

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Competition Appeal (AT) No. 33 of 2022

**[Arising out of the Order dated 17.03.2021, passed by the
Competition Commission of India in Case No. 90 of 2016]**

IN THE MATTER OF:

1. M/S Klassy Enterprises (Earlier "Klassy Computers") through its Sole Proprietor Mr. Venkatesh Darak Office:
Shop No. 4, Ishana Complex, Bhusari Coloney Puad Road,
Kthrud Dep,
Pune: 411038
Mob: +91 9595822921
Email: Klassy.computers@gmail.com

...Appellant

Versus

1. Competition Commission of India,
Office: 9th Floor, Office Block - 1,
Kidwai Nagar (East), Opposite Ring Road -
New Delhi: 110023, India
Email: secy@cci.gov.in
2. Usha International Ltd.
Plot No. 15, Institutional Area, Sector-32
Gurgaon-122001, Haryana
Email: corporate@ushainternational.com
3. M/S Nayan Agencies
Shukarawar Peth,
Gadhikhana, Pune
411002, Maharashtra
Mob: +919764005246
Email: nayanagencies@gmail.com
4. M/S Jawahar Brothers
Office: Dhawalgiri Baramati Pune
413133 Maharashtra
Mob: +91 9764005246
Email: Jawaharbrothers@yahoo.com
5. Pune Zila Parishad
(Through Chief Executive Officer)
Office: Velsali Road, Pune: 411001
Email: Ceozp.pune@maharashtra.gov.in
6. People's All India Anti-Corruption and Crime
Prevention Society (IP)
Office: 70/2, Gali No. 15-B,
Swatantra Nagar,
Narela Delhi: 110040

...Respondent No. 1

...Respondent No. 2

...Respondent No. 3

...Respondent No. 4

...Respondent No. 5

Present:

For Appellant : Mr. Pawan Reley, Mr. Akshay Lodhi, Mr. Gaurav Kumar, Mr. Tavish Rawat, Ms. Simran Singh, Mr. Utkarsh, Advocates.
For Respondent : Mr. Dinesh Chandra, Dy. Director, CCI.
Mr. MM Sharma, Mr. Ankit Singh Rajput, Advocates for R-1.
Mr. Pawan Sharma, Mr. Anuj Shah, Advocates for R-2.

J U D G M E N T
(Hybrid Mode)

[Per: Justice Mohd. Faiz Alam Khan, Member (Judicial)]

The present appeal has been filed by Klassy Enterprises (Earlier "Klassy Computers) (the "Appellant"), under Section 53 B of the Competition Act, 2002 ("Act"), challenging the order of the Competition Commission of India ("Respondent Commission") dated 17.03.2021 ("Impugned Order") passed by the Respondent Commission under Section 27 of the Act in Case No 90 of 2016 titled as People's All India Anti-Corruption and Crime Preventive Society v. Usha International Ltd & Ors. whereby the commission has hold the appellant guilty of anti-competitive conduct and bid rigging pertaining the tender floated by respondent No.5, for supply of Picofall-cum-Sewing machines and further imposed penalty of Rs. 10,00,000/- (Rs. Ten Lakh only) upon the appellant and other two respondents.

2. Brief facts necessary for disposal of this appeal are, that Informant (Respondent No. 6) is a society registered under the Societies Registration Act, 1860 and stated to be engaged in the business of sale of new age home appliances such as sewing machines, fans, power products, water coolers,

water dispensers, etc. Appellant (OP-2), Respondent No. 3 (OP-3) and Respondent No. 4 (OP-4) were the authorised dealers of Respondent No. 2 (OP-1). Respondent No. 5 (OP-5) is the local government body that administers the rural areas of Pune district of Maharashtra and respondent No.6 is the informant.

3. It is reflected from the record that an Information/ Complaint was filed by the Informant with the Commission in terms that OP-5 had invited bids, vide e-tender no. 1/15-16 dated 07.11.2015 ('Tender'), from eligible vendors for procurement of Picofall-cum-Sewing Machine with Indian Standard Institute (ISI) mark for distribution amongst the people belonging to backward classes, women, and disabled persons living in the rural areas of Pune district under a scheme announced by the Social Welfare Department (SWD) of the Government of Maharashtra. The Government of Maharashtra, vide resolutions dated 02.01.1992 and 30.10.2015, had specified that the government departments should purchase products bearing ISI mark only through public procurement and in the event of non-availability of ISI mark products, the concerned department may opt for non-ISI mark products provided that the products to be purchased should be in conformity with the standards specified by ISI.

4. It was further stated in the complaint/information that despite Picofall-cum-Sewing Machine bearing ISI mark were available in the market, Respondent No. 5, at the behest of Respondent No. 2 obtained equivalent specifications from the Government Polytechnic Institute, Pune vide letter dated 14.09.2015 and then invited bids and it was done so that the product specifications of Respondent No. 2 could only match with the specifications

of the Government Polytechnic Institute, Pune. It is further alleged that Appellant, Respondent No. 3 and Respondent No. 4 submitted identical bids (prices) and they also agreed as to who will submit the lowest bid and determined the common norms to calculate prices and terms of the bids. After the technical evaluation, the bids of Appellant, Respondent No. 3 and Respondent No. 4 were accepted and the bid of SVS Chemicals was rejected due to non-submission of 'experience certificate'.

