



COMPETITION COMMISSION OF INDIA

Ref. Case No. 01 of 2012

Re: Reference Case No. 01 of 2012 filed under section 19(1)(b) of the Competition Act, 2002 by Director General (Supplies & Disposals), Directorate General of Supplies & Disposals, Department of Commerce, Ministry of Commerce & Industry, Government of India, New Delhi.

- 1. M/s Puja Enterprises
Basti Baba Khel Kapurthala
Road Jalandhar -144021
Opposite Party No. 1**
- 2. M/s A.R. Polymers Pvt. Ltd.
105, Chandralok Complex
26/ 72-D Birhana Road
Kanpur-208001
Opposite Party No. 2**
- 3. M/s M.B Rubber Pvt. Ltd.
195-Gagan Vihar
Delhi-110051
Opposite Party No. 3**
- 4. M/s Tirupati Footwears Pvt. Ltd.
Basti Baba Khel
Kapurthala Road
Jalandhar-144021
Opposite Party No. 4**
- 5. M/s H.B Rubber Pvt. Ltd.
A-43, Preet Vihar
Delhi-110092
Opposite Party No. 5**
- 6. M/s Rajkumar Dyeing & Printing Works
Pvt. Ltd. P-2 Kalakar Street
Kolkatta-700007
Opposite Party No. 6**
- 7. M/s Preet Footwears
D-1 & D-2, Sports & Surgical Complex
Basti Baba Khel Jalandhar-144021
Opposite Party No. 7**



- 8. M/s S.S Rubbers**
C-8, Sports & Surgical Complex
Basti Baba Khel Jalandhar-144021 **Opposite Party No. 8**
- 9. M/s R.S Industries**
11, Clive Row, 1st Floor
Room No. G
Kolkatta-700001 **Opposite Party No. 9**
- 10. M/s Shiva Rubber industries**
C-5, Kandra Industrial Area
P.O Bithia Dhanbad- 828109 **Opposite Party No. 10**
- 11. M/s Derpa Industrial Polymers (P) Ltd.**
56, Rural Industrial Estate
Loni, Ghaziabad-201102 **Opposite Party No. 11**

CORAM

Mr. Ashok Chawla
Chairperson

Dr. Geeta Gouri
Member

Mr. Anurag Goel
Member

Mr. M. L. Tayal
Member

Mr. Justice (retd.) S.N. Dhingra
Member

Mr. S. L. Bunker
Member



Appearances: None for the informant.

S/ Shri A K Bajpai, M F Khan & Nitin Bajpai advocates for the opposite party Nos. 1-8, 10 & 11.

Shri Matrugupta Mishra, advocate for the opposite party No. 9.

Order under Section 27 of the Competition Act, 2002

1. The present reference has been filed by Director General (Supplies & Disposals), Directorate General of Supplies & Disposals (DG S&D), Department of Commerce, Ministry of Commerce & Industry, Government of India, New Delhi ('the informant') under section 19(1)(b) of the Competition Act, 2002 ('the Act') against the above named opposite parties alleging *inter alia* bid rigging and market allocation in contravention of the provisions of section 3 of the Act while bidding against the Tender Enquiry dated 14.06.2011 floated by DG S&D for concluding Rate Contracts/ RC of product (Polyester Blended Duck Ankle Boot Rubber Sole) for the period from 01.12.2011 to 30.11.2012.

2. Shorn of details, the facts are that Wool and Leather (WL) Directorate of DG S&D had issued a Tender Enquiry No. AB(Duck)/WL-6/ RC-11050000/ 1112/ 66 dated 14.06.2011 for conclusion of new Rate Contracts relating to the period from 01.12.2011 to 30.11.2012 for polyester blended duck ankle boots rubber sole ('the product'), with tender opening date as 29.07.2011. The estimated requirement indicated in the Tender Enquiry was valued at Rs. 10.45 crores. The Tender Enquiry consisted of 45 items of different sizes and colours of the product, as in the previous Rate Contract for the year 2010-11 which was awarded to the eleven parties who were also holding the Rate Contract for the year 2009-10. On scrutiny of the tenders for year 2011-12 opened on 29.07.2011, it was found that the difference in quoted prices of different bidders was in a very narrow range and all the tenderers barring one, had restricted the quantity to be supplied by it during the Rate



Contract period. Nine tenderers had also stipulated the maximum quantity to be supplied by them to a particular Direct Demanding Officer (DDO). This was stated to indicate a pre-determined, collusive and restrictive bidding pattern or cartel formation by the bidders thereby violating the various provisions of the Act.

