a part of the 14 bidders whose technical bids were accepted and that since the party had withdrawn the offer, the Bid @46 was not considered.

24.07.2013 The Company sent a letter to the Independent External Monitors (IEM) mentioning that the request for A8 @ 247-251 consideration of the bid was made vide the letter dated 16.5.2013 i.e. much earlier to the opening of the bid on 31.5.2013.

08.08.2013 Appellant Company, vide email, inquired about the status of the letter dated 24.7.2013 to the External @252 Independent Monitors.

20.08.2013 A complaint was sent by the Company to the Vigilance Officer of HPCL.

A9 @ 258-260 24.09.2013 The Company made a complaint to the Executive Director of HPCL.

A10 @ 261-264 26.09.2013 The Independent External Monitors had submitted a report wherein it was noted that the authorized person A11 @ 265-268 in the withdrawal letter is not in line with the authorized signatory of the resolution of the Board. Further, the IEM wrongly equated the matters relating to tenders by stating that employees sign MRRS, Bills etc. and that withdrawal letter is also one such letter, which finding is totally against the provisions of the Tender. The IEM further held that the claim of request for considering the bid of the Appellant Company at that stage cannot be accepted since the Tender process had already been completed and POs were also placed during June 2013.

@ 266 This letter records that when the 16/05/2013 was sent / received, "BY WHICH TIME THE TECHNICAL (Top Para Last EVALUATION ALMOST COMPLETE"

Line 19.05.2016 In response to Notice dated 04.05.2016 u/s 36(2) r/w 41(2) of the Competition Act, 2002, the Appellant A12 @ 269 -271 Company all details/ copies of documents w.r.t. the unauthorized withdrawal of the Bid to Ld. JDG, CCI POINTS FROM PAGE 739-740-Pradeep Chauhan, Manager. EP & P. HPCL CROSS • Q&A19- Clause 5 is mandatory EXAMINATION Q&A20-Purpose of Clause 5 to ensure

document authenticity.

Q&A23- Withdrawal letter ought to be complying with Clause 5. Para 4.15 @742- Board Resolution was duly filed.

Para 4.17-By DG to discredit Pradeep Chauhan -

Contravention of Q13 @738-739. R/W 4.37 Q&A8 @751 by S. Balasubramanian, Chief Manager, E&P. HPCL Page 747-Sanjay Das Gupta, Manager, HPCL • Q&A20 Technical Bids are decrypted during technical bid opening event by HPCL openers....

Page 753-Sukumar Nandi, General Manager, LPG, HPCL • Q&A26-Bidders can withdraw from Tender as per Clause 15.

Findings against Page 165 (Internal 83) Para 107.p.- Withdrawal by unauthorized person no substantiated as no police TCPL complaint filed. Name of Employee not disclosed.

- Page 202 (Internal 120) Para 119.xli. Rakesh Singhal is in managing position and hence liable.

42.COMPETITION APPEAL (AT) NO.53/2019 The learned counsel for the appellant, Mr Pradeep Agarwal stated that HPCL was not finalizing the Tender No.2. On the other hand it gave repeat orders under Tender No.1 to the manufacturers and there was no indication given to the Appellants and other manufacturers that the Tender No.2 shall be opened, if at all, when. In view of this uncertainty, the Appellants could not have kept their price bids open indefinitely when repeat orders were being placed to the other manufacturers under Tender No.1.As such the Appellant No.1 wrote letter dated 4.3.2013 to HPCL, inter- alia stating as follows:-

"With reference to above cited subject we have participated in our above referred tender by submitting our Technical Bid and Price Bid. The Price Bid. However, in view of certain reservations and compelling circumstances, we withdraw our offer unconditionally."

We, therefore, request you to kindly take the same as withdrawn." That it hold that the report dated October 6, 2016 of the Learned DG is nullity and it is unsustainable as it is violative of the principles of natural justice as the Learned DG has not provided the Applicant with the copies of the documents and evidences (oral and documentary) before the finalization of the report dated October 6, 2016, which formed basis of arriving adverse findings against the Applicant and the Ld. DG has also not provided to the Applicant the right to controvert and/or the replies to the documents and/or cross-examine the witnesses in view of the provisions of Regulation 41(5) of the General Regulations whose evidence is sought to be read against the Applicant.

In Application dated 11.04.2017, the Appellants had inter alia stated that the investigation Report dated 06.10.2016 of the Ld DG is nullity as it does not follow the provisions under Indian Evidence act, 1872 and the Regulations of 2009 and detailed pleadings were made in this regard. In the reply, it is stated with regard to an electronic record that it has to comply with the mandatory provisions of Section 65B of the Evidence Act and that the said list is not certified or attested.

#### 43.COMPETITION APPEAL (AT) NO.57/2019

(i) While the generic issue as stated above was reiterated by the learned counsel for the Appellant, Mr. Manas Kumar Chaudhury, the specific issue as pointed by the appellants are stated as below:

a. It is submitted that during the course of the oral examination on oath of Appellant 2, besides Section 45 of the Competition Act the administration of the oath was also done in terms of Section 191, 193 of the Indian Penal. Code, 1860 ("IPC") when such provisions of IPC were deleted by the Parliament of India in amendment of 2007 in relation to Section 36(3) of the Competition Act. These powers of IPC had been conferred upon the Hon'ble Tribunal in terms of Section 53 (O) of the Competition Act. Thus, the oath administered by the Office of the Director General on 05.08.2016 [Annexure-2 at Page 168 of the Appeal] was void. Hence, any reliance on the testimony of Appellant No 2/Mr. K.K. Gupta is untenable under law.

b.It is submitted that without admitting the contents of the oral testimony of Appellant No. 2/ Mr. K.K. Gupta that:

-A notice under Section 36(2) read with Section 41(2) of the Competition Act was issued on 19.08.2016 by then Joint Director General (JDG) to the Appellant directing it to submit the entire email dump of the company for the period from September 2011 to April 2013 by way of DVD. In compliance with such directions, the Appellant in terms of communication dated 23.08.2016 submitted the entire email dump of the Appellant No. 2 by way of a DVD [Pgs. 27 and 28 of the Appeal]

-In the Investigation Report of the Director General [Annexure 4 at Pgs. 174 to 209 of the Appeal] there is no mention, much less examination / assessment of the email dump as submitted by the Appellant in blatant disregard to Regulation 20(4) of the General Regulations. Hence, it shall be deemed to be concluded that there was no evidence against the Appellants in the entire case record [Pgs. 27 and 28 of the Appeal] c.It is submitted that the Respondent/Commission has relied on the following evidence to conclude contravention of the Competition Act by the Appellants with respect to Tender No. 2 [Pgs. 19, 20 and 21 of the Appeal] • Exchange of withdrawal letter and common format of withdrawal letter;[Pg. 98 of the Appeal] Common reasons in withdrawal letters by cylinder manufacturersincluding the Appellant No. 1: [Pg. 94 of the Appeal] Identical IP addresses through which bids were submitted by variouscylinder manufacturers; [Pg. 100 of the Appeal] Cylinder manufacturers have common agent who represent them before PSU OMCS: [Pg. 103

of the Appeal] Email exchanges between certain cylinder manufacturers: [Pg. 98 and 105 of the Appeal] and Association as a platform for exchange of information. [Pg. 110 of the Appeal] d. It is submitted that the Respondent/Commission has in detail analysed all the evidence against the cylinder manufacturers in the Impugned Order but nowhere in the entire Impugned Order the Respondent/Commission has dealt with evidence pertaining to the Appellants which clearly established that there was no contravention of Section 3(3)(d) of the Competition Act by the Appellants. (Pgs. 21 and 22 of the Appeal) e. It is submitted that none of the evidence which the Respondent/CCI has relied upon in concluding the Impugned Order relates to the Appellants in any manner whatsoever. There is no evidence on record to show any communication or exchange of sensitive commercial information by Appellant No. 1 with any other cylinder manufacturing company. The Appellants had also provided evidence to establish that there was no contact with cylinder manufacturers whatsoever.

Further, there was not even single evidence of any communication exchange from other cylinder manufacturers even being received or sent by the Appellants. [Pgs. 105 to 110 of the Appeal] f. The Respondent/Commission did not analyse/examine the evidence and has discarded the arguments of the Appellant No. 1 by concluding there was no merit. It is pertinent to note that the Respondent/Commission has clearly recorded that there was no evidence of sharing of withdrawal letter by any other cylinder manufacturing company with the Appellant No. 1 in the present case. The Respondent/Commission has made this conclusion based on a sole assumption that the common agent may have led to passing of information to the Appellant No. 1 as the letter was dated 28.02.2013, although the submission date is of 04.03.2013. The letter was sent to the agent almost four days prior to the date at which the letter was submitted. Appellant No.1 had sent the withdrawal letter on 28.02.2013 and the letter was submitted by the agent along with the letters of other cylinder manufacturing companies on 04.03.2013. The reason given by the Appellant No. 1 was a reason unique to them and no other bidders withdrew their bids citing this reason. Even though Appellant No. 1 had clearly established the reason for withdrawing their bid, the DG and the Respondent/Commission did not consider the same [Pgs. 22, 23 and 24 of the Appeal] g. The Respondent/Commission in the Impugned Order analysed the IP addresses through which bids for Tender No. 2 was submitted. The Respondent/Commission has analysed that data and found that a lot of bids were placed from the same IP addresses. It is pertinent to note that the IP address used by Appellant No.1 to submit their bid was not common with any other cylinder manufacturing company [Pg. 100 and 101 of the Appeal] h. It is submitted that Appellant No. 2 in his deposition before the DG had clearly stated that he was not a member of any Association, and he does not have any communication from the same. He clearly stated that there is no such Association. The Respondent/Commission and the DG after analyzing all the evidence still could not find any evidence pertaining to the Appellants and was not part of any of such Association and never received any communication from the said Association whatsoever. [Pgs. 25, 26 and 27 of the Appeal]

(ii) In the summary what has been stated by the learned counsel that the appellant has not been found a party in common email, identical IP address/common IP address for submission of bid, withdrawal also not in common form, common language for withdrawal, not a Member of the Trade

Association, and even till date they are not a Member of Cylinder Manufacturers Association. The only case is that it has a common agent and that too dealing with by post only. The Learned Counsel also stated in summary withdrawal of certain powers from CCI/DG in the Competition Act and assigned to NCLAT based on only common agent, the penalty cannot be levied either on the Company or on the individual and cited the decision of Rajasthan Cylinders and Containers Limited (2020) 16 Supreme Court Cases 615 para 94 and 97 and requested for exoneration of both company and Mr. K.K. Gupta

#### 44.COMPETITION APPEAL (AT) No.45/20193

(i) The Learned Counsel for the Appellant, Mr, O.P. Gaggar reiterated the common issues as stated above. Apart from that the learned counsel also further pointed out:

a. The appellant and other manufacturers guilty of cartelization on mutatis mutandis similar facts of the earlier suo motu inquiry by the Commission against. same cylinder manufacturers where the findings of the Commission as affirmed by the then Competition Appellate Tribunal have been set aside by the Hon'ble Supreme Court in the Civil Appeal No. 3546 of 2014 titled as Rajasthan Cylinders Vs. Competition Commission of India reported as (2019) SCC Online 7806 which the Commission, inspite of having been extensively referred failed to distinguish.

b. The impugned order is squarely in the teeth of the Judgment of in Supreme Court in Rajasthan Cylinders and Containers Ltd. categorically holding that LPG cylinders market is competitive nature with the following observations: non "90 When we keep in mind the aforesaid fact situation on the ground, those very factors on the basis of which the CCI has come to the conclusion that there was cartelization. In fact, become valid explanations to the indicators pointed out by the CCI We have already commented about the market conditions and small number of suppliers. We have also mentioned that 12 new entrants cannot be considered as entry of very few new suppliers where the existing suppliers were only 50 Identical products along with market conditions for which there would be only three buyers, in fact, would go in favour of the appellants. The factor of repetitive bidding, though appears to be a factor against the appellants, was also possible in the aforesaid scenario The prevailing conditions in fact rule out the possibility of much price variations and all the manufacturers are virtually forced to submit their bid with a price that is quite close to each other. Therefore, it became necessary to sustain themselves in the market Hence, the factor that these suppliers are from different region having different cost of manufacture would lose its significance. It is a situation where prime condition is to quote the price at which a particular cost is more than the manufacturing cost of others. The main purpose for such a manufacturing would be to remain in the fray and not to lose out. Therefore, it would be ready to accept lesser margin. This would answer why there were near identical bids despite varying cost c The explanation is market conditions leading to the situation of oligopsony that prevailed because of limited buyers and Influence of buyers in the fixation of prices

was all prevalent. This seems to be convincing in the given set of facts. The situation of oligopsony can be both ways. There may be situation where the sellers are few and they may control the market and by their concerted action indulge into cartelization. It may also be, as in the present case, a situation where buyers are few and that results in the situation of oligopsony with the control of buyers. Therefore the Competition Commission lacked inherent jurisdiction to initiate action and hence the order dated 09.08.2019 is a nullity or void ab-initio, against the LPG cylinder manufacturers, in absence of a complaint by HPCL, or any consumer or their association, etc. "That the Commission has ignored the fact that the bids awarded.

were much lower than what was bid by L-1, which in turn was much lower than the ceiling price.

f. The LPG cylinder industry is governed by the LPG Control Order and the Gas Cylinder Rules, 2004 issued under provisions of the Essential Commodities Act, 2004. The evidence and the findings on record shows that the government acts both as a stakeholder and regulator in the LPG industry. The Commission in case no 1 of 2011 (Suo-moto case, Sugar Mills) has held that in view of the various controls and regulations of the Sugar Mills the dynamics of the market place would not be able to determine the behavior of the market players. When a sector itself is controlled and regulated, it would be insulated from the competitive forces to a large extent. Thus on grounds of parity and judicial propriety, this coordinate bench of the Commission should have held that like the Sugar Mills, in the case of LPG cylinder manufacturers, the dynamics of the market place would not be able to determine the behavior of market players.

g. That the Commission could not have held that there has been a violation of Sec. 3(3)(a) of the Act, when the sale price is much below the L-1 bid price and when the DG and in light of the fact the Commission failed to arrive at or determine the cost price of a 14.2 Kg LPG cylinder.

h. That the Commission cannot hold that due to the product being identical there has been bid rigging, since this is on account of government created norms and not because of manufacturers forming a cartel preventing product differentiation.

i. That the Commission cannot hold that cartelization has happened due to absence of substitutes because it is the government which has created these norms or alleged as barriers and not the manufacturers. The allegation against the manufacturers that there are no substitutes is incorrect. In the major metros there is now piped gas available. Further HPCL can procure cylinders on the basis of an international/global tender. Thus the choice of substitutes is clearly available both to HPCL and to the end consumer.

j. That the Commission cannot hold that there have been no technological changes, ignoring the changing BIS norms and technological improvements over for the relevant check period as BIS had introduced changes which have been incorporated by the manufacturers.

k. That the Commission cannot reach the conclusion of bid rigging and cartelization in the 14.2 Kg LPG cylinder market in the absence of any allegation from HPCL.

l. That the Commission cannot in the absence of the requisites of S. 3(3) of the Act being met, hold that the appellant is in breach of S. 3(3)

(d) because the sine qua non for invoking S. 3(3)(d) is that "... resulted in bid rigging..." and even if it assumed without admitting that cartelization had taken place to rig the bids even then it has not resulted in bid rigging, as no loss to HPCL has been caused, monetary or otherwise, because prices lower than the L-1 prices have been accepted and only part of the procurement order placed on each bidder.

m. That the Commission cannot in view of the explanation to S 3(3) which reads as under: "Explanation- For the purposes of this sub- section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding", hold that bids have been rigged when there has been no effect of eliminating bids or reducing competition and there has been no adverse appreciable effect, on the bid, and placed on all 50 and 12 new bidders nor has the "bidding process" been manipulated or adversely affected. n. That the Commission cannot ignore the basic micro economic theory that in oligopolistic market price stickiness and price parallelism is a common feature. Price parallelism by itself is not sufficient to hold cartelization especially in view of the fact that no other evidence of cartelization or bid rigging was available with the Commission.

o. That the Commission failed to consider that input cost of manufacture of cylinders, the input raw materials such as steel, SC valves, labour, zinc, paint, freight, power, cost of financing, are the same for everyone and price between producers cannot vary substantially. The Commission failed to consider that cost of raw material is about 80-95% in total of the cost of cylinder. p. Merely because there was price parallelism, it could not have been the reason to arrive at a conclusion that there was a collusive agreement or bid rigging. The Commission could not have ignored that in a monopsonist market where there are few buyers, the price is set by the buyers, and the conditions are such that sellers can predict demand, there is a repetitive bidding process and the products are identical and specialized, the likelihood of price parallelism is natural.