5. It is also alleged in the information that Respondent No. 2 provided authorisation letters to Respondent No. 5, in favour of Appellant, Respondent No. 3 and Respondent No. 4, mentioning itself as the authorised marketer of Usha-Jenome sewing machine, while the original manufacturer of the sewing machines sold by Respondent No. 2 was Janome (Thailand) Co. Ltd. and Respondent No. 2 was only its authorised Indian representative and neither Respondent No. 2 nor Appellant or Respondent No. 3 and Respondent No. 4 fulfil the eligibility criteria for the aforesaid tender.

6. It is also stated that due to extraneous consideration, Respondent No. 5 had deliberately overlooked all the aforesaid aspects to favour Respondent No. 2 and the terms of the bid were formulated in such a manner that none other than Respondent No. 2 and its dealers can fulfil the same. It was also alleged that the Appellant and Respondent No. 2 to Respondent No. 5 had indulged in malpractices and corruption causing huge loss to the public exchequer.

7. It is further alleged that Respondent No. 2 submitted three bids through its authorised dealers e.g. Appellant, Respondent No. 3 and

Respondent No. 4 with meagre price difference which is against the guidelines of the Central Vigilance Commission (CVC) and when the bids were opened on 08.01.2016 it was found that Appellant had quoted per unit price of Rs. 11,900/- (Rs. 12,621/- with taxes); Respondent No. 3 had quoted per unit price of Rs. 11,931/- (Rs. 12,649/- with taxes); and Respondent No. 4 had quoted per unit price of Rs. 11,921/- (Rs. 12,638/- with taxes). Subsequently, Appellant vide its letter dated 11.01.2016 reduced the per unit price from Rs. 12,621/- to Rs. 12,521/- which was again reduced to Rs. 12,250/- and the tender was ultimately awarded to Appellant. The price quoted by Appellant was almost double the Maximum Retail Price (MRP) of the same machine marketed and distributed by Respondent No. 2 in the open market and this clearly shows that Respondent No. 5 awarded the contract at a very high price due to extraneous consideration. Moreover, Appellant, Respondent No. 3 and Respondent No. 4 have submitted their respective bids through the same IP address and the fee for tender and EMD was also paid through a common bank, i.e., the State Bank of India.

8. It is further alleged that Respondent No. 5 had floated another tender on 25.08.2016 to purchase same Picofall-cum-Sewing Machine to the tune of Rs. 4,10,90,000/- wherein only the delivery period and payment terms were changed, and a corrigendum was published, in this regard, on the last date of submission of tender, i.e. on 07.09.2016. Six bidders, viz. Appellant, Respondent No. 2, Respondent No 3, Respondent No 4, Suttraway Engg. Works Pvt. Ltd., and M/S Sunil Traders participated in that tender and Respondent No 5, again issued a supply order on 07.09.2016 worth Rs.

2,37,77,250/- to Appellant before concluding the current bidding process, on the basis of previous year's tender process, which is per se illegal and unlawful and it is cartel with Appellant, Respondent No. 3, Respondent No. 4 and Respondent No. 5 to eliminate competition in the market which is in violation of the provisions of the Act. Request has been made initiate an inquiry into the aforesaid conduct of the OPs and pass an order holding the aforesaid conduct of the OPs to be in contravention of the provisions of Section 3(3) of the Competition Act.

9. The Commission after considering the Information and hearing the parties passed an order on 22.03.2017, under Section 26(1) of the Act, directing the Director General ("DG") to investigate the allegations as well as the role of the officials/persons who at the time of contravention of the provision of the Act, if any, were in-charge and responsible.

10. The DG submitted its investigation report on 28.03.2018 and framed following two issues for the purpose of investigation;

(a) Whether there is cartelisation and bid rigging/collusive bidding in Tender No. 1/2015-16 dated 07.11.2015 floated by the Pune Zilla Parishad for supply of Picofall-cum-Sewing Machine? If yes, who are the Opposite Parties involved in the cartelisation and bid rigging/collusive bidding in contravention of the provisions of Section 3 of the Act?

and

(b) If the answer to Issue (a) is in affirmative, who were the persons/officers in charge of and responsible for the conduct of the business of the OPs concerned at the time of the said contravention?

11. The DG in his report has found that the Appellant at various stages of the bidding use his own funds for bids of Respondent No. 3 and Respondent No. 4 and they all use, common IP address, which belong to the cyber cafe of the Appellant for filling up all the bids and also that Appellant, Respondent No. 3 and Respondent No. 4 were in close association and coordination on a regular basis and also with regard to various other tenders floated by the authorities in the region around the same time and found the common thread and scheme for such coordination between them and concluded that there was prior meeting of minds and coordination amongst Appellant, Respondent No. 3 and Respondent No. 4 in contravention of the provisions of Section 3(3)(d) read with Section 3(1) of the Act.