3. The reference was considered by the Commission in its ordinary meeting held on 08.05.2012 and *vide* its order of even date, the Commission noted that the above named opposite parties quoted prices within a narrow band of Rs. 393 to Rs. 410 for 45 types of different sizes and colors of Polyester Blended Duck Ankle Boots specifying the quantity to be supplied. The tender prices offered appeared not to have factored the differential cost of transportations to be incurred by opposite parties located at different places. Further, it was observed by the Commission that the material placed on record by the informant showed quantity allocation mutually agreed by the opposite parties in their offers at the time of tendering suggesting that the opposite parties quoted for limited quantities as if they have allocated shares amongst themselves. Hence, the Commission was of the opinion that *prima facie* a case of contravention of the provisions of the Act was made out. Accordingly, the DG was directed to conduct an investigation into the matter and to submit a report.

4. In terms of the aforesaid order of the Commission, an investigation was conducted by the DG and the investigation report was submitted to the Commission on 26.12.2012. The DG report was considered by the Commission in its meeting held on 09.01.2013. On consideration of the report, the Commission decided to forward copies of the report of the DG to the informant and the opposite parties for filing their respective replies/ objections thereto, if any.

5. The DG report shows that he had identified the following issues for investigation:



(i) Whether conditions prevailing specifically with respect to the industry, the product in question, its market *etc.* were conducive for collusive action by the parties.

(ii) Whether the identical/ near identical prices quoted by the parties against the Tender Enquiry of DGS&D dated 14.06.2011 were a result of collusion amongst them and whether there are any direct or indirect evidences in support of an agreement, formal or informal between them for bid rigging in violation of the provisions of section 3(1) read with section 3(3) of the Act as alleged.

(iii) Whether, the restriction of total quantity to be supplied during the RC period and the restriction of maximum quantity to be supplied per Direct Demanding Officer (DDO) was a result of collusion amongst the parties and whether there are any direct or indirect evidences of collusive agreement amongst the manufacturers in violation of the provisions of section 3(1) read with section 3(3) of the Act as alleged.

(iv) Whether there is any violation of the Act under section 3(4) as alleged by the informant.

6. The DG returned the following findings on the issues identified:

(i) It is noted by the DG that bid rigging is more likely to occur when a small number of companies supply the goods or services and such suppliers are repetitive bidders. The fewer the number of sellers, and the repetitive the bidding, the conditions become more conducive for bidders to reach an agreement to rig bids. Further, it is noted that when the products or services sold or rendered are identical or very similar and there are few or no substitutes, it is easier for bidders to reach an agreement on a common price structure. Based on the analysis, it was concluded by the DG that the conditions prevailing with respect to the product, its market *etc.* were conducive for the parties to reach an agreement for bid-rigging and mutual allocation of market.



(ii) The identical/ near identical prices quoted by the parties from time to time against the tenders of DG S&D for the given product in spite of variations in cost factors arising out of differences in product range, installed capacities, size of operations, tax rates, sources of procurement of raw materials, basis adopted for giving quotations *etc.* as well as on account of the parties being geographically located in different regions. The DG also found direct evidence of sharing of information by competitors and considered it as sufficient evidence to establish concerted action by the parties. Based on the above analysis and direct and indirect evidences, it was concluded by the DG that the parties had contravened the provisions of section 3(1) read with sections 3(3)(a) and 3(3)(d) of the Act by determining prices and bid rigging respectively.

(iii) It was noted by the DG that the parties by putting in quotations quantity restrictions both in terms of total quantity to be supplied during the Rate Contract period, as well as limitations of order quantity per DDO, restricted the options of DDOs of procuring the product from any one or more Rate Contract holders as per the choice of the DDOs. This *inter se* agreement/ arrangement of parties, made with a view to limit and control the supply of the product and to share the market by way of mutual allocation, amounted to bid rigging and was in violation of the provisions of section 3(1) read with section 3(3)(b), 3(3)(c) and 3(3)(d) of the Act.

(iv) Lastly, it was noticed by the DG that all the parties were DG S&D registered manufacturers and Rate Contract holders for polyester blended duck ankle boots of given specifications and as such were at the same level of production chain and in the same market for supply of the said product. The parties being not at different stages or levels of the production chain in different markets as required for invoking the provisions of section 3(4) of the Act, the allegation qua contravention of section 3(4) of the Act was not made out.