#### 45.COMPETITION APPEAL (AT) No.109, 110 and 111 of 2019

(i) The learned counsel Mr. K. Krishna Kumar initiated with a reiteration of the common issue as has been elaborately presented above has also presented further few facts and the same are stated hereinbelow:-

a. It was presented that the appellants are private ltd company and they are captive suppliers of LPG cylinders of different capacity to the OMC's. MOPNAG (Ministry of Petroleum and Natural Gases) is basically the controlling Authority. The product essential commodity are not available in same format in open market.

b. Also submitted that price generally approved by OMC's are based on laid down pricing formulae even finally based on negotiation. He also presented pricing



mechanism followed by MOPNAG from 01.04.2001 onwards.

c. It was also pointed out that Appellant in CA(AT) No. 109 of 2019-Sri Balaji Cylinders and 111 of 2019 AKMN Cylinders Pvt Ltd has not participated in 1st tender and has withdrawn from 2nd tender vide letter dated 2.3.2013 whereas in CA(AT) No.110 of 2019 Lite Containers that they participated in 1st tender but withdrawn from 2nd tender.

d. He further elaborately explained that HPCL has accepted the same. No query raised by HPCL so far.

e. The appellants understand that the 2nd respondent/ Director General submitted the Investigation report dated 06.10.2016 and the cross examination report dated 06.12.2018 to the 1 respondent Competition Commission. The appellants submit that Commission by order dated 09.01.2019 directed the 24 respondent to furnish the Investigation and Cross Examination report in Electronic form to the Appellants and directed the appellants to submit the written objections to the report on or before 19.02.2019 and also fixed a date for hearing the appellants on 07.03.2019. The appellants submitted the objections dated 18.02.2019 to the report of the 2nd respondent. f. The appellants submit that however the Competition Commission passed the stereo type order dated 09.08.2019 without considering the earliest of the documents and affidavit evidence furnished and also the objections partially. The appellants submit that the Commission accepted the stand that the matter was covered by the Judgment dated 01.10.2018 of the Hon'ble Supreme Court in Civil Appeal.No.4972 of 2014 etc batch thereby the issue of bid rigging cartel is a non existing factor but presumed the withdrawal of the bid even before tender opening as a collusive and concerted action and contravention of the provisions of section 3(3)(d) read with 3(1) of the Act on the premise that some of the bidders have also withdrawn for same or similar reasons vide para14 at Page No.100 of the Impugned Order. The appellants submits that the 1" appellant company was imposed with penalty and the second appellant as a person in charge of the affairs of the 1" appellant Company was also imposed penalty vide issue No 3 on the assumption that contravention comes under Section 48(1) of the Act g. The appellants submit that the findings and ratio laid on by Hon'ble Supreme Court in para 88 of the Judgment dated 01.10.2018 in the matter of Rajasthan Cylinders case is squarely applicable to this case also to hold that there is no cartelization and are valid answer for near or Identical factor for withdrawal from participating in the tendering process even before the tender was opened in as much as the tender is an invitation to offer not coming within the meaning of arrangement or agreement.

h. The appellants submit the categorisation of conduct of manufacturers while withdrawing from the 2nd E tender dated 24th January 2013 under heading as (A). Quotation of Identical Rates; (B) Collective withdrawal of bids by 51 Ops, (C) Common reasons in withdrawal letter; (D). Exchange of withdrawal letter through email and common format of withdrawal letter, (E) O'Ps with Common IP

addresses, (F). Common agents and (G) Association as a platform for exchange of Information is erroneous and have resulted in miscarriage of Justice and that the same categorisation in a different language and phrasing was applied by the Commission in Suo Moto Case no 1 of 2011 IOCL tender in Rajasthan Cylinders case and was not accepted by the Hon'ble Supreme Court.

i. The appellants submit that the words electricity or shortage of electricity could be same for more units or number of units and that the said factor could not be construed to presume that there was cartel or contravention of law j. The appellants submit that common factor like financial starving, lack of man power and similar reasons could not be considered as a presumption of rigging of invitation to offer. k. The appellants submit that closure of any complaint by HPCL against the conduct of the withdrawal of the invitation could not be construed as contravention of section 3(3)(1) and section 48 of the Act. That in the instant case, question of curtailing or price rigging does not and cannot arise because of the fact that everyone needs to supply at a same rate fixed by Oil Companies particularly IOCL, HPCL and BPCL for each state in terms of the policy decision of the Ministry of Petroleum and Natural Gas to achieve fair and equitable distribution of LPG gas, which is an essential commodity to the ultimate consumers irrespective of location of their units l. The Appellants submit that the Commission ought not to have held that the Appellants have not given adequate evidence to rebut the presumption that exists under 3(3) of the Act and that the Commission erred in not applying the provisions of the Section 19(3) of the Act vide para 103 at page 78 of the order. The appellants submit that the Commission has completely ignored the affidavit of evidence dated 06.03.2014 and 10.03.2015 given by the appellants at the initial stage itself and the written submission to the report of the Director General m. That the Commission proceeded on wrong premises and misunderstood the mechanism of processing the tender, opening of price bid and technical bid by the oil companies in as much as, oil companies calculated the cost of LPG cylinder price independently and as soon as the price bids are opened the quoted bids lose its all contractual and evidence value and the oil companies have independently gave fresh offers and counter offers long after the opening of the price bid. Under such circumstances, the presumption of price rigging on the premises of same or similar price quotes stands rebutted.

n. That the Commission was wrong in holding that the participation of the alleged pre-concerted agreement would have to be proved beyond doubt, it was of no consequences in as much as submitting the tender is an offer which could be withdrawn before it is accepted and that such offer cannot be construed as arrangement or undertaking to attract section 3(3)(d) of the Act.

#### 46.Submissions made by Respondent No. 1/CCI:

A. The Learned Respondent No. 1/CCI Mr Arjun Krishnan has initially submitted that the order passed by CCI itself may be referred on the various issues raised by the Appellant. It is general practice of CCI that normally they do not file Reply and only file Written Submission. Learned Counsel for the Respondent No. 1/CCI has clarified many issues as enumerated below:

a) Withdrawal of bids in a collective manner involves Contravention of Section 3(3)(d) read with Section 3(1) of the Act.

b) It was also submitted by the Learned Counsel for the Respondent No. 1 that 66 LPG Cylinder Manufacturers participated in Tender No. 2 out of which 51 Cylinder Manufacturers withdrew their bids. He even went to stress that 41 of them withdrew their bids simultaneously on 04.03.2013 out of 51 cylinder Manufacturers they withdrew their bids, while technical evaluation of bid was in progress by HPCL.

c) It was submitted by the Learned Counsel that after Technical evaluation, the rates were finalized by HPCL based on L-1 rates obtained from price bids of four bidders.

d) It was also submitted that identical rates were quoted by two of them.

e) It was submitted that in view of findings of CCI pertaining to price parallelism in Tender No. 1, they did not hold violation of Section 3(3)(d) on account of identical bidding, although found explicitly there.

f) It was also revealed, vide paragraph-48 of the Commission's Order that two qualified bidders i.e., Krishna Cylinders and Gopal Cylinders, out of four qualified bidders from the existing vendors categorically quoted identical rates for 8 states out of total 10 states for which they submitted their bids. Table No. 19 of the Commission's Order is reproduced herein for brevity and clarity.

Table No. 19: Rates quoted by Krishna Cylinders and Gopal Cylinders in 8 States.

S. No.	Name of the State	Price quoted by Krishna Cylinders	Price quoted by Gopal Cylinders.
1.	Bihar	1165.90	1165.90
2.	Gujrat	1145.90	1145.90
3.	J&K	1158.90	1158.90
4.	Madhya Pradesh	1155.90	1155.90
5.	Maharashtra	1165.90	1165.90
6.	Punjab	1125.90	1125.90
7.	Rajasthan	1135.90	1135.90
8.	U.P.	1135.90	1135.90

g) The Commission has also observed vide paragraph-49 of its Order

that these two cylinder manufacturers are inter se relatives and their rates generally remain identical as they discuss with each other about the same as revealed from the DG Report. It has also been touched upon in the DG Report that the partners of the two firms being relatives, as also were having inter se partnership till middle 2005. The DG Report also clarifies that the partner of Krishna Cylinders deposed before him that his firm has quoted the rates based on internal estimates and he could not comment on the rates of other Companies.

h) The Commission order vide paragraph-50 further clarifies that the rates of Krishna Cylinders were similar to Gopal Cylinders and were common as both the firms are run by family members and they are interrelated. However, they did not have anything common or similar or identical to any of the 66 bidders except with Gopal Cylinders and this fact is in the knowledge of Oil Manufacture Company (OMC) and other cylinder manufactures.

i). CCI has broadly found the following grounds for contravention of Section 3(3) (d) of the Act with regard to collective withdrawal of bids:

(i) Common reasons for withdrawal from tender no. 2. It is observed that the Cylinder Manufacturers have used identical languages when they were not located at the same place and it relates to bid for different states.

(ii) It was also pointed out that the reason for withdrawal provided by the Cylinder Manufacturers before the DG were common.

(iii) It was pointed out that 21 of the Cylinder Manufacturers who withdrew provided no reasons to HPCL. However, 17 stated unavoidable reasons/circumstances while 4 mentioned 'Calculation error' as prime reason for withdrawal of their bids.

(iv) It was also brought to the notice of the Bench that certain reasons as stated by the manufacturers like increase in steel prices/reduction in rebate by SAIL and calculation mistake where cited before the DG is not genuine.

k). Common IP address and Common agents.

(i) CCI has observed that these cylinder manufacturers have used common IP addresses. In deposition before the DG/investigation they have stated that the bids were uploaded from the respective office or factory premises.

(ii) Sahuwala Cylinder Pvt. Ltd. in Appeal No. 38 of 2019 has even admitted that the common agents uploaded the bids from same computers.

(iii) CCI has also challenged that it is beyond imagination to upload from a common IP address the withdrawal letter without having a prior understanding between them.

(iv) Investigation has also pointed out there were six common agents working for all the cylinders manufacturers for receiving and submitting documents to and from OMC's (Oil Marketing Companies) & they were supposed to convey all information whenever they were receiving (agents) to the manufacturers.

(v) Agents also worked for other agents in their inter-se absence even the manufacturers were in touch with other agents forgetting input of OMC's so agents were working for all such manufacturers inter se.

(vi) It was also stated by the R-1/CCI that the common agents as a natural phenomenon were using the same computer for bids submission of several entities and hence existence of common IP address is justified by the Appellants.

(vii) The DG/Investigation Report however has also observed that even for the parties who were not having common agents have also used the same IP address for withdrawal of bids.

(viii) In their Written Submission they have also attempted to prove that the same IP address was used by the entities having common agent is an incorrect statement. The same is depicted below:

IP Address 114.143.214.171 was used by Southern Cylinders (Agent Prashant Bhatt), Sahuwala Cylinders (Agent K Laxman) and Sunrays Engineers (Agent Rajkumar Upadhyay) amongst others. IP Address 114.143.214.170 was used by S.M. Cylinders (Agent N Swaminathan), Bhiwadi Cylinders (Agent Rajkumar Upadhyay) and Prathima Industries (Agent Prashant Bhatt) amongst others. IP Address 183.82.128.55 was used by Dharmraja Cylinders (no agent) and Kurnool Cylinders Unit II (Agent VM Bhandari)

(ix) From all these actions of manufacturers the CCI has attempted to prove that the common IP address & common agents are responsible for conducive environment for bid rigging.

l). The other specific contention of Cylinder manufacturer are also not in order like extension of tender no. 1/procurement under tender no. 1 as reason for withdrawal progressed by Confidence Petroleum India Ltd. in Competition Appeal (AT) No. 54 of 2019. What has been stated by the Appellant that they have to withdraw the bid as they were given additional orders by HPCL thereby non-availability of sufficient capacity to service both extended additional tender no.1 quantity & tender no.2 quantity leading thereby withdrawal of tender no. 2.

(i) CCI has presented that these Cylinder manufacturers were aware that they would stand to lose if tender no. 2 was opened at lower rates than tender no. 1 and hence they were interested in repeat orders/additional orders @ tender no.1.

(ii) These manufacturers were also aware of that in the event tender no. 2 gets opened at lower rates than naturally supply under tender no.1 would be foreclosed.

(iii) CCI was also of the view that these Cylinder manufacturers have always had spare installed capacity in 2012-13 and 2013-2014 for supplies under existing tender no. 1 as well as tender no. 2.

m). Another contention raised by Tirupati Containers Pvt. Ltd. in Competition Appeal No. 56 of 2019 that it has contended that withdrawal letter submitted to HPCL was signed by a person who was unauthorized to submit the same and the Appellant therein have not withdrawn the bid and hence, the question of bid rigging by withdrawal of bids are not correct.

(i) This contention of the Appellant is not correct as revealed from investigation in which no police complaint was filed before the DG. External independent Monitors of HPCL also did not take any action on his complaint. CCI has contended that unauthorized person was an employee of the Company. The name of which was not disclosed by the Appellant before DG. Hence, this ground taken by the Appellant is not correct and the contention of this Appellant deserves to be rejected.

n). None invocation of integrity pact as submitted by Bhiwadi Cylinder Pvt.

Ltd. in Competition Appeal (AT) No. 73 of 2019 and Confidence Petroleum India Ltd. in Competition Appeal (AT) No. 54 of 2019. It was contended by the Appellants that the HPCL itself didn't suffer any loss nor invoked the 'Integrity Pact' signed with Cylinder manufacturers and hence there was no wrong doing on the part of the Appellant Cylinder manufacturers. What has been submitted by CCI that Integrity Pact deals with issues of corruption which is a criminal offence and HPCL is not concerned with violation of Competition Act. The Jurisdiction only vests under CCI and has supplemented it with the Judgment of Supreme Court in CCI vs. Bharti Airtel Ltd. & Ors. (2019) 2 SCC 521 at para 109,111 of the Judgment.

"109. CCI is specifically entrusted with duties and functions, and in the process empower as well, to deal with the aforesaid three kinds of anti- competitive practices. The purpose is to eliminate such practices which are having adverse effect on the competition, to promote and sustain competition and to protect the interest of the consumers and ensure freedom of trade, carried on by other participants, in India. To this extent, the function that is assigned to CCI is distinct from the function of TRAI under the TRAI Act. The learned counsel for the appellants are right in their submission that CCI is supposed to find out as to whether the IDOs were acting in concert and colluding, thereby forming a cartel, with the intention to block or hinder

entry of RJIL in the market in violation of Section 3(3)(b) of the Competition Act. Also, whether there was an anti-competitive agreement between the IDOs, using the platform of COAI. CCI, therefore, is to determine whether the conduct of the parties was unilateral or it was a collective action based on an agreement. Agreement between the parties, if it was there, is pivotal to the issue. Such an exercise has to be necessarily undertaken by CCI. In *Haridas Exports [ Haridas Exports v. All India Float Glass Manufacturers' Assn., (2002) 6 SCC 600]*, this court held that where statutes operate in different fields and have different purposes, it cannot be said that there is an implied repeal of one by the other. The Competition Act is also a special statute which deals with anti-competition. It is also to be borne in mind that if the activity undertaken by some persons is anti-competitive and offends Section 3 of the Competition Act, the consequences thereof are provided in the Competition Act.

111. Moreover, it is within the exclusive domain of CCI to find out as to whether a particular agreement will have appreciable adverse effect on competition within the relevant market in India. For this purpose, CCI is to take into consideration the provisions contained in the Competition Act, including Section 29 thereof. Section 45 and 46 also authorize CCI to impose penalties in certain situations."

[Emphasis added] What has been further continued to be stressed by the CCI that the impact of loss or profit to HPCL is not within the ambit of CCI. CCI is concerned only with consumers. Consumers will be affected by the higher procurement prices due to bid rigging and they have supplemented it with the preamble & Section 18 of the Act.

o). As far as JKB Gas Pvt. Ltd. in Competition Appeal (AT) No. 57 of 2019 is concerned for raising the issue of rise in steel prices resulting into bid withdrawals. The Appellant in this case raise the issue that Cylinder manufacturers are at the mercy of steel prices and are also constrained by the Regulatory requirements of the quality & grade of steel that can be used by cylinder manufacturers in terms of the technical parameters fixed by OMC's. Hence, withdrawal of a bid as per Appellants cannot involve a collusive agreement. It was submitted by CCI that this ground taken by the Appellant for rise in steel price linking it to withdrawal of bid is baseless & misleading as the tender condition provided for price escalation/adjustment in the event of rise/fall in steel price. OMC's are already protecting the cylinder manufacturers through price escalation clause in the event there was a rise in price of an essential input like steel. Hence, the ground taken by the Appellants for rise in steel price leading to withdrawal of bid is misleading & incorrect. Similarly, JKB Gas Pvt. Ltd. in Competition Appeal (AT) No. 57 of 2019 taking the ground that there is no anti competitive agreement resulting from withdrawal letter for tender so submitted and rise in steel price as well as common agent are all not supported by the relevant fact as stated supra.

p). The Appellants in general has tried to stress that CCI has not been able to establish/prove the impact of 'Appreciable adverse effect on Competition' (AAEC). CCI has went on to say on this issue that CCI has proved concerted action which falls within the ambit of 'agreement' under Section 2(b) of the Act & hence there was no need to look at this fact. They have also cited the reference of Section 3(3) of the act which deliberates that once an agreement is proved there is a presumption

that such agreement causes appreciable adverse effect on competition.

q). CCI has cited another judgment of CCI vs. Coordination Committee of Artistes & Technicians of West Bengal film & television ref. (2017) 5 SCC 17 para 9 in which the Hon'ble Apex Court has held that there was no further need for the CCI to make enquiry in terms of the existing law.