12. The investigation report of the DG was considered by the commission and a copy of the same was forwarded to the parties and the other individuals found responsible for filing their objections/suggestions thereto along with financial details. That Appellant filed its objection on 5.07.2018. and after hearing the parties the Commission vide order dated 04.10.2018 directed the DG to make further investigation/ analysis and submit a revised comprehensive Investigation Report after incorporating and analysing the replies filed by Respondent No. 2 besides providing opportunity of cross-examination to the OPs.

13. Accordingly the DG submitted its Supplementary Investigation Report on 23.10.2019 which was considered by the commission in its ordinary meeting held on 10.02.2020 and decision was taken to forward a copy of the same to the Informant, Opposite Parties and the individuals who were

identified by the DG for the purposes of Section 48 of the Act for filing their objections/suggestions on both the Investigation Report and Supplementary Investigation Report dated 28.03.2018 and dated 23.10.2019, respectively. The Appellant filed its objection on 31.08.2020 pertaining to the above reports.

14. The Commission after considering all the facts and evidence of the case as well the reports submitted by the DG, found substance in the allegations made in the information and through impugned order dated 17.03.2021 passed in Case no. 90 of 2016, in terms of Section 27 (a) of the Act, directed Appellant and Respondent No. 3 and 4 and the individuals of R-4, who were held liable in terms of the provisions of Section 48 of the Act, to cease and desist in future from indulging in practices which have been found to be in contravention of the provisions of Section 3 of the Act further to pay the penalty to the tune of Rs. 10,00,000/- (Rupees Ten Lakhs Only) within a period of 60 days from the receipt of the order.

15. Ld. Counsel for the Appellant despite given an opportunity to file written submissions did not file any written submission within the time stipulated, however, in his oral submissions, Ld. Counsel for the Appellant submits that the impugned order has been passed by the Commission without their being any evidence of either forming of any cartel or of any bid rigging and the Commission has materially erred in drawing a presumption under Section 3(3) of the Act without their being any evidence in this regard and has completely ignored the fact that vide letter dated 11.01.2016 the Appellant had reduced the bid price from 12,621/- to Rs. 12,521/- and further reduced it to Rs. 12,250/- and it

is only thereafter the tender was awarded to it and had there been any cartel formed amongst Appellant and Respondent No. 3 and 4 then the Appellant would never have reduced the price of the sewing machine in the aforesaid manner as there were only three bidders left in the tender who were the authorized dealers of Respondent No. 2 (who must have known that whosoever wins the bid, the benefit would be to Appellant only).

It is further submitted that the Respondent Commission has further failed to consider the correct position of law laid down by the Hon'ble Supreme Court of India and Statutory Appellate Tribunal of the Respondent Commission that agreements mentioned in Section 3(3) could not raise a presumption without proof that such agreement shall have an appreciable adverse effect on competition and these agreements alone could not be treated as conclusive proof of the fact that it would result in appreciable adverse effect on competition. Whereas, in this case, Appellant vide letter dated 11.01.2016 has reduced the bid price (inclusive of taxes) from Rs. 12,621/- to Rs. 12,521/- and further to Rs. 12,250/-.

16. It is further submitted that the impugned order suffers from non-application of judicial mind and the Commission has blindly adopted the reports submitted by the DG as truthful except with regard to Respondent No. 2.

17. It is also submitted that the impugned order is based on conjectures and surmises as the reports of the DG had failed to project any agreement or understanding as required under Section 3(1) of the Act which is *sine qua non* to establish a violation under Section 3 of the Act

and the Commission did not take into consideration the evidence produced by the Appellant which may reflect that earlier also in one tender, there has been a margin of only two rupees in the bids of various bidders and this material fact has been ignored that parties who had participated in the bid were expert bidders who knew the nature of the relevant market, organizational structure and economic and business justifications, very well, therefore, the difference of thin margin between their bids is a natural corollary which may not be sufficient to infer any cartel or agreement of rig bidding.

18. It is further submitted that the Commission has taken into consideration the payment and refund of tender fee and the EMD in order to infer a cartelization and agreement of rig bidding but failed to take into consideration the evidence provided by the Appellant. Elaborating further, it is submitted that on earlier occasions also the Appellant had submitted EMD for other bidders where he was not a party to any tender and commission did not take into consideration this fact that the Appellant also indulge in the business of cyber café and also having profession of 'tender filling' and his services are available to public at large and anybody could use the same by paying the necessary charges/Fee and employees of the Appellant used to get the work of filling technical envelope which consists of only uploading of certain documents and submission of tender fee and deposition of earnest money etc. and so far as the commercial envelope is concerned, it is filled by bidders and it appears that the impugned tender and relevant record has not been properly pursued by the DG.

19. It is further submitted that the Commission has completely ignored the fact that the Appellant is in a business of tender filling and he used to charge in lump sum for tender filing and Respondent No. 3 and 4 were his regular clients and the Appellant was in fact waiting to receive some more tender to be filled from the Respondent No. 3 and 4 and thereafter to take the whole of the fee and circumstance of not taking any fee or charges may not be taken as adverse to the Appellant.

20. It is vehemently submitted that filing of the bids by the single IP address of the Cyber Cafe of the Appellant is not a circumstance which may be taken against the Appellant as the Appellant had given justification for the same and similarly, even on relying on call data records (CDR) of the Appellant and other Respondents the Commission has not considered the justification given by the Appellant and other Respondents and has ignored this fact that in the locality like Pune Zila Parishad almost all the bidders who participate in the tender know each other very well and interact over phone in order to talk about the business and relevant market condition and about their personal matters also.

21. It is further submitted that the commission has also committed illegality in taking into consideration the mobile location details of Respondent No. 3 in order to implicate him as a member of cartel allegedly formed with the Appellant while it was evident that Respondent No. 3 was not physically present at the premise of the Appellant at the time of the BOQ and likewise there was no occasion for the DG to have taken into consideration the other tenders which were not the subject matter of the

investigation and therefore the Commission has committed an illegality in relying on the reports submitted by DG pertaining to other two tenders earlier floated by Respondent No. 5 i.e. Pune Zila Parishad.

22. It is submitted that even if the evidence material collected by the DG is taken on its face there was no AAEC and the Commission has materially erred in arriving at a finding that such a AAEC was in existence and in this way, the Commission failed to examine as to how the conduct of the Appellant has caused AAEC.

23. Lastly, it is submitted that the finding of the Commission with regard to the quantum of penalty is also not sustainable as the Commission has taken into consideration the total turnover of the Appellant spanning across its operations for all the products and in this way the Commission has neglected to follow the law laid down by the Hon'ble Supreme Court and Hon'ble Competition Appellate Tribunal (COMPAT) and also not considering the mitigating factors which were apparent and evident on the record i.e. absence of any gain obtained by the Appellant by reduction of price of the sewing machine, absence of any harm to the market as there was uninterrupted supply of sewing machines, cooperation of the Appellant with the DG during the investigation and with the Respondent Commission and no direct evidence available with regard to the allegation.

24. Ld. Counsel for the Respondent No. 1 i.e. Competition Commission of India (CCI) submits that the Commission has passed the impugned order after careful scrutiny of the investigation report and have found that the appellant was mainly responsible for bid rigging in the tenders dated

07.11.2015 and 20.08.2016 issued by the Pune Zila Parishad for supply of pico fall-cum-sewing machine with ISI mark for distribution among the people of specified class.

25. It is further submitted that appellant had entered into a horizontal anti-competitive agreement with Respondent No.3 and 4, who have acted as cover bidders for the appellant and this has been done in contravention of the provisions of Section 3(3)(d) read with Section 3(1) of the Competition Act, 2002.

26. It is further submitted that the findings arrived at by the Commission are based on the strong evidence available on record with regard to the appellant entering into an anti-competitive agreement with Respondent No.3 and 4 leading to the bid rigging.

27. Ld. Counsel for the Commission highlighted that the bids filed by the appellant/OP No. 3 and OP No. 4 were having a very narrow price range and significantly they were filed from the one and the same IP address of the appellant using the cyber café of the appellant as a convenient place for performing this illegal collusive act.

28. It is also submitted that there was strong evidence that OP No. 3 and 4 were in constant touch on mobile phone with the appellant on one day before the date of submissions of the bids as about 19 phone calls of 90 minutes duration and 32 calls of 158 minutes duration were made between them on 25th and 26th November, 2015.

29. It is also submitted that the defense taken by the appellant and other persons, who have been held guilty, has not been found proved and it was evident that the appellant and Respondent No.3 and 4 were in close co-

ordination and the appellant not only paid the EMD for the Respondent No.3 and 4 but also the tender fee for the tenders but also for another tender bearing ID No. 2016_RDPUN_148014_1 which was also for supply of sewing machines, floated in August, 2016. In this case also the appellant had paid the EMD of three other bidders.

30. It is further submitted that the DG investigation has clearly revealed similar nexus of the appellant and Respondent No.3 and 4 in two other tenders floated by the same Pune Zila Parishad which were for the supply of flour mills and for supply of fully automatic box type domestic flour mill, floated by a Government Agency of Satara in March, 2016 wherein also the appellant had made the payment of EMD and tender fee for OP No. 3 and 4 and the same *modus operandi* was adopted by the appellant in the instant case.

31. It is also submitted that in addition to the price parallelism which were in existence in this case in bulk and were sufficient to deduce the existence of an agreement between the appellant and OP No. 3 and 4, there were other connecting factors, circumstantial evidence and forensic evidence on the basis of which it is established that there was a *nexus* between the appellant, Respondent No. 3 and 4 in forming a cartel.

32. It is also submitted that the defense of the appellant that he has reduced the price which were quoted in tender, after negotiation with Respondent No. 5 is of no help to the appellant, in presence of cartel.

33. Ld. Counsel for the Respondent – Commission further submits that the findings with regard to the forming of cartel and rigging in submission of bids by the Appellant along with two others has been

arrived at on the evidence collected by the DG in the main investigation as well as in the supplementary investigation and it was evident that the Appellant had entered into a horizontal anti-competitive agreement with Respondent No. 3 and 4 leading to the aforesaid bid rigging.