"...Therefore, if a particular agreement comes in any of the said categories, it is per se treated as adversely affecting the competition to an appreciable extent and comes within the mischief of sub-section (1). There is no further need to have actual proof as to whether it has caused appreciable effect on competition."

[Emphasis added] CCI has also cited another Judgment of Rajasthan Cylinders & Containers Ltd. vs. Union of India (2020) 16 SCC 615 para 75 "75) We may also state at this stage that Section 19(3) of the Act mentions the factors which are to be examined by the CCI while determining whether an agreement has an appreciable adverse effect on competition under Section 3. However, this inquiry would be needed in those cases which are not covered by clauses (a) to (d) of sub-section (3) of Section 3. Reason is simple. As already pointed out above, the agreements of nature mentioned in sub-section (3) are presumed to have an appreciable effect and, therefore, no further exercise is needed by the CCI once a finding is arrived at that a particular agreement fell in any of the aforesaid four categories. We may hasten to add, however, that agreements mentioned in Section 3(3) raise a presumption that such agreements shall have an appreciable adverse effect on competition. It follows, as a fortiori, that the presumption is rebuttable as these agreements are not treated as conclusive proof of the fact that it would result in appreciable adverse effect on competition. What follows is that once the CCI finds that case is covered by one or more of the clauses mentioned in sub-section (3) of Section 3, it need not undertake any further enquiry and burden would shift upon such enterprises or persons etc. to rebut the said presumption by leading adequate evidence. In case such an evidence is led, which dispels the presumption, then the CCI shall take into consideration the factors mentioned in Section 19 of the Act and to see as to whether all or any of these factors are established. If the evidence collected by the CCI leads to one or more or all factors mentioned in Section 19(3), it would again be treated as an agreement which may cause or is likely to cause an appreciable adverse effect of competition, thereby compelling the CCI to take further remedial action in this behalf as provided under the Act. That, according to us, is the broad scheme when Section 3 and 19 are to be read in conjunction." What the CCI conveyed was that it is the Appellants who have to adduce cogent evidence for rebutting the presumption and the Appellants/Cylinder manufacturer have acted in concert and has not produced adequate rebut the presumption under Section 3(3) of the Act.

On the issue of Rajasthan Cylinders, it was also submitted by the Ld. Counsel for the CCI that exoneration in the facts of one case would not mean that the same entity cannot be found to have violated the act in different facts and in respect of different tender. It is relevant to note that the Principles of Res judicata would not apply to Competition Act when the violation relates to different facts/ different time period and have cited the judgment of Hon'ble Delhi High Court in Cadila Health Care vs. CCI 2018 SCC online Del11229 para 59....



"59. The last point on this issue is the question of res judicata. Here, the court notices that Grasim Industries was a case where the court had ruled that even though there might be an infirmity in the CCI's approach regarding the initiation of proceedings, the material gathered by DG can be treated as information. Therefore, that in a given case, a decision is rendered may not be conclusive of the matter in entirety; complaints and grievances regarding abuse of dominance have an inherently anti-competitive effect, which pervade the marketplace and tend to stifle competition or create barriers to a free trade in goods and services. Conclusions of one or two specific complaints may not always be determinative of an entity's behaviour in the market place; they tend to cover a larger canvas, influencing the outcomes in terms of price, access to articles goods and services, within the commercial stream and their deleterious effects are felt by the general public. Settlement or disposal of individual or some cases might not be determinative of the matter which pertains to abuse of dominance, for the reason that it affects the wider public, just as a crime does. It is like saying that a builder or other service provider who indulges in widespread malpractice that amounts to cheating investors or flat buyers, which is exposed by one complaint, that results in a first information report (FIR) and consequent investigation, that unearths that several other consumers are like preys can be quashed on the ground that the errant service provider settles with the complainant/informant. In such event, the High Court would never exercise its discretion to quash the proceeding emanating from the FIR. Therefore, the CCI or an expert body should ordinarily not be crippled or hamstrung in their efforts by application of technical rules of procedure."

Division Bench of the Hon'ble Madras High Court in MRF Ltd. vs. Ministry of Corporate Affairs and Ors. 2022 SCC online Mad para 50 "50. A close and careful reading of the proviso to Section 27 supports the arguments of the respondents 2 & 3 that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent. of its turnover for each year of the continuance of such agreement, whichever is higher. Therefore, the principles of res judicata may not apply, inasmuch as the expression 'for each year of the continuance of such agreement', the CCI is empowered to investigate the complaint of cartelization, as it concerns with each year. Moreover, if the CCI taking up the complaint for the year 2008, finding want of acceptable evidence, dismissed the complaint for the year 2008, it does not mean that the same CCI is precluded from entertaining a fresh complaint for the next year against the same producer or distributor, trader, etc., by virtue of Section 27. When the Act permits the CCI to initiate action on the complaint of cartelization independently for each year, the argument of the appellant on the principles of res judicata cannot be accepted. This issue is also answered against the appellant, accordingly."

r). As far as the issue of alleged 'predatory pricing' by Successful bidders are concerned that a few cylinder manufacturers have not proved that they were not acting in a concerted and anti-competitive manners like M/s. International Cylinders Pvt. Ltd. in Competition Appeal (AT) No. 52 of 2019. Similarly, the letter written by LPG Cylinder Manufacturer Association reflects that

the LPG Cylinder Manufacturers were pressing for repeat orders to be placed under tender no.1 which was in the interest of the Appellants as they wanted to avoid the pressure of any decrease in prices. The Ld. Counsel for CCI even stated that both orally and in writing vide the written submission produced to this Tribunal vide diary no. 61647 dated 01.10.2022 that the bidders had withdrawn the bids prior to opening of the price bid on 31.05.2013. CCI is stating that they have withdrawn the bids on the apprehension that few of the manufacturers had quoted very low bids. If price bids yet to be opened then there ought to have been no question of knowing the prices of other bidders. It was further stated that low prices could not corner the entire market. They have further stated that in spite of assumption that some bidders quoted a low price, this per se would not mean that competitive bids would not be acceptable to HPCL in view of the large quantity of cylinders being procured for different states. Lowest prices are available to customers through the bidding process and for the process of determining fair competition. The legislative purpose is to determine the low prices and increase in competition. On the contrary if the tenderers/bidders are abstaining/withdrawing to gain advantage of higher existing rates it is illegal and violative of Section 3(3)(b) of the Act. The Ld. Counsel for the CCI also on the contention of Jesmajo Industrial Fabrications Karnataka Pvt. Ltd. Competition Appeal (AT) No. 45 of 2019 is concerned even if the organization is suffering losses, it does not justify anti-competitive conduct on its part. No doubt in the year 2010 the Appellants cost was below what was quoted for the relevant tender in that year while this bid withdrawals relate to tender no. 2 pertained to year 2013.

s). It is not a new issue that exchange of information amongst parties who should act as competitors is a strong indicator of anti-competitive conduct. This Tribunal in Ambuja Cements Ltd. vs. CCI in TA (AT) (Competition) No. 22 of 2017 old Appeal No. 61/2016 at Para 90 and Para 100 has held so that is to say information exchange between manufacturers who are competitors indicates anti-competitive conduct.

"99. In some of the foreign judgment, the 'agreement' has been noticed and defined on the basis of the European Law in line with the case- law of the Court of Justice of the European Union. The concept of a 'concerted practice' refers to 'a form of coordination' between undertakings by which, without it having reached the stage where an agreement properly so-called has been concluded, amounts to cooperation between them has been knowingly substituted for the risks of competition.

100. Information exchange can constitute a concerted practice if its reduces strategic uncertainty in the market thereby facilitating collusion, that is to say, if the data exchanged is strategic. In European Union Law, the aforesaid proposition has been shown in the guidelines on the applicability of Article 101 of the Treaty on the functioning of the European Union to horizontal co-operation agreements while explained."

t). It was also stated by the Ld. Counsel of the CCI that several cylinder manufacturers were regularly communicating with each other for coordinating their conduct and these manufacturers were sharing sensitive and strategic information pertaining to bids and negotiations and therefore, they have acted in concert including in tender no. 2. The Ld. Counsel cited few emails to reflect

concerted actions on the part of manufacturers. A few cited such emails are depicted below:

Email dated 07.05.2012 by Tirupati LPG Industries Ltd. to Him Cylinders Ltd. forwarding documents pertaining to BPCL tender due on 28.05.2012. [Email @ Pg. 377 of DG Report/Vol. 2 of Affidavit in Support of Documents on behalf of CCI] Email dated 07.07.2012 by Bhiwadi Cylinders Pvt. Ltd. to several other manufacturer's seeking comments on Gas Cylinder Rules. [ Email @ Pg. 378 of DG Report/Vol. 2 of Affidavit in Support of Documents on behalf of CCI] Email dated 26.06.2013 by International Cylinders (P) Ltd. forwarding a calculation sheet for BPCL tender for LPG cylinders. [Email @ 380-383 of DG Report/Vol. 2 of Affidavit in Support of Documents on behalf of CCI] Email dated 19.12.2013 by Mahaveer Cylinder Ltd. to Universal Cylinders Ltd., Tirupati Cylinders Ltd., Surya Shakti Vessels Pvt. Ltd., Faridabad Metal Udyog Pvt. Ltd. and Mauria Udyog Ltd. wherein the cylinder manufacturers decided not to negotiate further in relation to a tender. [Email @ Pg. 389-390 of DG Report/ Vol. 2 of Affidavit in Support of Documents on behalf of CCI] u). The Ld. Counsel of the CCI also submitted that a few emails exchanged between Mahaveer Cylinders, Universal Cylinders, Tirupati Cylinders and Sunrays Engineers Pvt. Ltd. also reveals that the parties were in regular touch with each other and the same are depicted below:

(i) Email dated 17.12.2013 from Mahaveer Cylinders Ltd. common agent (Mr. N. Swaminathan) to several manufacturers forwarding an attachment regarding a revised offer to HPCL tender. [Email @ Pg. 755-756 of DG Report/ Vol. 4 of Affidavit in Support of Documents on behalf of CCI]

(ii) Email dated 06.02.2012 from Mahaveer Cylinders Ltd. forwarding an email from Universal Cylinders Ltd. to Tirupati Cylinders Ltd. forwarding the rates of certain parties in relation to a HPCL tender. [Email @ Pg. 778-779 of DG Report Vol. 4 of Affidavit in Support of Documents on behalf of CCI]

(iii) Email dated 14.11.2013 from Tirupati Cylinders Ltd. to Mahaveer Cylinders Ltd. and other manufacturers forwarding the revised offer to HPCL tender no. 13000054. [Email @ Pg. 780-781 of DG Report/ Vol. 4 of Affidavit in Support of Documents on behalf of CCI]

(iv) Email dated 26.05.2013 from Tirupati Cylinders Ltd. to Mahaveer Cylinders Ltd. and other manufacturers in relation to hotel booking for a meeting. [Email @ Pg. 782-784 of DG Report/Vol. 4 of Affidavit in Support of Documents on behalf of CCI].

v). The Ld. Counsel of the CCI also revealed that several cylinder manufacturers had shared a format of Power of Attorney and Resolution in favour of Director of Tirupati Cylinders via email dated 11.11.2013 and the same was confirmed by the Mahaveer cylinders ltd. that the purpose of the power of attorney was to authorized the Director of Tirupati Cylinders Ltd. to negotiate with HPCL on Mahaveer Cylinders behalf in a

meeting held on 13.11.2013. The Ld. Counsel further went on to say that the association has been used as a platform for exchange of information and the same is stated supra in CCI order paragraph 89 to 100. What CCI has stated that formation of association is only a platform for manipulating bids through coordinated actions para 96, 99 and 100 of impugned order.

96. In view of the foregoing, the Commission notes that there was an active Association of LPG Cylinder manufacturers namely, Indian LPG Cylinders Manufacturers Association and regional associations namely, North India LPG Cylinders Manufacturers Association and Rajasthan LPG Cylinders Manufacturers Association. Even though most of the OPs that most of the OPs denied the existence of such associations, investigation conducted by the DG unearthed certain evidence, discussed above substantiates that these associations existed.

99. Based on above, the Commission is of the view that there is evidence that there was a platform available to the OPs to get together and facilitate coordination of their conduct. Further there is strong likelihood that the OPs used this platform for taking common decisions for manipulating the bid process of OMCs including that of HPCL. The contention of the OPs that right to form an association is a fundamental right, is acknowledged. But in light of the conduct of the members and the facts and circumstances of the present case, it is found that aegis of the association was used for improper purposes.

100. The fact that the OPs were using the aegis of the association(s) to discuss their business affairs is evident from the findings of the investigation. These meetings had taken place prior to impugned tenders as well as in subsequent tenders too. The Commission is thus of the view that actions of OPs cannot be said to be independent, rather they were result of meetings and negotiations inter-se. It has been stated by Ld. Counsel of the Respondent that investigation has pointed out exchange of sensitive and strategic information between competitors. It was also brought to the notice of the Bench that Associations were active and had sent several representations to HPCL and the Government regarding tender related issue para 92, 94, 96 of impugned orders.

"92. The investigation revealed that the association was active and had sent several representations to government and HPCL regarding tender related issues. The investigation has also brought out that letters dated 20.05.2013 and 16.05.2013 sent by the association were signed by Mr. P.K. Gupta of Sahuwala Cylinders (P) Ltd.. Letters dated 12.02.2013 and 08.12.2013, were signed by Mr. Dinesh Goyal of Tirupai Cylinders and letter dated 24.12.2012 was signed by Mr. Manvinder Singh of Bhiwadi Cylinders Pvt. Ltd.. The investigation brought out that the association was still active and gave them a platform for discussion and information sharing.

94. The investigation has also revealed that apart from all India level association, certain manufacturers had also formed regional associations to raise their issues with OMCs. The DG observed that most of the manufacturers have denied being members of any LPG Cylinder Manufacturer Association. The Commission notes that HPCL, in its reply dated 26.07.2016, had provided certain letters sent by manufacturers under

the names of different associations.

96. In view of the foregoing, the Commission notes that there was an active Association of LPG Cylinder manufacturers namely, Indian LPG Cylinders Manufacturers Association and regional associations namely, North India LPG Cylinders Manufacturers Association and Rajasthan LPG Cylinders Manufacturers Association. Even though most of the OPs that most of the OPs denied the existence of such associations, investigation conducted by the DG unearthed certain evidence, discussed above substantiates that these associations existed.

98. The Commission notes that certainly forming a trade association is not anti-competitive per se, but when such trade association transgress its legal contours and facilitates collusive or collective decision making with the intention of limiting or controlling the production, distribution, sale or price of or trade in goods or provision of services, by its members, it violates the provisions of the Act as has been also been observed by the Hon'ble Supreme Court in the case of Competition Commission of India Vs. Coordination Committee of Artists and others (2017) SCC 5 SCC.

w). As far as the liability of individual officers/ Directors/ Persons in charge of the Affairs of the Appellant Companies are concerned it was stated by the CCI that the issue has been amply stated clearly at paragraph 118 and 119 of the impugned order.