34. It is further submitted that there was ample evidence with regard to the price parallelism as the bids by the Appellant as well as the Respondent No. 3 and 4 have been filed from the same and single IP address which was of the Appellant's cyber café and further payment of not only tender fee and EMD was managed by the Appellant but the refund of the EMD deposited by the Respondent No. 3 and 4, who were unsuccessful bidders, also came back to the Appellant which shows crystal clear agreement between these persons pertaining to the bid rigging.

35. It is also submitted that the evidence has also been collected by the DG with regard to the close association and interactions of the Appellant, Respondent No. 3 and 4 through their mobile phones on one day before the date of submission of bids i.e. 25.11.2015 by making various calls for long duration and also mobile location of Respondent No. 3 was found in the office of the Appellant while he had taken a defense that he was in his office.

36. It is also submitted that apart from the tender in question, the Appellant and Respondent No. 3 and 4 has also adopted the same modus operandi in earlier two tenders and therefore, the formation of illegal cartel for the purpose of bid rigging was in existence from before.

37. It is also submitted that the direct evidence of forming a cartel is rarely available and evidence of the same is generally available in pieces and also in circumstantial evidence and there are various pieces of evidence

collected by the DG which taken together were sufficient to prove that the Appellant and Respondent No. 3 and 4 had formed an illegal cartel for the purpose of bid rigging and the argument advanced by the Ld. Counsel for the Appellant that the Appellant had further reduced the price of the Sewing Machine by meeting Respondent No.5, is of no benefit to the Appellant in view of the concrete evidence which has emerged pertaining to the bid rigging and creation of Respondent No. 3 and 4 as dummy bidders.

38. It is further submitted that the contention of Ld. Counsel for the Appellant with regard to the fact that there was no appreciable adverse effect on competition (AAEC) in terms of the failure to show any entry barriers to new entrants is also untenable in view of the statutory presumption of AAEC under Section 3(3) of the Act with regard to any agreement of any of the four categories mentioned in clauses (a) to (d) of sub section (3) of Section 3 of the Act and once there is sufficient evidence to draw presumption, the burden shifts to the other party, in this case on the Appellant, to prove by showing the evidence with regard to the existence of any of the three positive factors given in clauses (d) to (f) of sub – section (3) of Section 19 of the Act.

39. It is further submitted that the Commission with regard to imposition of penalty of Rs. 10 Lakhs on the Appellant has also taken care of the doctrine of proportionality and also the average turnover of Respondent No. 2 for the relevant period which was about Rs. 2.87 Cr. earned through the sale of sewing machines and the amount of penalty imposed is much less than 10% of the relevant turnover and therefore, there is no illegality so far

as the imposition of penalty is concerned. Thus, there is no illegality or any irregularity in the impugned order.

40. Ld. Counsel for the Respondent No. 2 fairly adopted the submissions made by the Ld. Counsel for the Commission and submits that the appellant has not challenged or questioned the exoneration of the Respondent No. 2 nor appears to be aggrieved by any findings recorded by the Commission in favor of Respondent No. 2 and therefore, the circumstances and evidence collected by DG in both his reports so far as the Respondent No. 2 is concerned, was insufficient and untenable and has not established any agreement of the Respondent No. 2 with the Appellant and the other two co-bidders in order to prove the role of Respondent No. 2 in alleged bid rigging and only issuance of authorization letters cannot be taken as an evidence of collusion.

41. It is further submitted that upon a holistic assessment of the material / evidence, the Commission has concluded that Appellant and Respondent No.3 and 4 had acted in concert and there is no evidence with regard to the involvement of Respondent No. 2, being part of their agreement.

42. Having heard Ld. Counsel for the parties and having perused the record, we find that with regard to the allegations alleged by the Respondent No. 6 (Informant) the Commission has taken a decision to investigate the allegations by the DG and the DG in this regard has submitted his first report. For ready reference, the relevant paras mentioned by the commission in impugned order with regard to the of the said report are being reproduced as under: -

“11. After investigation, the DG submitted its investigation report on 28.03.2018. The DG framed the

following two issues for the purpose of the investigation:
(a) Whether there is cartelisation and bid rigging/collusive bidding in Tender No. 1/2015-16 dated 07.11.2015 floated by the Pune Zilla Parishad for supply of Picofall-cum-Sewing Machine? If yes, who are the Opposite Parties involved in the cartelisation and bid rigging/collusive bidding in contravention of the provisions of Section 3 of the Act? and (b) If the answer to Issue (a) is in affirmative, who were the persons/officers incharge of and responsible for the conduct of the business of the OPs concerned at the time of the said contravention? Based on the analysis, evidence, facts and circumstances discussed in the investigation report, the DG found that OP-1 to OP-4 were in active collusion and there was meeting of minds between them and thereby, they have violated the provisions of Section 3(3)(d) read with Section 3(1) of the Act. Further, two individuals of OP-1 and 4 individuals of OP-4 were found to be responsible under Section 48 of the Act for their conduct. The findings of the DG, in brief, are as follows:

11.1. OP-2 utilised its own funds for the purposes of making of the bids in the names of OP-3 and OP-4 and for the same, the accounts of M/s Steelfab Corporation and M/s Steelfab maintained in the Oriental Bank of Commerce have been utilised. This illustrates the key role played by OP-2 in the entire process of bidding for the Impugned Tender.

11.2. The bid values quoted by the OPs in the Impugned Tender were very close to each other and is indicative of being filled up, after being fixed in consultation with each other or by a single person on behalf of all. OP-2 had quoted per unit price of Rs. 11,900/- (Rs. 12,621/- with taxes); OP-3 had quoted per unit price of Rs. 11,931/- (Rs. 12,649/- with taxes) and OP-4 had quoted per unit price of Rs. 11,921/- (Rs. 12,638/- with taxes). The DG observed that the difference in prices quoted by OP-2 and OP-3 is Rs. 28/-, and that of OP-3 and OP-4 is Rs. 11/- and OP-2 and OP-4 is Rs. 17/- only.

11.3. OP-2 used its own IP address for filling up the tenders of all three bidders, i.e. for itself and OP-3 and OP-4 which was not disputed rather admitted by OP-2. As per the DG, this goes to establish that the Impugned Tender was subjected to bid rigging by OP-2, coupled

with the consent and connivance of OP-3 and OP-4 in the process to rig the bids.

11.4. The analysis of call data record (CDR) revealed that Mr. Venkatesh, Proprietor of OP-2 was in continuous touch with Mr. Nayan Shah, Proprietor of OP-3 and Mr. Rahul Shah of OP-4 at the time of submission of bids for the Impugned Tender. Based on the CDR analysis, there is evidence that on the date of submission of bids - by OP-3 and OP-4, all the three OPs were not only interacting with each other, but there were also - - talks in quick sessions amongst the three of them. They were in constant touch with each other - and thus - as per the DG, it is a reasonable inference that they had a deep level of association as well as they were into collusive bidding.

11.5. OP-2 to OP-4 were closely coordinating with each other in relation to participation in other tenders also.

11.6. The DG had also noted that in the instant matter, the bids have been ostensibly submitted by OP-2, OP-3 and OP-4 with the help of OP-1 which issued authorisation letters dated 24.11.2015 addressed to OP-5 whereby it authorised OP-2 to OP-4 to quote and negotiate for items mentioned in the said tender. In the absence of availability of such authorisations, OP-2 to OP-4 would not have been technically qualified by Pune Zilla Parishad. Thus, as per the DG, the role of OP1 in the entire process of tendering is of relevance and significance. Accordingly, the DG has examined the manner in which such authorisation letters have been issued by OP-1 and noticed that these authorisation letters have been issued without making recourse to the stated manner/ procedure as no documentation, whether submitted by the aspiring bidder or the internal documentation/ file noting, etc, have been maintained and produced. The DG has also stated that in about half a dozen tenders, the bid money on behalf of OP-1 was paid by OP2 and that the tenders were also filled in, by the latter. Thus, the DG has concluded that OP-1 was the main stakeholder of tender for supply of sewing machines and more specifically tender No. 01/2015-16 of OP-5 and that there was collusion/ complicity between OP-1 and the bidders of this tender through OP-2, which is a contravention of the provisions of the Act.

12. Finally, the DG concluded that the role played by Mr. Venkatesh of OP-2 at various stages of the bidding for the tender which includes use of his own funds for bids of OP-3 and OP-4, use of common IP address belonging to OP-2 for filling up of bids, close association and coordination between OP2, OP-3 and OP-4 on a regular basis evidenced through admission of all the key personnel of these OPs as well as their CDRs, coupled with admitted coordination in various other tenders floated by the authorities in the region around the same time, etc. do establish beyond doubt the common thread and scheme for such coordination between them.

13. Thus, the DG concluded that there was a meeting of minds and coordination amongst OP-1 to OP-4 in contravention of the provisions of Section 3(3)(d) read with Section 3(1) of the Act.”

43. We also notice that after considering the objections filed by the Appellant and other Respondents, the Commission took a decision to get a supplementary investigation done by the DG and in pursuance of the said decision, the supplementary investigation was done by the DG and a supplementary report was accordingly submitted. We find that the Commission in paragraph No.18 and 19 of the impugned order has noted the contention and crux of this report of the DG and we are reproducing these paragraphs herein below: -

“18. Based on the Order of the Commission dated 04.10.2018, the DG formulated following issues for investigation: (a) the role played by officials of OP-5 in the tendering process, particularly at the stage of designing of the tender and evaluation of the bids and examination of the officials of OP-5 to ascertain the eligibility of the bidders in terms of tender conditions; (b) to accord opportunity of cross-examination to the OPs; and (c) examination of reply of OP-1 dated 31.03.2018.

19. The DG submitted its Supplementary Investigation Report on 23.10.2019. During the investigation, the DG

analysed the role of OP-5 in designing of tender and evaluation of the bids and it was noted by the DG that OP-5 did not follow the procedure laid down and as such did not exercise due diligence while evaluating the bids. Further, the OPs were accorded opportunities of cross-examination. Reply dated 31.03.2018 of OP-1 was also examined during the course of the investigation. The DG concluded by noting that the basic nature of the transgression, which existed in the initial report, has not been removed by the OPs and no new answer has emerged during further investigation. In fact, the DG stated that the second round of the investigation has strengthened the fact that there was a nexus and meeting of minds between the OPs, especially OP-1 and OP-2.”