"118.The DG has identified the following individuals to be liable under Section 48(1) of the Act for the conduct of their respective enterprises in relation to Tender No.2 :

Table No.24: Officers identified by the DG S No. Name of the Officer Name of the OP Position held

1. Mr. M.B. Koyakutty Allampally Brothers Ltd. Managing Director
2. Mr. K.H. Puttaswami Gowda Asian Fab Tec Ltd. Managing Director
3. Ms. Shashikala BR Asian Fab Tec Ltd. Director
4. Mr. N. Ravindran AKMN Cylinders (P) Ltd Managing Director
5. Mr. Elesh Khara Andhra Cylinders Director
6. Mr. Manvinder Singh Bhiwadi Cylinders Pvt. Ltd. Director
7. Mr. Ramesh Kumar Balaji Pressure Vessels Ltd. Chairman and Managing Director
8. Mr. P.N. Vinaykumar Balaji Pressure Vessels Ltd. Executive Director 9. Mr. B.B. Patil BTP Structural India Pvt. Ltd. Chairman & Managing Director

10. Mr. C.P. Bhartia Carbac Holdings Ltd. Director
11. Ms. Aradhna Bhartia Carbac Holdings Ltd. Director
12. Mr. Sanjay Bhartia Carbac Holdings Ltd. Director
13. Mr. Sandeep Bhartia Carbac Holdings Ltd. Director
14. Mr. Elesh Khara Confidence Petroleum India Ltd. Director
15. Mr. A.P. Sapra Daya Industries Partner
16. Mr. Adarsh Jain Faridabad Metal Udyog Pvt. Ltd. Managing Director 17. Mr. Rakesh Agarwal Gopal Cylinders Partner
18. Mr. Cedric Fernandez Jesmajo Industrial Fabrication Karnataka Pvt. Ltd. Director
19. Mr. Nand Kishore Ladda Winfab Equipments Pvt. Ltd. Managing Director
20. Mr. M. Muruganandam GDR Cylinders (P) Ltd. Managing Director
21. Mr. Ashok Raja Him Cylinders Ltd. Chairman and Director
22. Mr. N Suresh Southern Cylinders Pvt. Ltd. Managing Director
23. Mr. Vijay Sanghvi Hyderabad Cylinders Pvt. Ltd. Managing Director 24. Mr. C.P. Bhartia Haldia Precision Engineering Pvt. Ltd.

Director

25. Mr. Sanjay Bhartia Haldia Precision Engineering Pvt. Ltd. Director
26. Mr. Sandeep Bhartia Haldia Precision Engineering Pvt. Ltd. Director 27. Mr. Arun Goyal International Cylinders (P) Ltd. Director
28. Mr. K.K. Gupta J.K.B. Gas Pvt. Ltd. Director
29. Mr. B.S. Reddy Kurnool Cylinders Pvt. Ltd. (Unit-II) Director
30. Mr. Arun Kumar Aggarwal Krishna Cylinders Partner
31. Shri Gulshan Kumar Aggarwal Krishna Cylinders Partner

32. Mr. Gagan Agarwal Raghupati Synergy Pvt. Ltd. Director
33. Mr. Nishant Mittal Raghupati Synergy Pvt. Ltd. Director
34. Mr. Kushagra Agarwal Raghupati Synergy Pvt. Ltd. Director
35. Mr. Pankaj Gupta Intel Gas Gadgets (P) Ltd. (Unit-II) Managing Director
36. Mr. Puneet Gupta Intel Gas Gadgets (P) Ltd. (Unit-II) Director
37. Mr. Kulandhaiswamy Lite Containers Pvt. Ltd. Managing Director
38. Mr. Dinesh Mittal Mahaveer Cylinders Ltd. Director
39. Mr. N.K. Sureka Mauria Udyog Ltd. Managing Director
40. Mr. Yogesh Sanghvi Nandi Cylinders Pvt. Ltd. Director
41. Mr. Rajkumar Bhartia North India Wires Ltd (Howrah Unit) Director
42. Mr. Naveen Bhartia North India Wires Ltd (Howrah Unit) Director
43. Mr. Sandeep Bhartia North India Wires Ltd (Howrah Unit) Director
44. Mr. Ashok Raja Omid Engineering Pvt. Ltd. Chairman and Director
45. Mr. Davish Jain Prestige Fabricators Pvt. Ltd. Chairman
46. Mr. Sanjay Rathi Prestige Fabricators Pvt. Ltd. Director
47. Mr. Rajesh Mittal Punjab Gas Cylinders Ltd. Director
48. Mr. Naveen Mittal Punjab Gas Cylinders Ltd. Director
49. Mr. Viprendar Aggarwal Punjab Gas Cylinders Ltd. Director
50. Mr. Chenadi Ramu Prathima Industries Pvt. Ltd. Director
51. Ms. B. Usharani Prathima Industries Pvt. Ltd. Director
52. Ms. I. Savitri Prathima Industries Pvt. Ltd. Director
53. Mr. Dev Prakash Mahapatra Konark Cylinders & Containers Pvt. Ltd. Managing Director
54. Mr. Ritesh Sanghvi R.M. Cylinders Pvt. Ltd. Director

55. Mr. Ramesh Sanghvi Sanghvi Cylinders Pvt. Ltd. Managing Director 56. Mr. P.K. Gupta Sahuwala Cylinders (P) Ltd. Ex- Director

57. Mr. Vimal Mahipal Sunrays Engineers Pvt. Ltd. Director

58. Mr. Vijay Kumar Aggarwal S.M. Cylinders Director

59. Mr. Kamal Goyal S.M. Cylinders Director

60. Mr. Pankaj Goel S.M. Cylinders Director

61. Ms. Neelam Aggarwal S.M. Cylinders Director

62. Mr. D.V. Rajasekhar Reddy Shri Shakti Cylinders P Ltd. Managing Director

63. Mr. M. Muruganandam Sri Sai Balaji Gas Cylinders Pvt. Ltd. Managing Director

64. Mr. Puneet Batra Surya Shakti Vessels Pvt. Ltd. Director

65. Mr. Dinesh Goyal Tirupati Cylinders Ltd. Director

66. Mr. Rakesh Singhal Tirupati Containers Pvt. Ltd. Managing Director 67. Mr. Arun Goyal Tirupati LPG Industries Ltd. Director

68. Mr. Kishor Kela Teekay Metals Pvt. Ltd. Director

69. Mr. A.K. Sharma Universal Cylinders Ltd. (Unit-II) Joint Managing Director

70. Mr. Mukesh Kumar Mittal Vidhya Cylinders Pvt. Ltd. Director

71. Late V.K. Gupta Sarthak Industries Ltd. Director

72. Late B.L. Sahoo Saboo Cylinders Pvt. Ltd. Managing Director

119. The Commission now proceeds to analyse the liability, if any, of the individuals, identified by the DG, under Section 48(1) of the Act, in respect of the contravention of the provisions of the Act by 51 OPs. In this regard, the liability of each of such individuals of OPs is discussed as under:

(i) In case of Allampally Brothers Ltd., Mr. M.B. Koyakutty, Managing Director of the company has been found to take all the decisions of the company. Therefore, being the Managing Director of the company he is incharge of and responsible for the conduct of the business affairs of the company as well as responsible to the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that



he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by Mr. M.B. Koyakutty in the present case.

(ii) In case of Asian Fab Tec Ltd, the DG found that the decision making authority of the company is Mr. Mr. K.H. Puttaswami Gowda, who is the Managing Director of the company. Further, Ms. Shashikala B.R., Director, in her deposition before the DG has stated that she looks after the day to day affairs of the company with the concurrence of the Managing Director.

Accordingly, the Commission is in agreement with the DG that Mr. Gowda and Ms. Shashikala are incharge and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by these persons.

(iii) In case of AKMN Cylinders (P) Ltd, the Commission is in agreement with the DG that Mr. N. Ravindran, being the Managing Director of the company, is said to be incharge and responsible for the conduct of the business of the company as well as responsible for the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by Mr. N. Ravindran in the present case.

(iv) In case of Confidence Petroleum India Ltd. and Andhra Cylinders, the Commission notes that as per the statement of Mr. Jacob Mathew, the Commercial Manager of the company, all the decisions regarding quotation in tenders etc. are taken by Mr. Elesh Khara, Director of both the companies. In response to the Investigation Report, it has been submitted that the DG has merely stated that the person who is in charge of the company is liable to prosecuted and there is no clinching evidence in support of such claim. It has been further stated that to prosecute the director in vicarious capacity, it is mandatory to produce clinching evidence to the effect that director was not only involved in the day to day affairs of the company but had direct nexus with the alleged non-compliance of the Competition Act. The Commission notes that Mr. Elesh Khara is incharge of and responsible for the conduct of the business affairs of the company as well as responsible to the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by Mr. Elesh Khara in the present case.

(iv) With respect to Bhiwadi Cylinders Pvt. Ltd., the DG found that Mr. Manvinder Singh, Managing Director, is involved in finalization of tender documents and related decisions. In response to the Investigation Report, it has been stated that the DG has not produced clinching evidence to the effect that director was not only involved in the day to day affairs of the company but had direct

nexus with the alleged non-compliance of the competition Act. Being the Managing Director of the company, the Commission is in agreement with the DG that Mr. Manvinder Singh is in charge and responsible for the conduct of the business of the company as well as responsible for the affairs of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by Mr. Manvinder Singh.

(v) In relation to Mr. Ramesh Kumar, Chairman and Managing Director (CMD) and Mr. P.N. Vinay Kumar, Executive Director of Balaji Pressure Vessels Ltd., investigation has revealed that as per organizational chart submitted by the company, all the divisions of the company reports to the Chairman and Managing Director and all the decisions are taken by the Chairman and Managing Director and Executive Director of the company. Accordingly, the Commission is in agreement with the DG that both of them are in charge and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by these persons in the present case.

(vi) With regard to Mr. B.B. Patil, Chairman and Managing Director (CMD) of BTP Structural India Pvt Ltd., investigation has revealed that Mr. B.B. Patil, CMD of the company, in his deposition has stated that he was looking after the day to day affairs of the company till 2013-14. Being the CMD of the company and being responsible for looking after day to day affairs of the company, Mr. Patil is in charge and responsible for the conduct of the business of the company as well as responsible for the affairs of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by Mr. B.B. Patil, in the present case.

(viii) In relation to Mr. C.P. Bhartia, Ms. Aradhna Bhartia, Mr. Sanjay Bhartia and Mr. Sandeep Bhartia, Directors of Carbac Holdings Ltd., the DG noted that Mr. C.P. Bhartia, Director, in his deposition has stated that all the decisions in the company regarding tenders etc. are taken by all the Directors jointly and thus they are jointly in charge of and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by these persons in the present case.

(ix) With respect to Mr. C.P. Bhartia, Mr. Sanjay Bhartia, and Mr. Sandeep Bhartia, Directors of Haldia Precision Engineering Pvt. Ltd., the DG has noted that Mr. C.P. Bhartia, Director, in his deposition has stated that all the decisions in the company regarding tenders etc. are taken by all the Directors jointly and thus they are jointly in charge of and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had

exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by these persons in the present case.

(x) As regards Daya Industries, the Commission notes that the investigation has revealed that Mr. A.P. Sapra, Partner, in his statement before the DG, has submitted that he was solely looking after the day to day affairs of the firm till 2014 and was responsible for the conduct of its business. Therefore, the Commission is in agreement with the DG that Mr. A.P. Sapra was the person who was in charge of and responsible for the conduct of the business of the firm being its Partner. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by Mr. A.P. Sapra, in the present case.

(xi) With respect to Faridabad Metal Udyog Pvt. Ltd, the Commission notes that as per the reply dated 12.05.2015, Mr. Adarsh Jain takes all business decisions being the Managing Director of the Company and is looking after the day to day affairs of the company. In response to the Investigation Report, it has been stated that to prosecute the director in vicarious capacity it is mandatory to produce clinching evidence to the effect that director was not only involved in the day to day affairs of the company but had direct nexus with the alleged non-compliance of the Act. The Commission notes that Mr. Adarsh Jain was the person who was in charge of and responsible for the conduct of the business of the company being it's Managing Director. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by Mr. Adarsh Jain in the present case.

(xii) As regards Mr. Cedric Fernandez, Director of Jesmajo Industrial Fabrication Karnataka Pvt Ltd., investigation revealed that Mr. Cedric Fernandez, Director of the company, in his statement before the DG stated that he is looking after day affairs of the company and responsible for conduct of its business. Therefore, the Commission is in agreement with the DG that he is in charge of and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by Mr. Cedric Fernandez. (xiii) With respect to Mr. Nand Kishor Ladda, Managing Director of Winfab Equipments (P) Ltd., investigation has revealed that Mr. Ladda, in his deposition, has stated that he is responsible for the day to day affairs of the company and looking after its conduct of business. Accordingly, the Commission is in agreement with the DG that Mr. Nand Kishor Ladda is in charge of and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by Mr. Nand Kishor Ladda in the present case. (xiv) In relation to Mr. M. Muruganandam, MD of GDR Cylinders Pvt Ltd., the investigation has brought out that the company

was taken over by Mr. B.S. Reddy of Kurnool Cylinders Pvt Ltd through MoU between the promoters of GDR and him. The loans to company had become the non-performing asset of Canara Bank and due to one-time settlement, the same has been taken over by Mr. B.S. Reddy. However, the said agreement was entered into on 06.05.2014 but the tender in question was related to 2013. Therefore, the Commission is in agreement with the DG that Mr. M. Muruganandam who was the MD of the company at that relevant time was in charge of and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by Mr. M. Muruganandam, in the present case. (xv) With respect to Mr. Ashok Raja, Chairman and Director of Him Cylinders Ltd. and Omid Engineering Pvt. Ltd., investigation revealed that as per the statement of Mr. Rajesh Harith, Commercial Manager, Mr. Ashok Raja in consultation with the accounts departments takes the decision regarding quotation in tenders. Being the Chairman and the Director of the company, the Commission is in agreement with the DG that Mr. Ashok Raja was in charge of and responsible for the conduct of the business of the companies. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by Mr. Ashok Raja, in the present case. (xvi) With respect to Mr. N. Suresh, Managing Director of Southern Cylinders Pvt Ltd, investigation revealed that Mr. N. Suresh, Managing Director, is the final authority to take all decisions on behalf of the company. Accordingly, the Commission is in agreement with the DG in this respect that Mr. N. Suresh was in charge of and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by Mr. N. Suresh, in the present case. (xvii) As regards Mr. Vijay Sanghvi, Managing Director of Hyderabad Cylinders Pvt. Ltd. and Director of Nandi Cylinders Pvt. Ltd., the investigation revealed that Mr. Vijay Sanghvi, in his statement has stated that he is responsible for the day to day affairs of Hyderabad Cylinders and Nandi Cylinders and looking after conduct of business. Accordingly, the Commission is in agreement with the DG that Mr. Vijay Sanghvi was in charge of and responsible for the conduct of the business of the companies. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by Mr. Vijay Sanghvi, in the present case. (xviii) In relation to Mr. Ritesh Sanghvi, Director of R.M. Cylinders Pvt Ltd., investigation has revealed that Mr. Ritesh Sanghvi, Director of the company, in his deposition has stated that Mr. Ramnik Lal Sanghvi was looking after the day to day affairs of the company till Jan'2013 but due to his deteriorating health condition, after Jan'2013 Mr. Ritesh Sanghvi is looking after the aforesaid work. Accordingly, the Commission is in agreement with the DG that Mr. Ritesh Sanghvi was in charge of and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to

prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by Mr. Ritesh Sanghvi, in the present case.

(xix) With respect to Mr. Ramesh Sanghvi, Managing Director of Sanghvi Cylinders Pvt. Ltd., the Commission notes that Mr. Ramesh Sanghvi, in his statement before the DG has stated that he is responsible for the day to day affairs of the company and looking after its conduct of business. Accordingly, the Commission is in agreement with the DG in this regard that Mr. Ramesh Sanghvi was in charge of and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by Mr. Ramesh Sanghvi, in the present case. (xx) As regards, Tirupati LPG Industries Ltd. and International Cylinders Pvt. Ltd., Mr. Arun Goyal, Director, in his deposition before the DG stated that he is looking after the day to day affairs of the company. Accordingly, the Commission is in agreement with the DG that Mr. Goyal was in charge of and responsible for the conduct of the business of the companies. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by Mr. Arun Goyal, in the present case.

(xxi) In relation to J.K.B. Gas Pvt. Ltd., investigation has revealed that Mr. K.K. Gupta, in his deposition before the DG stated that he is looking after day to day affairs of the company and responsible for conduct of its business. In response to the Investigation Report, it has been contended that Mr. K.K. Gupta has been identified for the purpose of proceedings under Section 48 of the Act, on the basis of the fact that he was looking after day to day affairs of the company. However, no investigation was conducted by the DG to link the role of individual with the impugned conduct and accordingly the liability of Mr. K.K. Gupta is not established under the provisions of the Act. The Commission does not find any merit in this submission and agrees with the findings of the DG that Mr. K.K. Gupta was in charge of and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by Mr. K.K. Gupta, in the present case. (xxii) In relation to Mr. B. S. Reddy, Director of Kurnool Cylinders Pvt. Ltd. (Unit-II), the Commission notes that as per the statement of Mr. B.S. Reddy recorded before the DG, he was looking after day to day affairs of the company and is responsible for conduct of its business. In response to the Investigation Report it has been stated that to prosecute the director in vicarious capacity it is mandatory to produce clinching evidence to the effect that director was not only involved in the day to day affairs of the company but had direct nexus with the alleged non-compliance of the Competition Act. The Commission agrees with the findings of the DG that Mr. B. S. Reddy, Director of Kurnool Cylinders Pvt. Ltd. (Unit-II) was in charge of and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due

diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by Mr. B.S. Reddy, in the present case. (xxiii) As regards, Mr. Gagan Agarwal, Mr. Nishant Mittal, and Mr. Kushagra Aggarwal, Directors of Raghupati Synergy Pvt. Ltd., investigation brought out that despite service of summons, Mr. Gagan Aggarwal, Director of the company did not appear for his deposition before the DG. There are three directors in the company namely Mr. Gagan Aggarwal, Mr. Nishant Mittal and Mr. Kushagra Aggarwal. As per the DG, in absence of any specific delineation of the duties, the board of directors of the company are collectively responsible for conduct of company's business. The Commission is in agreement with the DG in this regard and thus all the three directors was in charge of and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by these persons, in the present case.

(xxiv) With respect to Mr. Pankaj Gupta, Managing Director and Mr. Puneet Gupta, Director of Intel Gas Gadgets Pvt. Ltd. (Unit-II), investigation has revealed that Mr. Pankaj Gupta in his deposition before the DG stated that he and his brother Mr. Puneet Gupta look after day to day affairs of the company. Accordingly, the Commission agrees with the DG and finds both of them to be in charge of and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by these persons, in the present case. (xxv) As regards Mr. S. Kulandhaisamy, Director of Lite Containers Pvt Ltd., investigation revealed that Mr. S Kulandhaisamy, Director had submitted that his company was being prosecuted by banks in Debt Recovery Tribunal(DRT) to liquidate the assets including his house. DRT has also taken possession of his factory. However, at the relevant time of tenders in question, he was the MD of the company and being in that capacity he was responsible for the conduct of the business of the company. Accordingly, the Commission is in agreement with the DG that Mr. S.Kulandhaisamy is found to be in charge of and responsible for the conduct of the business of said company at the relevant time. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by the said person in the present case.

(xxvi) In relation to Mahaveer Cylinders Ltd., the Commission notes that as per the statement of Mr. Dinesh Mittal, Director, recorded before the DG, he was looking after the day to day affairs of the company since 1995 and being responsible for the conduct of its business. In response to the Investigation Report, it has been stated that the DG has merely stated that the person who is in charge of the company is liable to prosecuted and there is no clinching evidence in support of such claim. It has been further stated that to prosecute the director in vicarious capacity it is mandatory to produce clinching evidence to the effect that director was not only involved in the day to day affairs of the company but had direct nexus with the alleged non-compliance of the Act. In view of

complete lack of nexus of the director with the alleged contravention of the Act, the director cannot be prosecuted under Section 48 of the Act. The Commission notes that Mr. Dinesh Mittal, as per his own statement, was in charge of and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by the said person in the present case.

(xxvii) In relation to Mr. N.K. Sureka, Managing Director of Mauria Udyog Ltd., investigation revealed that Mr. K.M. Pai, Director of the company, in his deposition, stated that he was simply looking after day to day affairs of the company other than finance. It was further stated that he does not have any shareholding in the company and gets fixed remuneration. As per Mr. K.M. Pai, Mr. N.K. Sureka is the Managing Director of the company. The Commission is in agreement with the DG that being the Managing Director of the company, Mr. N.K. Sureka was in charge of and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by the said person in the present case. (xxviii) With respect to Mr. Rajkumar Bhartia, Mr. Naveen Bhartia and Mr. Sandeep Bhartia, Directors of North India Wires Ltd (Howrah), the investigation revealed that Mr. Rajkumar Bhartia, Mr. Naveen Bhartia and Mr. Sandeep Bhartia are the Directors of the company and are involved in the decision making of the company. Being directors involved in day to day affairs of the company, the Commission is in agreement with the DG that all the said persons were in charge of and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by the said persons in the present case.

(xxix) In relation to Tee Kay Metals Pvt. Ltd., investigation has revealed that Mr. Kishore Kela, Director of the company, takes all the decisions of quotation for the different tenders. In his deposition, he has stated that he was looking after the day to day affairs of the company and conduct of its business in 2013 in relation to tender of HPCL. Therefore, the Commission is in agreement with the DG that Mr. Kishore Kela was in charge of and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by the said person in the present case.

(xxx) In relation to Mr. Davish Jain, Chairman and Mr. Sanjay Rathi, Director of Prestige Fabricators Pvt. Ltd., the Commission notes that as per the statement dated 01.08.2016 of Mr. Sanjay Rathi, Director of the said company, he was looking after day to day affairs of the company during 2011 and 2013 in consultation and approval of Mr. Jain. Therefore, it can be said that Mr.

Jain and Mr. Rathi were the persons incharge and who were responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by these persons in the present case. (xxxi) With respect to Mr. Rajesh Mittal, Mr. Naveen Mittal and Mr. Viprendar Aggarwal, Directors of Punjab Gas Cylinders Ltd., the investigation has revealed that Mr. Rajesh Mittal, Director of the company, in his deposition stated that he along with Mr. Viprendar Aggarwal and Mr. Naveen Mittal, jointly control the company and are responsible for conduct of its business. In response to the Investigation Report it has been stated that the DG has merely stated that the person who is in charge of the company is liable to be prosecuted and there is no clinching evidence in support of such claim. It has been further stated that to prosecute the director in vicarious capacity it is mandatory to produce clinching evidence to the effect that director was not only involved in the day to day affairs of the company but had direct nexus with the alleged non-compliance of the Act. In view of complete lack of nexus of the director with the alleged contravention of the Act, the director cannot be prosecuted under Section 48 of the Act. It has been further stated that Mr. Viprendar Aggarwal was never called upon by the DG for recording any statement which is despite of the fact that after statement of Mr. Rajesh Mittal the DG issued summons upon Mr. Naveen Mittal who was examined as well as confronted with the answers given by Mr. Rajesh Mittal. The Commission finds that all the three above named directors were in charge of and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by the said persons in the present case. (xxxii) As regards, Mr. Chenadi Ramu, Ms. B. Usharani and Ms. I. Savitri, Directors of Prathima Industries Pvt. Ltd., investigation revealed that Ms. I. Savitri, in her deposition before the DG stated that all decisions are taken collectively by the board though day to day affairs are carried out by her only. In view of the above, the DG found all three persons are responsible for the conduct of the business of the company. The Commission finds that no evidence is available to suggest that the aforesaid Directors were not incharge and responsible for the conduct of the business of the company. Thus, the Commission finds all the three Directors in charge of and responsible for the conduct of the business of the company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by the said persons in the present case. (xxxiii) With respect to Mr. Dev Prakash Mahapatra, Managing Director of Konark Cylinders & Containers Pvt Ltd, the DG noted that Mr. Mahapatra takes all important decisions in relation to tenders. Further, as per the information available in public domain, he is the Managing Director of the Company. Being Managing Director of the company, he was found to be responsible for the conduct of the business of the company. Accordingly, the Commission agrees with the DG in this regard that Mr. Dev Prakash Mahapatra, Managing Director is incharge of and responsible for the conduct of the business of the abovenamed company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such



contravention. It is noted by the Commission that such burden of proof has not been discharged by the said person in the present case. (xxxiv) As regards Mr. P.K. Gupta, Ex. Director of Sahuwala Cylinders Pvt Ltd, investigation has revealed that Mr. P.K. Gupta, in his statement before the DG, stated that he was the founder director of the company and was looking after day to day affairs of the company and also responsible for the conduct of its business including deciding tender rates for the company in 2013. Accordingly, the Commission is in agreement with the DG that Mr. P.K. Gupta was in charge of and responsible for the conduct of the business of the abovenamed company at the relevant time. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by the said person in the present case.

(xxxv) In relation to Mr. Vimal Mahipal, Director of Sunrays Engineers Pvt Ltd, investigation has revealed that Mr. Pradeep Mahipal, Director of the company, in his statement before the DG has stated that, he looks after the day to day affairs of the company and is responsible for the conduct of its business. In response to the Investigation Report it has been submitted that in view of complete lack of nexus of the director with the alleged contravention of the Act, the director cannot be prosecuted under Section 48 of the Act. The Commission does not find any merit in the contention of the OP and is in agreement with the DG that that Mr. Vimal Mahipal is in charge of and responsible for the conduct of the business of the abovenamed company, being its Director. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by the said person in the present case.

(xxxvi) As regards Mr. Vijay Kumar Aggarwal, Mr. Kamal Goyal, Mr. Pankaj Goel, and Mrs. Neelam Aggarwal, Directors of SM Cylinders, the Commission notes that as per the statement dated 16.03.2016 of Mr. Vijay Kumar Aggarwal, Mr. Aggarwal takes all business decisions relating to the company after discussion with other directors as the company is not well organized professionally. In view of above statement it can be said that all the above named three directors are persons who are collectively in charge of and responsible for the conduct of the business of the abovenamed company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by the said persons in the present case. (xxxvii) In relation to Shri Shakti Cylinders Pvt Ltd, Mr. D.V. Raja Sekhar Reddy, in his statement before the DG stated that he is responsible for the day to day affairs of the company and tender related decisions are taken by him. Accordingly, the Commission agrees with the DG that Mr. D.V. Rajasekhar is in charge of and responsible for the conduct of the business of the abovenamed company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by the said person in the present case. (xxxviii) With

respect to Mr. M. Muruganandam, Managing Director of Sri Sai Balaji Gas Cylinders Pvt Ltd., investigation revealed that despite service of summon, Mr. Muruganandam did not appear for deposition before the DG. The Commission is in agreement with the DG that being the MD of the company, Mr. Muruganandam is said to be incharge of and responsible for the conduct of the business of the abovenamed company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by the said person in the present case.

(xxxix) As regards Mr. Puneet Batra, Director of Surya Shakti Vessels Pvt Ltd, the Commission notes that Mr. Batra, in his deposition has stated that he is responsible for the day to day affairs of the company and conduct of the business of the company. Therefore, the Commission agrees with the DG that Mr. Batra is incharge of and responsible for the conduct of the business of the abovenamed company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by the said person in the present case.

(xl) With respect to Tirupati Cylinders Ltd., as per the DG, Mr. Dinesh Goyal, in his deposition stated that he is responsible for the day to day affairs of the company and tender related inputs are given by him. Accordingly, the Commission agrees with the DG that he is incharge of and responsible for the conduct of the business of the abovenamed company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by the said person in the present case.

(xli) As regards Tirupati Containers Pvt. Ltd., Mr. Rakesh Singhal, Director of the company, in his deposition before the DG, has stated that he was solely looking after the day to day affairs of the company and is responsible for the conduct of its business. In response to the Investigation Report it has been stated that the DG has merely stated that the person who is in charge of the company is liable to prosecuted and there is no clinching evidence in support of such claim. It has been further stated that to prosecute the director in vicarious capacity it is mandatory to produce clinching evidence to the effect that director was not only involved in the day to day affairs of the company but had direct nexus with the alleged non-compliance of the competition Act. In view of complete lack of nexus of the director with the alleged contravention of the Act, the director cannot be prosecuted under Section 48 of the Act. The Commission notes that Mr. Rakesh Singhal was incharge of and responsible for the conduct of the business of the abovenamed company, being its Managing Director. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by the said person in the present case. (xlii) In relation to Mr. A.K. Sharma, Joint MD of Universal Cylinders Ltd. (Unit-II), as per the statement of Mr.

Sharma, he was looking after the work with the OMCs tender etc. In response to the Investigation Report, it has been stated that to prosecute the director in vicarious capacity it is mandatory to produce clinching evidence to the effect that director was not only involved in the day to day affairs of the company but had direct nexus with the alleged non-compliance of the Act. The Commission finds Mr. A.K. Sharma to be incharge of and responsible for the conduct of the business of the abovenamed company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by the said person in the present case. (xliii) In relation to Vidhya Cylinders Pvt. Ltd., investigation has revealed that Mr. Mukesh Kumar Mittal, Director of the company, in his statement before the DG, has stated that he is responsible for the day to day affairs of the company and looking after the conduct of its business. Accordingly, the Commission is in agreement with the DG that Mr. Mukesh Kumar Mittal is incharge of and responsible for the conduct of the business of the abovenamed company, being the Director of the said company. As per the proviso to Section 48(1) of the Act, the burden of proof is on the person liable to prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. It is noted by the Commission that such burden of proof has not been discharged by the said person in the present case. (xliv) With respect to Sarthak Industries Ltd., as per the statement of Mr. Yogender Kumar Sharma, Director, Late Mr. V.K. Gupta, the then Director of the company was looking after the conduct of business of the company during 2013. In view of above the DG found that Late V.K.Gupta, the then Director was the responsible for the conduct of the business of the company. It is pertinent to mention that Mr. V.K. Gupta has expired on 22.05.2014. Thus, Commission decides not to proceed against Late Mr. V.K. Gupta. (xlv) As regards Saboo Cylinders Pvt Ltd, the Commission notes that as per the statement of Mr. Pawan Kumar dated 18.07.2016, Late B.L. Saboo, the then MD of the company was looking after affairs of the company and also responsible for the conduct of its business. The DG found Late B.L. Saboo, the then MD as responsible for the conduct of the business of the company. It is pertinent to mention that Mr.B.L.Saboo has since expired. Thus, the Commission decides not to proceed against Late Mr. B.L. Sahoo.

As per the CCI the detail of the position of each of the individuals has been separately discussed while holding them liable and hence no interference is called for in the findings of CCI.

x). On the issue of submission of penalty which has been elaborately discussed in para 121 to 130 of the impugned order.

"121.The OPs and their respective office bearers are directed to cease and desist from indulging in practices, in future which are found to be in contravention of the provisions of Section 3 (3) (d) read with Section 3 (1) of the Act.

122.The Commission, for the reasons recorded below, finds the present case fit for imposition of penalty. Under the provisions contained in Section 27(b) of the Act, the Commission may impose such penalty upon the contravening parties, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last

three preceding financial years, upon each of such person or enterprises which are parties to such agreement or abuse. Further, in cases of cartelization, the Commission may impose upon each such cartel participant, a penalty of up to three times of its profit for each year of continuance of the anti-competitive agreement or ten per cent of its turnover for each year of continuance of such agreement, whichever is higher.

123. It may be noted that the twin objectives behind imposition of penalty are: (a) to reflect the seriousness of the infringement; and (b) to ensure that the threat of penalties will deter the infringing undertakings. Therefore, the quantum of penalty imposed must correspond with the gravity of the offence and the same must be determined after having due regard to the mitigating and aggravating circumstances of the case.

124. Most of the OPs in their objections to the Investigation Report have submitted that in a case of this nature, a zero penalty with a warning or a notional penalty would be sufficient to the act as a deterrent and a reformatory measure. As per the OPs, the important aspects that deserve consideration in determining the nature of penalty applicable are firstly, the dominant position of oil companies/HPCL and the lack of any loss to them on account of the alleged acts, secondly, lack of any intent to contravene any provision of the Act, thirdly, precarious financial position and the status of a small industry and lack of any supernormal profit. To support the plea, reliance was placed upon an order of the Commission in Ref. Case No. 05 of 2011 filed by Shri B. P. Khare, Principal Chief Engineer, South Eastern Railway, Kolkata against M/s Orissa Concrete and Allied Industries Ltd. and others wherein the Commission did give due considerations to the facts that opposite parties therein were small & medium enterprises and there was lack of awareness amongst the alleged bidders thereby resulting into no penalty against the bidders in spite of the fact that the substantive findings of bid rigging were held against them. It has also been submitted that at the time of calculating the penalty, if any, the penalty shall be considered from perspective of "relevant average annual turnover" only i.e. from the sale of 14.2 kg LPG cylinder to HPCL over last three years, which is the product in question in the present case.

125. Before examining the pleas, the Commission deems it appropriate to clarify its finding in M/s Orissa Concrete and Allied Industries Ltd. (supra). In the said order, it was observed by the Commission as follows:

As regards penalty under section 27 of the Act, the Commission notes that there are circumstances in this case which require the issue of penalty to be looked into somewhat differently. The facts as projected in the present reference reveal a complete lack of awareness by the opposite parties which are small and micro enterprises. The replies of many of these parties are effectively incriminating in nature. Further, none of these parties quoted for more than 50% quantity which was

a requirement under the tender. Thus, right in the beginning the offers made by these parties were not in accordance with the requirement of the tender and hence they could not have got supplies as per the tender conditions. Moreover, the bid given by these parties was not the lowest and so they could not have been awarded the contract.

126. From a plain reading of the above, it would appear that there were myriad considerations which weighed with the Commission in not imposing penalty upon the infringing firms. It is evident that being small and micro enterprises per se was not a consideration before the Commission in adopting such course. Thus, it is futile for the parties here to quote the said order out of context and in isolation of the facts of the present case. At the same time, the Commission is of opinion that though size of the enterprise in itself may not be a decisive factor while quantifying the penalty, it may be taken among other things as a mitigating factor while considering the issue of penalty.