44. So far as the Appellant is concerned, he by filing his reply before the commission, has taken a defense that had there been any cartelization he would never have reduced the price of Sewing Machine as there was only three bidders left in the tender who were authorized dealers of OP No. 1 and even assuming that there was a cartel the same could not be presumed to have an adverse effect on the competition in the market. The Appellant also took a defense that he also run a cyber café and also offers tender filling services which are available to public at large by paying the necessary fee and charges and the small difference between the bids of the Appellant and other Respondents is a result of the fact they all are located at Pune itself, therefore, the freight component, travel expenses, labour charges may have only small difference in quoted price and lastly as the bidders who participated in the tender know well each other, therefore, it was but natural for them to have conversation on telephone and also to visit each other residences which could not be taken as adverse as the cyber café is a public place.

45. Having considered above, we find that the allegations in the complaint/information were pertaining to the rigging in bids invited by Respondent No. 5 from eligible vendors for the purpose of procurement of Picofall-cum-sewing machine with ISI mark for distribution amongst certain classes of persons living in the rural area under some scheme of the State Govt.

46. We find that in order to arrive at a finding that the Appellant and other two Respondents were indulged in bid rigging / collusive bidding in respect of the impugned tender floated by Respondent No. 5 the Commission considered price parallelism and examined the rates quoted by the bidders and in para 40 of the impugned order has provided the rates quoted by bidders including the Appellant and the difference in rates quoted by them.

We reproduce the said tables for convenience herein below: -

Table-1

Bidder (OP)	Rate quoted per unit (without taxes)	Rate quoted per unit (with taxes)
OP-2	Rs. 11,900/-	Rs. 12,621/-
OP-3	Rs. 11,931/-	Rs. 12,649/-
OP-4	Rs. 11,921/-	Rs. 12,638/-

Table-2

Comparison of rates of the bidders <i>inter se</i>	Difference in rate quoted per unit (with taxes)
OP-2 with OP-3	Rs. 28/-
OP-3 with OP-4	Rs. 11/-
OP-2 with OP-4	Rs. 17/-

The main argument which has been taken by the Appellant is with regard to the lowering of bid price by him, from Rs. 12,621/- to Rs. 12,521/- and

further reduction of same to Rs. 12,250/- and also that had there been a cartelization or bid rigging there was no occasion for him to reduce quoted price any further.

47. The Commission considered the aforesaid submissions and came to a conclusion that the bid values quoted by the Appellant and other two Respondents were very close to each other and there was only a difference of less than thirty rupees which is highly unlikely in normal market conditions that the prices quoted by three different independent bidders would be so close to each other and further observed that the Appellant and other two Respondents failed to demonstrate/justify with any evidence, e.g. cost data, the minuscule difference in the price bid in the impugned tender and thus goes on to hold that in the absence of plausible justifications, the bids are indicative and suggestive of the fact that such similar price quotes may not be a mere coincidence and is an outcome of some agreement or understanding or arrangement amongst the participating bidders.

48. We notice that the DG during the course of investigation has collected evidence related to the payment of tender fee and EMD for the impugned tender and also gathered the entire trail of movement of the funds for the payment of such tender charges and collected evidence that in fact initially the proprietor of M/s Steelfab Corporation, had paid the tender charges of Rs. 12,81,769/- on behalf of the Appellant and Respondent No. 3 on 26.11.2015 and whereas his brother Nikhil Gandhi has paid the same on behalf of Respondent No. 4 on 26.11.2015 and the Appellant transferred a sum of Rs. 38,46,000/- to the Bank account of M/s Steelfab Corporation on

26.11.2015 in order to facilitate the payment of tender charges on behalf of Respondent No. 3 and 4 and the Appellant and so much so when Respondent No. 3 and 4 were not declared successful in the tender, the total amount of these EMD i.e. Rs. 25,13,200/- was credited back to the account of Appellant by Mr. Nikhil Gandhi and thus, it was evident that it was the Appellant who had deposited the EMD and other tender charges on behalf of Respondent No. 3 and 4 which is a clear evidence that there was a prior agreement of formation of a cartel with regard to the performance of bid rigging.

49. We also notice that the Commission has also taken into consideration the submission of the bids by the Appellant and the OP No. 3 and 4 by using the cyber café of the Appellant, a fact which is also admitted to the appellant, which is highly unlikely between competitive bidders and we find that in the facts and circumstance and material collected by the DG, this finding recorded by the Commission appears to be correct and it is highly unlikely that the competitive bidders would use the same IP address for uploading their technical as well as financial bids and the defense of the Appellant that Respondent No. 3 and 4 were his regular clients is not substantiated from the evidence submitted by the Appellant.

50. We also notice that the Commission has also considered the documents submitted by the Appellant pertaining to M/s Jai Khodiyar Industries and M/s Micro Industries in an attempt to show that these entities are also the client of the Appellant. Having regard to the infirmities noted by the Commission in para 52 of the impugned order, we find that

this defense of the Appellant has been rightly rejected by the Commission as these documents appears to be manufactured.