127. With respect to the aspect of relevant turnover, some of the OPs have contended that relevant turnover should be calculated based only on the sale of 14.2 kg LPG cylinders to HPCL in impugned tenders. In this regard, reliance has been placed upon the judgment of the Hon'ble Supreme Court in Excel Crop Care Ltd. case. The Commission observes that such a narrow interpretation of the concept of relevant turnover as has been sought to be done by some of the OPs may be neither in consonance with the definition of turnover as contained in the Act nor in the light of the judgment of the Hon'ble Supreme Court in Excel Crop Care Ltd.(Supra). Further, restricting the turnover only with respect to impugned tender of HPCL is highly inappropriate as admittedly the OPs are manufacturing and supplying cylinders to other OMCs and is not confined to HPCL alone. In view of above, contentions of OPs on this aspect is rejected by the Commission.

128. The Commission notes that the instant case emanates out of public procurement and as such it is a fit case to impose penalties upon the infringing parties. Any collusion in rigging tenders in public procurement costs exchequer on account of anti-competitive bids besides resulting in higher cost to end-consumers for whom a cylinder is a necessary input for their daily requirements. This itself is a compelling factor for the Commission to not only impose penalty but to view the contravention seriously.

129. Having dealt with the nature of contravention as well as the mitigating factors stated by them, the Commission proceeds to impose penalty on the OPs at the rate of 1 percent of its average relevant turnover for the financial years 2013-14, 2014-15 and 2015-16 filed with the Commission.

What the CCI has stated that the three preceding years have been considered 2013-14 to 2015-16 based on the report of DG which is dated 06.10.2016. What the Appellants have contended that is

the violation of tender of bid rigging of tender no. 2 has happened without accepting that it has so happened is in January to February 2013 then the appropriate preceding years in terms of Section 27(b) of the Act would be 2009-10 to 2011-12 for the purpose of calculating the average annual turnover for levy of penalty.

y). On the issue of quantum/percentage of penalty based on average annual turnover depends on the objectives behind imposition of penalty. The objectives may be to reflect the seriousness of infringement and to ensure that the threat of penalties will deter the infringing undertakings after having due regard to the aggravating and mitigating circumstances of the case. The mitigating circumstances considered by CCI are position of OMC's vis-à-vis Cylinder manufacturers, alleged lack of intent and size of enterprises.

CCI has also observed that many Appellants are small/medium size enterprises. It was submitted by the Ld. Counsel of the CCI that the CCI impugned order at para 123-126 reflects imposing penalty at lowest rate of 1% of turnover.

z). On the issue of relevant turn over it was submitted by the Ld. Counsel of the CCI that it cannot be restricted to the turnover of a particular product or the category of product in question and the turn over is to considered the Companies full turnover and have cited the Judgment of Excel Crop Care Ltd. vs. CCI 2017 (8 SCC 47) para 127 of the impugned order. What has been stated by the Ld. Counsel of the CCI that it has imposed appropriate penalty considering that any collusion in rigging public procurement tender cost the exchequer due to absence of competition and as a result and users are losers.

As a result of above the Ld. Counsel for the CCI submitted that no interference is called for and the Appeal should be dismissed with costs. B. It was also brought to the notice of the Tribunal by the Ld. Counsel for the clarification/stand of CCI on the following issue:

a) Anonymous complaint to the CCI - to be regulated as Suo moto enquiry.

It was submitted that CCI is not prohibited or barred to act or take into consideration anonymous information provided it has merit. They also submitted that the Suo moto enquiry can also be initiated on the basis of some information and mere irregularity in initiation of proceedings will not vitiate the entire investigation and enquiry.

b) Even defective information can be used by CCI to initiate action. They have also supplemented by regulation 40 which provides that such failures will not invalidate any proceedings before the CCI and have cited the Judgment of the Division Bench of Hon'ble Madras High Court in MRF Ltd. vs. Ministry of Corporate Affairs and Ors. (2022) SCC online Mad 50 . And have also cited Hon'ble Supreme Court Judgment in Pradeep S. Wodeyar vs. State of Karnataka (2021) SCC online SC 1140

c) It was also stated by the Ld. Counsel of the Respondent that the Director General Investigation Report and Cross Examination Reports were not time barred. They have also stated that the Commission is permitted to grant multiple extension to the DG as it was a lengthy and

time-consuming fact- finding exercise with 70 or more opposite parties.

d) It was also stated by the Ld. Counsel of the CCI that absence of Judicial Member will not vitiate CCI's order. No-doubt the Hon'ble Delhi High Court in Mahindra Electric Mobility vs. Union of India in WP (C) 11467/ 2018 has held that a Judicial Member should be present in the composition of CCI when there is adjudication. However, this Tribunal is not a constitutional court and hence, should not enter in this area. They have also cited Section 15(a) and (b) of the Act.

e) It was also mentioned by the Ld. Counsel of Respondent that non- compliance of Section 65 B of Indian Evidence Act for Electronic Record is a hyper technical objection and the Appellants and their officials have not objected to the access by the DG.

f) The Ld. Counsel for the Respondent/CCI also submitted relevant extract of DG Report to substantiate that the DG Report is not time barred by time. (pg. 23-30) (Composite W.S submitted on 01.10.2022)

h) Email trail dated 23.02.2013 were also submitted by the Ld. Counsel for the CCI to substantiate the collusive conduct of the Appellants for withdrawal from the tender (Pg. 31-33)

h) They also submitted extract of DG Report indicating the comparative table of common bidders in tender no. 1 and tender no. 2 to show that there were common bidders in both the tenders. (Pg-39 to 45)

#### 47. Summary and observations:

We have heard the Ld. Counsels of the Appellants & Respondent as also have gone through the pleadings submitted by the parties, the related Act and Regulations as also law laid down on the issues and have following observations:

a. Since this is a case where 72 Appeals have been filed against the impugned order dated 09.10.2019 in Suo moto case no.1/2014 by Competition Commission of India, the cases were heard from 10.08.2022 to 23.09.2022 and Judgement was finally reserved on 23.09.2022. Parties were granted liberty to file composite written submission within 10 days from 23.09.2022. Hence even the written submissions submitted by the parties were also considered.

b. This case was initiated by the CCI based on an anonymous letter dated 25.04.2013 received by CCI wherein it was alleged that there was a cartel operating in Tender No.2 being invited by Hindustan Petroleum Corporation Ltd. (HPCL).

c. The allegations raised in an anonymous letter was that the Tender no. 1 floated on 28.10.2011 for supply of 45 lakhs LPG Cylinders orders were placed on vendors at prices higher than the procurement price of other Oil Companies with the same vendors at the same period. Also raised in the anonymous letter that HPCL invited another tender dated 24.01.2013 floated for supply of 40

lakhs LPG Cylinders, have irregularity as out of 66 LPG Manufacturers participated in the bid process, 51 bidders withdraw their bids by submitting letters of withdrawal. As per the impugned order out of 66 bidders, 65 were technically qualified and 1 was disqualified, 4 qualified in the category of "existing vendors" and 10 qualified as "new vendors".

d. The impugned order has gone ahead with the anonymous letter dated 25.04.2013 registering it a Suo moto case no. 1 of 2014 under Section 19 (1) of the Act and further proceeded upon considering the information and allegations therein the commission passed an order dated 02.01.2014 under Section 26 (1) of the Act directing the Director General (DG) to cause an investigation into the matter including the role of the person who were in charge of and responsible to the companies for the conduct of their business. DG has submitted investigation report in respect of both Tender no. 1 & 2 to the Commission on 06.10.2016.

e. The various issues involved in this case are broadly as follows:

- (i) Withdrawal of bids in Tender no. 2.
- (ii) Issue of common IP address and common agents.

(iii) Invoking of "appreciable adverse effect on competition" without ascertaining the same in terms of Section 3 of the Act.

(iv) Passing of impugned order by CCI as handling an adjudicatory function without the presence of any Judicial Member.

(v) Issue of DG report being time barred on account of an unexplained delay of 948 days.

(vi) CCI taking cognizance on the basis of an anonymous letter when the Act and related regulations provides procedure for filing of information and for other related activities and events etc?

f. LPG Cylinders are not the off- the- shelf items available across the counter in a free format. These items are highly technically qualified items. As revealed from the input available that the "Petroleum and Exclusive safety Organisation" certifies the Cylinder manufacturers and then only they are in a position to supply the item to the OMC's. Apart from HPCL, India Oil Corporation Ltd. and Bharat Petroleum Corporation Ltd. are the other market players in the procurement of empty LPG Cylinders for retail and distribution of 14.2 Kg filled LPG Cylinders. LPG Cylinder is regulated by the LPG (Regulation of Supply and distribution order 2000) issued under the Essential Commodities Act, 1995 under the notification dated 26.04.2000 of the Ministry of Petroleum and Natural Gas. Only three OMC's are permitted to supply LPG to domestic consumers. It has also been revealed from the order of CCI that there are 155 authorised LPG Cylinders manufacturers in India. The yearly demand of HPCL for LPG Cylinders are varying between 50 lakhs to 60 lakhs Cylinders and vendors generally participate in tender are 60 to 80 in number.



g. There is no substitute to 14.2 Kg LPG Cylinders. The LPG Cylinder manufacturers are engaged in manufacturing and supply of identical product. There is not much design change in the product for years together all this also lead one to feel that the market of this product is conducive for cartelisation.

48. As reveals from CCI report in tender no. 1 there were 78 bidders while in tender no. 2 there were 66 bidders. The requirement published in tender no. 1 was 45 lakhs cylinders while in tender no. 2 it was 40 lakhs cylinders.

49. It is not in dispute that the manufacturing units of different tenderers are located at different places and in different parts of the country. It is also revealed that other components as tax credit, excise duty exemption, power supply tariff etc. which effect cost of firms are also different in different states. In a normal parlance it reflects collusion when the bidders had quoted identical rates for different states.

50. CCI was astonished to find that 51 parties withdrew their bids and out of which 46 simultaneously withdrew their bids on 04.03.2013 while technical evaluation of tender no. 2 was still in progress and price bid was not opened. The common reasons pointed out for withdrawal by the bidders

- "due to unavoidable circumstances". HPCL could not punish as they have withdrawn the bids before opening of price bids as per Tender conditions.

51. Several issues emerged during investigation by DG were common IP addresses for withdrawal of bids as well as for uploading of bids. A few common agents working for LPG Cylinder manufacturers, existence of National Level Association of manufacturers namely Indian LPG Cylinder manufacturer association and regional association namely North India LPG manufacturer association and Rajasthan LPG manufacturers association. The fact of existence of association was established and has generally been accepted by the Appellants.

52. It is also an established fact that the tender conditions result into Rate Contracts.

53. HPCL has accepted it that whenever two or more vendors have quoted identical rates in some states HPCL has negotiated with the vendors to reduce their rates and purchase orders were placed on negotiated rates in most of the states.

54. HPCL has also cited clause 11(c) of instruction to tenders .

12. HPCL filed the requisite information, in terms of order dated 07.03.2019, on 26.04.2019, after seeking extension of time. A gist of the submissions filed by HPCL is as under:

- i. The tender conditions contained in Tender No.1 and Tender No.2 are in the nature of rate contracts.

ii. With respect to treatment accorded to identical bids received from OPs in Tender No.1, especially having regard to Clause 11

(c) of the Instructions to Tenderers (Annexure-1 to Tender No.1) it has been stated that as per the records pertaining to Tender No.1, two or more vendors have quoted identical rates in some states. HPCL negotiated with vendors to reduce their rates and purchase orders were placed on such negotiated rates in most of the states. Negotiating rates below L-1 rates quoted in Tender No.1 was in line with clause 11(c) of the Instructions to Tenderers in Tender No.1. Clause 11(c) of the Instructions to Tenderers (Annexure-1 to the tenders) is reproduced as follows:

"11(c) Notwithstanding anything contained elsewhere in this tender, in the event the Corporation receives the same rate for any state / states from 2 or more bidders, the Corporation reserves the right to believe that these bidders have formed a cartel, and the rate quoted as cartel rate and may accept or reject or not reckon such rates/ offered quantities/ States participated / ranking etc., of such offers. In such cases, the Corporation also reserves the right to follow the negotiation process with such bidders if deemed fit and amend the order distribution criteria / ratio best suited to the interest of the Corporation."

iii. In response to the specific question whether HPCL had invoked the integrity pact submitted by respective bidders in both the tenders, it was stated that it had not invoked the integrity pact submitted by the respective bidders in either of the tenders.

iv. In respect of factors taken into consideration by HPCL in finalising the price per cylinder prior to award of tender to various parties including the nature and extent of consideration of price bids submitted by the parties, HPCL responded as under:

"The internal estimate of HPCL prior to floating of tender is one of the guiding factors in finalising the price per cylinder. The internal estimate is arrived at by considering the price of Body steel, steel for foot ring and VP Ring, Bung, SC Valve and cost of consumables like paint, welding rods, inert gas, Zinc wire, furnace oil, iron shots/grits, flux (SAW welding), DD compound, cost of spares, stores, etc., BIS marking fee, PESO fee, packing charges, loading/unloading charges etc., manufacturing cost like labour cost, electricity cost, administrative charges and steel transportation cost, finished cylinder transportation costs, taxes, working capital, profit margin, etc. The existing procurement cost of HPCL and Industry rates compared to the price bids submitted by parties to HPCL and the time the existing tenders of industry were finalised is another factor taken into consideration during finalisation."

55. It is also revealed from the Reply of HPCL vide letter dated 26.07.2016 that the pattern of change in procurement price of 14.2 KG LPG Cylinder from 2010 to 2013 were varying between Rs. 1092.61/- in January 2010 to 1250.01/- in December 2013. However, in January 2010 excise duty

was 8% and steel was Rs. 34,000/- in January 2010 while in December 2013 excise duty was 12% and steel price was Rs. 39,500/-.

56. They have also informed that the representatives for collecting documents were restricted to the Reception area of HPCL.

57. In Appeal No. 55 of 2000 it has been pointed out that the Appellant withdrew from the tender no. 2 due to certain specified circumstances and the same are depicted below:

Appellant Company was managed by the family members comprising of five sons of late Bhikuram Jain. There was pending litigation since 2010 with respect to the ownership and control of the Appellant Company. Hence, one of the Directors who was running the company finally decided to withdraw from the bid as the family members were in the process of recording settlement and the business was yet to be stabilised. This should have needed appropriate consideration by the CCI.

58. During the course of submission a few Ld. Counsel also submitted that most of the organisations are SME/MSME and they are the backbone of the economy and they don't have so much financial backup and hence they are keeping common agents to liaise with various plants of HPCL and these common agents are representing each to a few of such manufacturer. Hence using of common IP address or a common agent also needs to have been appropriately considered by the CCI.

59. Judgment of Hon'ble Supreme Court in Rajasthan Cylinders vs Union of India (2020) 16 SCC 615 relates to the same procurement of 14.2 Kg Gas Cylinders by the IOCL and for brevity and clarity we are citing the important para of the same as given below:

73. It follows from the above that whereas on the one hand the economic policy of the nation has ushered in the era of liberalisation and globalisation thereby giving freeplay to the private sector in the manner of conducting business, at the same time, in public interest and in the interest of consumers, a regime of regulators has also been brought to ensure certain checks and balances. Since competition among the enterprises or businessmen is treated as service for a public purpose and, therefore, there is a need to curb anti-competitive practices, the CCI is given the task (as a regulator) to ensure that no such anti-competitive practices are undertaken. In fact, Section 18 of the Act casts a specific and positive obligation on CCI to 'eliminate' anti-competitive practices and promote competition, interest of the consumer and free trade. This objective was also emphasised by this Court in Competition Commission of India vs. Steel Authority of India Limited and Another<sup>12</sup> which can be found in the following observations:

"6. As far as the objectives of competition laws are concerned, they vary from country to country and even within a country they seem to change and evolve over the time. However, it will be useful to refer to some of the common objectives of competition law. The main objective of competition law is to promote economic efficiency using

competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are threefold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law."

81. Second proposition of Ms. Divan was that there was no collusive bidding in the present case. The CCI and COMPAT have rejected this argument in view of the fact that there is an active trade association of the suppliers; a meeting took place couple of days before the date of bidding; common changes were pointed out by these appellants who submitted bids on their behalf; and bids were of identical amounts despite varying cost, which were repetitive in nature. The respondents may be right in their submission that there may not be a direct evidence on the basis of which cartelisation or such agreement between the parties can be proved<sup>64</sup> as these agreements are normally entered into in closed doors. The standard of proof which is required is one of probability, which is a principle accepted in *Technip SA vs. SMS Holding (P) Ltd. & Ors.*<sup>13</sup> wherein the Court stated and discussed this aspect in the following manner:

"54. The standard of proof required to establish such concert is one of probability and may be established "if having regard to their relation etc., their conduct, and their common interest, that it may be inferred that they must be acting together: evidence of actual concerted acting is normally difficult to obtain, and is not insisted upon"

55. While deciding whether a company was one in which the public were substantially interested within the meaning of Section 23- A of the Income Tax Act, 1922 this Court said:

"The test is not whether they have actually acted in concert but whether the circumstances are such that human experience tells us that it can safely be taken that they must be acting together. It is not necessary to state the kind of evidence that will prove such concerted actings. Each case must necessarily be decided on its own facts."

56. In *Guinness PLC and Distillers Co. PLC* the question before the Takeover Panel was whether Guinness had acted in concert with Pipetec when Pipetec purchased shares in Distillers Company PLC. Various factors were taken into consideration to conclude that Guinness had acted in concert with Pipetec to get control over Distillers Company. The Panel said:

"The nature of acting in concert requires that the definition be drawn in deliberately wide terms. It covers an understanding as well as an agreement, and an informal as well as a formal arrangement, which leads to cooperation to purchase shares to acquire control of a company. This is necessary, as such arrangements are often informal, and the understanding may arise from a hint. The understanding may be tacit, and the definition covers situations where the parties act on the basis of a 'nod

or a wink'.... Unless persons declare this agreement or understanding, there is rarely direct evidence of action in concert, and the Panel must draw on its experience and common sense to determine whether those involved in any dealings have some form of understanding and are acting in cooperation with each other."

90. However, that is only one side of the coin. The aforesaid factors are to be analysed keeping in mind the ground realities that were prevailing, which are pointed out by the appellants. These attendant circumstances are argued in detail by the counsel for the appellants which have already been taken note of. We may recapitulate the same in brief hereinbelow:

(i) In the present case there are only three buyers. Among them, IOCL is the biggest buyer with 48% market share. It is also a matter of record that all these appellants are manufacturers of 14.2 kg gas cylinders to the three buyers who are available in the market, namely, IOCL, HPCL and BPCL. If these three buyers do not purchase from any of the appellants, that particular appellant would not be in a position to sell those cylinder to any other entity as there are no other buyers.

(ii) There are only three buyers, it may not attract many to enter the field and manufacture these cylinders. It is because of limited number of buyers and for some reason if they do not purchase, the manufacturer would be nowhere. That may deter the persons to enter the field.

(ii) The manner in which the tenders are floated by IOCL and the rates at which these are awarded, are an indicator that it is the IOCL which calls the shots insofar as price control is concerned. It has come in evidence that the IOCL undertakes the exercise of having its internal estimates about the cost of these cylinders. Their own expert arrived at a figure of Rs. 1106.61 paisa per cylinder. All the tenders which have been accepted are for a price lesser than the aforesaid estimate of IOCL itself. That apart, the modus adopted by the IOCL is that that final price is negotiated by it and the contract is not awarded at the rate quoted by bidder who turns out to be L-1. Negotiations are held with such a bidder who is L-1 which generally leads to further reduction of price than the one quoted by L-1. Thereafter, the other bidders who may be L-2 or L-3 etc. are awarded the contract at the rate at which it is awarded to L-1. Thus, ultimately, all the bidders supply the goods at the same rate which is fixed by the IOCL 75 after negotiating with L-1 bidder. The only difference is that bidder who is L-1 would be able to receive the order for larger quantity than L-2 and L-2 may get an order of more quantity than L-3.

(iv) It has also come on record that there are very few suppliers. For the tender in question, there were 50 parties already in the fray and 12 new entrants were admitted. Number of 12, in such a scenario, cannot be treated as less. Therefore, the conclusion of CCI that the appellants ensured that there should not be entry of new entrant may not be correct.

(vii) Since there are not many manufacturers and supplies are needed by the three buyers on regular basis, IOCL ensures that all those manufacturers whose bids are technically viable, are given some order for the supply of specific cylinder. For this purpose, it has framed its broad policy as well. This also shows that control remains with IOCL. Thus, the appellants appear to be correct when they say

that all the participants in the bidding process were awarded contracts in some State or the other which was aimed at ensuring a bigger pool of manufacturers so that the supply of this essential product is always maintained for the benefit of the general public. Had IOCL left some manufacturers empty handed, in all likelihood, they would have shut their shops. However, IOCL wanted all manufacturers to be in the fray in its own interest. Therefore, it was necessary to keep all parties afloat and this explains why all 50 parties obtained order along with 12 new entrants.

(viii) There is another very relevant factor pointed out by the appellants, viz., the governmental control which is regulated by law. As pointed out above, it is not only the three oil companies which can supply LPG to domestic consumers in 14.2 kg LPG cylinders as mandated in the LPG (Regulation and Distribution) Order, 2000 which is issued under the provisions of Essential Commodities Act, 1955, even the price at which the LPG cylinder is to be supplied to the consumer is controlled by the Government. Following features of the aforesaid LPG Order, 2000, are significant:

The LPG supplied in 14.2 kg gas cylinders is an essential commodity. The distribution of LPG in 14.2 kgs cylinders takes place as part of a public distribution system defined under clause 2(1) of the Order as "the system of distribution, marketing or selling of liquified petroleum gas by a Government Oil Company at the Government controlled or declared price through a distribution system approved by the Central or State Government". The price to the consumer is controlled by the Government. The supply of LPG to domestic consumers shall be made only in 14.2 kg 77 gas cylinders.

According to clauses 4 and 5 read with Schedule III of the LPG Order, parallel marketeers who supply and distribute LPG cylinders, may do so only for cylinders with size and specifications other than those specified in Schedule II.

91) The manner in which tendering process takes place would show that in such a competitive scenario, the bid which the different bidder would be submitting becomes obvious. It has come on record that just a few days before the tender in question, another tender was floated by BPCL and on opening of the said tender the rates of L-1, L-2 etc. came to be known. In a scenario like this, that obviously becomes a guiding factor for the bidders to submit their bids.

92) When we keep in mind the aforesaid fact situation on the ground, those very factors on the basis of which the CCI has come to the conclusion that there was cartelization, in fact, become valid explanations to the indicators pointed out by the CCI. We have already commented about the market conditions and small number of suppliers. We have also mentioned that 12 new entrants cannot be considered as entry of very few new suppliers where the existing suppliers were only 50. Identical products along with market conditions for which there would be only three 78 buyers, in fact, would go in favour of the appellants. The factor of repetitive bidding, though appears to be a factor against the appellants, was also possible in the aforesaid scenario. The prevailing conditions in fact rule out the possibility of much price variations and all the manufacturers are virtually forced to submit their bid with a price that is quite close to each other. Therefore, it became necessary to sustain themselves in the market. Hence, the factor that these suppliers are from different region

having different cost of manufacture would lose its significance. It is a situation where prime condition is to quote the price at which a particular manufacturer can bag an order even when its manufacturing cost is more than the manufacturing cost of others. The main purpose for such a manufacturing would be to remain in the fray and not to lose out. Therefore, it would be ready to accept lesser margin. This would answer why there were near identical bids despite varying cost.

93) Insofar as meeting of bidders in Mumbai just before the date of submission of tender is concerned, some aspects pointed out by the appellants are not considered by the CCI or the COMPAT at all. No doubt, the meeting took place a couple of days before the date of tender. No doubt, the absence of agenda coming on record would not make much difference. However, only 19 appellants had attended that meeting. Many 79 others were not even members or did not attend the meeting. In spite thereof, even they quoted almost same rates as the one who attended the meeting. This would lead us to the inference that reason for quoting similar price was not the meeting but something else. The question is what would be the other reason and whether the appellants have been able to satisfactorily explain that and rebut the presumption against them?

94) The explanation is market conditions leading to the situation of oligopsony that prevailed because of limited buyers and influence of buyers in the fixation of prices was all prevalent. This seems to be convincing in the given set of facts. The situation of oligopsony can be both ways. There may be a situation where the sellers are few and they may control the market and by their concerted action indulge into cartelization. It may also be, as in the present case, a situation where buyers are few and that results in the situation of oligopsony with the control of buyers.

95) To recapitulate, the two prime factors against the appellants, which are discussed by the CCI, are that there was a collusive tendering, which is inferred from the parallel behaviour of the appellants, namely, quoting almost the same rates in their bids. The parameters on the basis of which these aspects are to be judged are stated in Excel Crop Care Limited as follows:

"50. It needs to be emphasised that collusive tendering is a practice whereby firms agree amongst themselves to collaborate over their response to invitations to tender. Main purpose for such collusive tendering is the need to concert their bargaining power, though, such a collusive tendering has other benefits apart from the fact that it can lead to higher prices. Motive may be that fewer contractors actually bother to price any particular deal so that overheads are kept lower. It may also be for the reason that a contractor can make a tender which it knows will not be accepted (because it has been agreed that another firm will tender at a lower price) and yet it indicates that the said contractor is still interested in doing business, so that it will not be deleted from the tenderer's list. It may also mean that a contractor can retain the business of its established, favoured customers without worrying that they will be poached by its competitors.

51. Collusive tendering takes many forms. Simplest form is to agree to quote identical prices with the hope that all will receive their fair share of orders. That is what has happened in the present case. However, since such a conduct becomes suspicious and

would easily attract the attention of the competition authorities, more subtle arrangements of different forms are also made between colluding parties. One system which has been noticed by certain competition authorities in other countries is to notify intended quotes to each other, or more likely to a Central secretariat, which will then cost the order and eliminate those quotes that it considers would result in a loss to some or all members of the cartel. Another system, which has come to light, is to rotate orders. In such a case, the firm whose turn is to receive an order will ensure that its quote is lower than the quotes of others.

52. We are here concerned with parallel behaviour. We are conscious of the argument put forth by Mr Venugopal that in an oligopoly situation parallel behaviour may not, by itself, amount to a concerted practice. It would be apposite to take note of the following observations made by European Court of Justice in Dyestuffs:

"By its very nature, then, the concerted practice does not have all the elements of a contract but may *inter alia* arise out of coordination which becomes apparent from the behaviour of the participants. Although parallel behaviour may not itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not respond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market. Such is the case especially where the parallel behaviour is such as to permit the parties to seek price equilibrium at a different level from that which would have resulted from competition, and to crystallise the status quo to the detriment of effective freedom of movement of the products in the [internal] market and free choice by consumers of their suppliers."

At the same time, the Court also added that the existence of a concerted practice could be appraised correctly by keeping in mind the following test:

"If the evidence upon which the contested decision is based is considered, not in isolation, but as a whole, account being taken of the specific features of the products in question."

96) Having regard to the aforesaid principles in mind, we deal with the argument on oligopsony raised by the appellants.

97) Monopsony consists of a market with a single buyer. When there are only few buyers the market is described as an oligopsony. What is emphasised is that in such a situation a manufacturer with no buyers will have to exit from the trade. Therefore, first condition of oligopsony stands fulfilled. The other condition for the existence of oligopsony is whether the buyers have some influence over the price of their inputs. It is also to be seen as to whether the seller has any ability to raise prices or it stood reduced/eliminated by the aforesaid buyers.



60. The stand taken by the CCI that the Anonymous complaint can be covered into suo motu inquiry. It has also been explained elaborately by the CCI that anonymous information/complaint can always result into suo motu inquiry and form the basis of prima facie opinion for initiation of investigation, if it has some substance, under Section 26(i) of the Act.

In this context, there is a need to refer Competition Commission of India (General) Regulations 2009 particularly, Regulations 10, 11, 12, 13, 15 and 16. For brevity and clarity, we are reproducing the same:-

"10 Contents of information or the reference. -

(1) The information or reference (except a reference under sub-section (1) of section 49 of the Act) shall, inter alia, separately and categorically state the following seriatim:-

- (a) legal name of the person or the enterprise giving the information or the reference;
- (b) complete postal address in India for delivery of summons or notice by the Commission, with Postal Index Number (PIN) code;
- (c) telephone number, fax number and also electronic mail address, if available;
- (d) mode of service of notice or documents preferred;
- (e) legal name and addressees of the enterprise(s) alleged to have contravened the provisions of the Act; and
- (f) legal name and address of counselor or other authorised representative, if any.

(2) The information or reference referred to in sub-regulation (1) shall contain-

- (a) a statement of facts;
  - (b) details of the alleged contraventions of the Act together with a list enlisting all documents, affidavits and evidence, as the case may be, in support of each of the alleged contraventions;
  - (c) a succinct narrative in support of the alleged contraventions;
  - (d) relief sought, if any;
  - (e) such other particulars as may be required by the Commission.
- (3) The contents of the information or the reference mentioned under sub-regulations (1) and (2), along with the appendices and attachments thereto, shall be complete and duly verified by

the person submitting it.

11 Signing of information or reference. -

(1) An information or a reference or a reply to a notice or direction issued by the Commission shall be signed by-

(a) the individual himself or herself, including a sole proprietor of a proprietorship firm;

(b) the karta in the case of a Hindu Undivided Family (HUF);

(c) the managing director and in his or her absence, any director, duly authorised by the board of directors in the case of a company;

(d) the president or the secretary in the case of an association or society or similar body or the person so authorised by the legal instrument that created the association or the society or the body;

(e) a partner in the case of a partnership firm;

(f) the chief executive officer in the case of a co-operative society or local authority;

(g) in the case of any other person, by that person or by some person duly authorised to act on his behalf.

(2) A reference shall be signed and authenticated by an officer not below the rank of a Joint Secretary to the Government of India or equivalent in the State Government or the Chief Executive Officer of the Statutory Authority if the same has been received from the Central Government or State Government or Statutory Authority. (3) Without prejudice to the provisions of this regulation, the counsel may also append his or her signature to the information or reference as the case may be.

12 Procedure for filing of information or reference. - (1) Information or reference or responses thereto to the Commission shall be presented to the Secretary or to an officer authorised in this behalf by the Secretary, in person or sent by registered post or courier service or facsimile transmission addressed to the Secretary or to such authorised officer.

(2) Any separate or additional document(s) that a party to the proceedings wishes to rely upon in support of its information, or reference shall be filed in the form of a "paper book", at least seven days prior to the date of the ordinary meeting, after serving the copies of the said document(s) on the other parties to the proceedings, with documentary proof of such service. Such documents shall be serially numbered, prefaced by an index and shall be supported by a verification.

(3) An information(s) or reference sent by post or courier service or facsimile transmission under sub-regulation (1) shall be deemed to have been presented to the Secretary or to the officer authorised by the Secretary, on the day on which it is received in the office of the Secretary or the

authorised officer, as the case may be. 13 Procedure for filing of information or reference in electronic form. -Subject to the provisions of regulation 12, information or a reference to the Commission may be sent by a person or an enterprise to the Secretary in an electronic form duly authenticated with digital signature by the subscriber as and when so desired by the Commission through a public notice. Explanation. -For the purpose of this regulation,-

(a) "digital signature" means the digital signature as defined under clause (p) of section 2 of the Information Technology Act, 2000 (21 of 2000);

(b) "electronic form" with reference to an information or a document means the electronic form as defined under clause, (r) of section 2 of the Information Technology Act, 2000 (21 of 2000);

(c) "subscriber" means the subscriber as defined under clause (zg) of section 2 of the Information Technology Act, 2000 (21 of 2000). 14 Powers and functions of the Secretary. -

(1) The Secretary shall have the custody of records of the Commission and shall exercise such other functions as may be assigned by the Chairperson.

(2) Subject to the Competition Commission of India (Meetings for Transaction of Business) Regulations, 2009, the Secretary shall circulate to all concerned, the date, time and place of each meeting, as per the directions of the Chairperson.

(3) The Secretary shall be the nodal officer on behalf of the Commission for,-

(a) making or receiving all statutory communications;

(b) entering into any formal relationships, including signing of any memorandum or arrangement, with competition authority or any agency of any foreign country, with the prior approval of the Commission and the Central Government as per section 18 of the Act. (4) The Commission may sue or be sued in the name of the Secretary and the Commission shall be represented in the name of the Secretary in all legal proceedings, including appeals before the Tribunal. (5) Subject to the provisions of section 51 of the Act the Secretary shall assist the Committee of Members constituted under sub-section (3) of section 51 of the Act for,-

(a) preparation and approval of the annual budget of the Commission;

(b) administration of the competition fund.