51. We also notice that it was admitted to the Appellant that technical envelope of the bid was completed by its employees and the commercial envelop was filled by the concerned Respondent itself while it was evident that the commercial envelop was also filled by Respondent No. 3 and 4 on 26.11.2015 by using the same IP address of the cyber café, which belongs to the Appellant.

52. We have also noticed the call data record (CDR) collected by the DG during the course of investigation, which was clearly indicative of the close association of the Appellant with the Respondent No. 3 and 4 and they have talked frequently just before filing of the tender bids which is highly unlikely for independent competitive bidders and so much so they were also in close association, even when the investigation was being done by the DG.

53. Thus, this circumstance is also suggestive of the fact that the Appellant and the Respondent No. 3 and 4 were in close association not even at the time of filling of tender bids but also thereafter when the investigation by the DG was going on.

54. Similarly the circumstance of Mobile Location details of Respondent No. 3 at the premises of the Appellant during the filling of BOQ appears to be a strong circumstance which shows his involvement in the cartel formed for the object of bid rigging and the fact that Mr. Venkatesh associated with the Appellant was in interaction with Respondent No. 3 and also soon after filling of bid online, is a clear

indication of the meeting of mind of these persons for the illegal purpose of formation of cartel.

55. We also notice that the DG as well as the Commission has also taken into consideration the closeness of the Appellant and the Respondent No. 3 and 4 as well as Respondent No. 5 with regard to the earlier two tenders which were floated for supply of flour mills and supply of fully automatic box type domestic flour mill which also shows and suggest such type of cartelization was in existence from before.

56. We are also in agreement with the observations made by the Commission that the direct evidence of formation of any cartelization or bid rigging is seldom available. The conspiracies with regard to the such illegal acts are hatched in isolation and executed with precision and therefore it would only the circumstances by which the formation of cartelization or bid rigging may be inferred. The strong evidence of the close association of the Appellant with Respondent No. 3 and 4 and submission of the bids by using the same IP address of the Appellant and their close association on phone calls as well as through the CDR records and the fact that the EMD of the Respondent No.3 and 4 was managed by the appellant, clearly establishes that they were not fairly competitive with each other and rather they have formed a cartelization in order to bid rigging.

57. We also find that once an agreement as defined in Section 2(b) of the Act is established and found to be established in respect of the specified clauses of Section 3(3) of the Act then a presumption may be safely drawn with regard to the fact that such an agreement was having an AAEC and the onus in such scenario is shifted to the other party to rebut this

presumption, once the burden has been discharged by the reliable evidence collected by the DG.

58. We find that the material / evidence which has been produced by the Appellant and other Respondents before the Commission, in order to rebut this presumption was not sufficient enough and it was clearly evident that the Appellant and respondent No. 3 and 4 had formed a cartel for the purpose of bid rigging in the tender floated by Respondent No. 5 which was having an adverse effect on the competition in the market and also having an AAEC.

59. Thus, keeping in view all the evidence and material which is available on record before the Commission, we do not find any illegality so far as the holding of the Appellant guilty in terms of Section 27(a) of the Act and the directions issued by the Commission therein, is concerned.

60. So far as the imposition of penalty of Rs. 10 Lakhs is concerned, we are in agreement with the view taken by the Commission. It has been argued on behalf of the appellant that the imposition of penalty is not proportionate and the whole of the turnover of the Appellant has been considered for the purpose of imposition of penalty, which is per se illegal.

61. We do not find any substance in this submission of the appellant, as we notice that the Commission, in the impugned judgment has cited ***Excel Crop Care Ltd. Vs. CCI & Anr., Civil Appeal No. 2480 of 2014*** decided on 08.05.2017 by the Hon'ble Supreme Court, wherein the parameters have been provided by the Hon'ble Supreme Court for imposition of penalty and considering this the Commission has proceeded to determine relevant turnover in order to calculate the appropriate percentage of penalty and thereafter noted that the anti-competitive conduct of the parties, in this case, was pertaining to supply of Sewing machine and the Appellant has

provided details of revenue generated from such supply in respect of the relevant period and thereafter noticing the ratio laid down by the Hon'ble Supreme Court in the case of **Excel Crop Care Ltd. (Supra)** pertaining to the proportionality in imposition of penalty, took the revenue generated from the supply of such machines for the relevant period in consideration and imposed the penalty of Rs. 10 Lakhs on the Appellant and other two co-bidders. Admittedly the revenue generated in the relevant year by selling Sewing Machines was more than one Crore for the relevant period and the amount of penalty imposed appears much less than 10% of the same. In our considered opinion, having regard to the formation of illegal cartelization and gravity of the illegal act, commensurate and proportionate penalty has been awarded by the Commission.

62. Therefore, keeping in view all the facts and circumstances of the case, we do not find any good ground to interfere in the impugned judgment passed by the Commission and resultantly the appeal filed by the Appellant is hereby **dismissed** and the impugned order passed by the Commission is hereby **affirmed**. No order as to costs.

63. I.A.'s, if any, are hereby closed.

[Justice Mohd. Faiz Alam Khan]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

New Delhi.
07.01.2026

sr/sc