(6) The Secretary shall keep in custody the official seal of the Commission. The official seal of the Commission shall not be affixed to any document including the certified copies of the orders of the Commission, save and under the authority in writing of the Secretary. (7) Subject to sub-regulation (1), to ensure a timely and efficient disposal of the matters brought before the Commission and for achieving the objectives of the Act the Secretary shall have the following powers and functions:-

- (a) to receive, endorse and categorise all the information, references, applications or documents including miscellaneous applications and other documents for transfer of proceedings and application for adjournment etc.;
- (b) to check the amount of fee received where applicable and to ensure the timely deposit of the same in the bank account of the Commission;
- (c) to scrutinise all information, references, applications or documents so received to find out whether they are in conformity with the rules and regulations;
- (d) to point out defects in such information(s), references, applications or documents to the parties requiring them to rectify such defects;
- (e) to serve copy of the information, reference, application or document along with the enclosures to the concerned parties including the Director General, within a reasonable time;
- (f) to serve the notice of the date of the ordinary meeting of the Commission to consider the information or reference or document to decide if there exists a prima facie case and to convey directions of the Commission for investigation or to issue notice of inquiry after receipt and consideration of the report of the Director General;
- (g) to bring on record executors, administrators or other legal representatives, in case of death of any party or adjudication of a party as insolvent, upon an application by any party to the proceedings;
- (h) to verify the service of notice or other processes and to ensure that the parties are properly served;
- (i) to requisition records on the direction of the Commission from the custody of any authority;
- (j) to allow inspection of records of the Commission;
- (k) to return the documents filed by any party or authority on orders of the Commission;
- (l) to certify and issue copies of the orders of the Commission to the parties;
- (m) to grant certified copies of documents filed in the proceedings to the parties, in accordance with these regulations;
- (n) to grant certified copies of the orders of the Commission for publication, in accordance with these regulations;

(o) to dispose of all matters relating to the service of notices or other related processes, applications for issue of fresh notice or for extending the time for or ordering a particular method of service on a party including a substituted service by publication of notice by way of advertisement in the newspaper or putting it on the website, as the case may be;

(p) to compile and preserve record of any proceeding during an ordinary meeting including-

(i) the chronology of events;

(ii) the initiating document;

(iii) the notice of the meeting;

(iv) report of the Director General, if any;

(v) opinion of expert, if any;

(vi) any interim order made;

(vii) all documentary evidence filed;

(viii) the transcript, if any, of the oral evidence given;

(ix) the final order or decision of the Commission;

(q) to disclose information subject to section 57 of the Act;

(r) to ensure confidentiality of documents or evidences or statements or any analysis as per these regulations, by keeping them in safe custody;

(s) to undertake maintenance of records including weeding out of records in accordance with retention schedule in force and in accordance with directions of the Chairperson issued from time to time;

(t) to file complaint before the Chief Metropolitan Magistrate, Delhi for non-compliance with the orders or directions of the Commission under sub-section (3) of section 42 of the Act, if so directed by the Commission.

15 Procedure for scrutiny of information or reference. - (1) Each information or reference received in the Commission shall be scrutinised by the Secretary to check whether it conforms to these regulations and the defects, if any, shall be communicated to the party within a reasonable time not exceeding,-

(a) fifteen days in case of an information or reference received under clause (b) of sub-section (1) of section 19 of the Act; or

(b) seven days in case of a reference received under section 21 or sub-section (1) of section 49 of the Act.

(2) The information provider referred to in clause (a) of sub-section (1) of section 19 of the Act or the Central Government or the State Government or the statutory authority referred under clause (b) of sub-section (1) of section 19 or in sub-section (1) of section 49 of the Act, as the case may be, shall, on receipt of the communication about the defects under sub-regulation (1), remove the defects within-

(a) thirty days of receiving the intimation in case of an information or reference under clause (b) of sub-section (1) of section 19 of the Act; or

(b) fifteen days of receiving the intimation in case of a reference under section 21 or sub-section (1) of section 49 of the Act. (3) In case the defects are not removed by the Central Government or the State Government or the statutory authority or the concerned party, as the case may be, as per the provision of sub-regulation (2), the information or the reference or the application connected therewith shall be treated as invalid: Provided that the Central Government or the State Government or the statutory authority or the concerned party shall be entitled to file fresh information, reference or application for consideration by the Commission together with applicable fees.

(4) In the event of the information having been treated as invalid under sub-regulation (3), the fee paid on such information shall stand forfeited.

(5) Nothing contained herein above shall preclude the Commission from using the contents of such information or reference in any manner as may be deemed fit, for inquiring into any possible contravention of any provision of the Act: Provided that the time taken in removing the defects in such references shall not count towards the period of sixty days provided for giving of opinion by the Commission in sub-section (2) of section 21 or sub-section (1) of section 49 of the Act, as the case may be.

#### 16 Opinion on existence of prima facie case. -

(1) The Secretary, after scrutiny and removal of defects, if any, in an information or reference, as the case may be, shall place the same before the Commission to form its opinion on existence of a prima facie case.

(2) In cases of alleged anti-competitive agreements and/or abuse of dominant position, the Commission shall, as far as possible, record its opinion on existence of a prima facie case within sixty days. (3) The Commission shall, as far as possible, hold its first ordinary meeting to consider whether prima facie case exists, within fifteen days of the date of placement of the matter by the

Secretary under sub-regulation (1).

All these suggest that proceedings under Section 26(1) can be initiated either on a complaint or suo motu. Section 19(1)(a) explicitly provide on this issue particularly the reference to Regulation.

However, as a general practice, referring both to Competition Act, 2002 and related Competition Commission of India General Regulations, 2009, it is not proper to go ahead with anonymous complaint. Had it been a mandatory condition, then the Regulations should not have provided a particular procedure. The preamble to the Act is as follows:

"Preamble: An Act to provide, keeping in view of the economic development of the country, for the establishment of a commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."

Hence, the purpose of the Act is economic development of the country as well as to protect the interest of consumer. This reflects that the purpose of the Act is to ease the commercial environment for the development of the country. This is equally important. Anonymous complaint, if entertained, then it will be difficult for the business sector to grow as in the business also there is rivalry and this rivalry can easily be used in the format of Anonymous petition. The CCI is to take appropriate care in the future.

Since in this case, the matter has progressed too far by the CCI and even DG has conducted the detailed investigation and has observed a symmetrical pattern resulting into a curtail, so we do not want to set aside the order of CCI on this count alone as mere irregularity in initiation of proceeding will not vitiate the investigation and inquiry.

61. On the issue of Director General's investigation report and cross-examination report were time barred as alleged by the Appellant, there is a need to refer paragraphs 22,23 of the Impugned Order and the same are depicted below for explicit reference:

"22. As regards the next contention of some of the Ops that the Investigation Report and Cross-Examination Report prepared by the DG are time barred, it is pertinent to note contents of Regulation 20 of the General Regulations provides as under:

"(2) The Commission shall direct the Director General to submit a report within such time as may be specified by the Commission which ordinarily shall not exceed sixty days from the date of receipt of the directions of the Commission. (3) The Commission may, on an application made by the Director General, giving sufficient reasons extend the time for submission of the report by such period as it may consider reasonable."

Further, Section 26(3) of the Act states that the DG shall submit a report on his findings within such period as may be specified by the Commission. Thus in terms of the provisions of the Act, as well as the regulations framed thereunder more particularly under Regulation 20(3) of General Regulations, the Commission is empowered to grant appropriate time to the DG to investigate and submit the Investigation Report and there is no period of limitation prescribed for that purpose. Accordingly, the Commission finds no merit in the argument of the Ops in this regard.

23. With respect to the preliminary issue raised by some of the Ops that there was delay in passing of the order passed by the Commission under Section 26(1) of the Act, the Commission notes that as per the provisions of Section 26(1) of the Act read with Regulations 16(2) of the General Regulations, the Commission shall 'as far as possible' record its opinion on the existence of a prima-facie case within 60 days. It is clear from the bare reading of Section 26(1) of the Act that the expression used is 'as far as possible' which does not connote a definite time period. Same is true of Regulation 16(2) of General Regulations. Thus, it cannot be said that there is any delay in passing of prima-facie order. Moreover, directions under Section 26(1), have to be issued, after consideration of all the facts and circumstances justifying such course of action. Thus, there is no merit in the contentions raised by the Ops in this regard." On this count we agree with Competition Commission of India as it has elaborately explained with reasons.

62. Section 26(3) deals with the requirement to submit a report by DG within such period as may be specified by the Commission. Regulation 20 of the General Regulation deals with investigation by DG. This requires DG to submit a report within such time as may be satisfied by the commission. However, the same is restricted to 60 days in general in Ordinary Course from the date of receipt of directions of the Commission. This Regulation also empowers the Commission to extend the time for submission of the Report by such period on an Application made by DG when sufficient reasons are provided. The said regulation does not indicate that only one or two extensions can be granted to the DG. Learned counsel of CCI brought to the notice to the Bench that the investigation was lengthy and time consuming fact finding exercise and hence it has taken an abnormally a high period of over 900 days. Investigations being involved of number of organisations, we do not find any irregularity in this.

63. The composition of CCI Bench, which passed the impugned order, did not contain judicial Member. Issue was raised by the Appellants that constitution of CCI Bench is not in accordance with law. It was raised by the Appellant that the Impugned order was passed by three Members of CCI and none of them were either holding judicial Office or passed professional qualification with substantial experience in practice of Law whereas CCI is passing adjudication order, imposing penalty etc. which needs to be set aside.

However, we reiterate that this issue is sub judice before Hon'ble Supreme Court so desist from making observations on this.

64. On the issue of non-analysis of appreciable adverse effect on Competition of India for the cylinder manufacturers action, it is an undisputed fact that CCI has not made any such analysis which reflects that there will be an appreciable adverse effect on competition by withdrawing bid



before the appointment of price bid, as permitted by the Tender Conditions of HPCL. However, CCI has gone by establishing the Commission Conduct of the cylinders manufacturer and it has found that it fall within the provision of Section 3(3) of the Act. For brevity and clarity, we reproduce Section 3 of the Act.

"3. Anti-competitive agreements.--

(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which--

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition: Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation.--For the purposes of this sub-section, "bid rigging"

means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including--

(a) tie-in arrangement;

(b) exclusive supply agreement;

(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India. Explanation.--For the purposes of this sub-section,--

(a) "tie-in arrangements" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

(b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;

(c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;

(d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;

(e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged. (5) Nothing contained in this section shall restrict--

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under:

(a) the Copyright Act, 1957 (14 of 1957);

(b) the Patents Act, 1970 (39 of 1970);

(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

(e) the Designs Act, 2000 (16 of 2000);

(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

65. What has been observed that collective withdrawal of bids is established on the following facts:

1) Accepting a few, generally, the reason for withdrawal are identical of the common. This being the situation, when some such bidders are located at different destinations and have bid for different stage

2) Reason for withdrawal submitted by HPCL deferred from what they have submitted before DG.

3) In between few vendors, there were exchange of format of withdrawal letter.

4) Common IP address used for bid submission, it has been found that submission of bids by various manufacturers, not related to each other, has been filed from a common IP address as revealed from e-

mail of 2012-2013 with cylinder manufacture were also sensitive and strategic information relating to bid and negotiation strategy. All these lead us to believe that preferential of Section 3 (3)(d) of the Act has happened.

5) Excepting in view cases as negotiations were under the Act, in case of Appeal No. 55/2019, the Appellant M/s Faridabad Metal Udyog Pvt. Ltd. withdrew their Tender No. 2 because of some family dispute, as stated above.

6) Similarly, in the case of M/s Tirupati Containers Pvt. Ltd in Appeal No. 56/2019, the Appellants had contended as here was no withdrawal as it was not done by various official of the Company but it has been done by an authorised employee of the Company which has since been removed. The matter has already been referred to HPCL also and it was pointed out that Company has provided the specific signature of the authorised person to the HPCL which was duly approved by Resolution letter dated 08.02.2013. This case is also not covered by Section 3(3)(d) of the Act and apart from this the Appellant is Small Industry and it is not a member of any Association. Hence, this Appeal

may also be exempted from the rigour of Competition act violation.

7) These exception case, as pointed out above, also needs to be reviewed by CCI in great depth before imposing any penalty either on the Company or its Director.

66. CCI reliance on cartel is the only ground that reflects Anti-Competitive Agreement, resulting from withdrawal of bid. In this case it is very much clear that cylinder Manufacturers have acted in concert and hence invited the wrath of Section 3 of the Act. It is also established the fact that 19 Ops were identified to have exchanged the letter of withdrawal which had similar language and format. This fact is an established fact and hence it is coming in the gamut of cartel. However, number of Appellant/Parties penalised by CCI are either SME or MSME and generally these SME & MSME has not much infrastructure to bid individually hence they need of considering a lenient view while imposition of penalties elaborately by CCI. In paragraphs 121 and 131 of the Impugned order which reflect that a heavy penalty imposed on the OPs/Appellants need consideration at the end of CCI.

67. It is apparently clear that the judgment of Hon'ble High Court of Delhi is under challenge before the Hon'ble Supreme Court in Civil Appeal No. 4887-98/2021 filed by the Union of India and the CCI. It is also relevant to mention subsequent to the judgment of Hon'ble Delhi High Court in Mahindra Electric Mobility Ltd. Vs. CCI & Anr. (2019) SCC Online (Del) 8032 as stated supra, the issue was considered in CADD Systems & Services Ltd. v. Competition Commission of India (2019 SCC Online Del 9252 at para 16 to 21) which held that the order of CCI would not be held to be vitiated on this ground alone. However, we wish not to pass any comments on this as Hon'ble Supreme Court is seized with the matter.

68. In this context, we refer Sections 15(a) and 15(b) of the Act which provide that vacancy etc. not to invalidate proceeding of the CCI. However, it is a constitutional issue and Hon'ble Constitution Court deals with this subject and require final adjudication by Hon'ble Supreme Court as stated supra, this Tribunal is unable to make the comments as it is in the fitness of the things that this Tribunal has to work within the four boundaries of the Competition Act and related Regulations. Hence, we are concerned with the provisions of Section 15 of the Competition Act, 2002 and do not wish to further progress in this matter.

69. One area of bone of contention is levying penalty on the basis of the turnover for the preceding three years upon each such person or enterprises which are parties to such agreement or abuse in terms of Section 27 of the Act. CCI has taken a stand that it has adopted the legally correct approach in taking three proceeding order with reference to the Report of DG dated 06.10.2016, i.e., Financial Year 2013-14, 2014-15 and 2014-2015. If any violation has been found in a particular year, then appropriate preceding years in terms of Section 27(b) of the Act, three last three preceding years prior to the event of the financial year and it should not be calculated with reference to DG report or CCI order etc. We reproduce Section 27(a) and Section 27(b) of the Act.

"27. (a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such

abuse of dominant position, as the case may be;

27. (b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse: Provided that in case any agreement referred to in section 3 has been entered into by any cartel, the Commission shall impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent. of the average of the turnover of the cartel for the last preceding three financial years, whichever is higher;"

Hence Penalty requires recomputation by Competition Commission of India.

70. As in this case it is an undisputed fact that rigging of Tender 2 has happened in January and February, 2013 (the event period) so the appropriate preceding three years as per Section 27(b) of the Act be taken for the Financial Years 2009-2010, 2010-2011 and 2011-2012 for the purpose of calculating average annual turnover for levy of penalty.

71. It is undisputed fact that the LPG cylinder manufacturer/supplier market is under Oligopsony market where there are only three buyers i.e., Public Sector Company, IOCL, HPCL & BPCL. There is need to understand that the three buyers will have to depend on approved manufacturers/suppliers, as approved by the 'Petroleum and Exclusive Safety Organisation as explained above. It is also not in dispute that originally these markets were operating under Fixed Price Contract System as the process was based on actual cost and other parameters to be done by concerned Public Sector. At a later stage, all have adopted tendered pricing but the bidder's quality and manufacturing plant requires requisite approval from Petroleum and Exclusive Safety Organisation. Hence the seller has a limited choice and ability to raise process as much as possible and the mechanism of negotiation is already existing. HPCL is already doing and has done in this case also. Hence we do not disbelieve HPCL that they are not determining the reasonable price. There are other authorities like Chief Vigilance Commissioner and C&AG also to appropriately consider, if things went wrong. However, we are of the view that the Competition Act is limited to provision initiated in the preamble and relevant section of the Act and while determining the violations, which are must, also keep in mind, the preamble of the Act while fixing penalty.

72. All these, as stated supra, lead us to record that cartel was existing in the case and requires compliance of Section 27(a) of the Competition Act in letter and spirit by these Appellants and the issue of penalty of Ops/Appellants in each case be reconsidered by the Competition Commission of India considering all these organisations, being SME or MSME and their licensee and appropriate reduction/waiver by considering each individual case.

73. With these observations, we approve the impugned order of CCI in the formation of cartel and also we are concurring with the paragraph-121 of the impugned order as stated below:

"121. The Ops and their respective office bearers are directed to cease and desist from indulging in practices, in future which are found to be in contravention of the provisions of Section 3(3) (d) read with Section 3(1) of the Act."

74. Accordingly the cases are directed to be remanded back to CCI for re- computation/review of penalty after hearing all the parties.

75. With these observations we dispose of all the 73 Appeals as stated above. No order as to cost.

[Justice Rakesh Kumar] Member (Judicial) [Dr. Ashok Kumar Mishra] Member (Technical) bm