7. Based on the above findings, it was concluded by the DG that all the parties in the instant case were DG S&D registered Rate Contract holders of



Polyester Blended Duck Ankle Boots of Governing Specifications G/Tex/Misc/55/Boots Rubber (but with detachable sock thickness 5mm). This product was procured by various government agencies against the Rate Contracts awarded by DG S&D. For securing Rate Contracts, the parties had been submitting their bids against the tender enquiries floated by DG S&D for the said item from time to time. The parties had been submitting identical/ near identical rates against the tenders of DG S&D and that direct and indirect evidences established that the identical/ near identical rates were a result of collusion amongst the bidders. These bidders being well conversant with the DG S&D methodology of awarding Rate Contracts, by not bidding competitively, and by quoting identical/ near identical rates, had, indirectly determined prices/ rates in the Rate Contracts finalized by DG S&D and indulged in bid rigging or collusive bidding thereby contravening the provisions of section 3(1) read with section 3(3)(a) and 3(3)(d) of the Act.

8. Further, it was noted by the DG that the parties being the Rate Contract holders of the product are the only source of procurement for the product in question by various DDOs. These parties have imposed quantity restrictions in terms of total quantity to be supplied by them individually during the Rate Contract period as well as the maximum quantity to be supplied to a particular DDO during the said period. The imposition of quantity restrictions had been started by all the parties simultaneously from the RC period 2010-11, and no such restrictions were being imposed by them in prior periods. Based on direct and indirect evidences, it was concluded by the DG that the parties self-imposed quantity restrictions through collusive act to distribute total demand of the product amongst the bidders. Moreover, it was concluded by the DG that the parties by imposing quantity restrictions for the RC period as well as per DDO have controlled the supply of the product in question and shared the market of the product amongst themselves under an agreement/ arrangement and by bid rigging thereby contravening the provisions of section 3(1) read with sections 3(3)(b), 3(3)(c) and 3(3)(d) of the Act.



Replies of the OPs

9. Pursuant to the order of the Commission, a copy of the DG report was sent to the parties. The opposite parties filed their replies/ objections to the report of the DG. The opposite parties essentially filed their respective replies raising similar issues. The same are summarised in the following paras.

10. At the outset, it was pointed out on behalf of the opposite parties that the units against which the investigation was ordered by the Commission were small/ micro enterprises enjoying certain concessions/ exemptions from the Government of India/ State Governments. None of the opposite parties was involved in any kind of bid rigging and there was no direct or indirect evidence to show the violation of any provision of the Act. The DG conducted its investigation on the basis of presumptions and therefore, the investigation report was not sustainable. The report failed to demonstrate the conditions precedent for existence of a cartel. Moreover, the report was unable to show the existence of an agreement between the opposite parties to limit or control the production or sale or price of goods and since, an agreement was a condition precedent to establish an allegation of cartel, the contravention of the provisions of section 3 of the Act was not made out against the parties.

11. It has been further stated that the DG adopted a theoretical approach and wrongly relied upon the economic principles of price parallelism, ignoring the facts given by opposite parties. The entire report of the DG was based on his own prejudicial perception about industry rather than based on documents and data produced by the opposite parties. It was also contended that the report of the DG was wholly without jurisdiction and thus deserved to be rejected on this ground.

12. The opposite parties, however, agreed with the finding of the DG on non-contravention of the provisions of section 3(4) of the Act.

13. On merits, it was argued that the rates quoted by the RC holders could not be treated as final because it was DG S&D who had the machinery to



check reasonableness of the rates of a particular item. Also, DG S&D used to negotiate rates by issuing counter offer before finalization of the rates. The location of units could not be treated as a valid ground for assuming the existence of an agreement between the RC holders to conclude bid rigging.

14. It is the case of the opposite parties that the DG had relied upon installed/ production capacity, turnover, and geographical location of industry to conclude that cost of production and sales of product could not be so similar as to result in identical prices quoted by the opposite parties. It is argued that the points taken into consideration by the DG were not valid as all the opposite parties were in the same trade, having almost same and similar plant & machinery, source & cost of raw material, product specification, delivery time and therefore, similarities in rates were bound to arise.

15. The opposite parties further assailed the inference of the DG that despite variations in margin of profit, almost similar quotations of the opposite parties with a negligible price differential of about 1% indicated collusion amongst them. It is contended that the rates quoted were not at all related to the margin of profit as many factors are considered while deciding the actual cost of a particular product. On the similar reasoning, the opposite parties challenged the conclusion of the DG regarding collusion amongst the opposite parties on the basis of similarity in quotations of parties located in different States with varying tax structure. It is reiterated that rates quoted by the opposite parties were based on many factors.

16. It is submitted that the DG took into account a meeting organized by Federation of Industries of India (FII) on 20.10.2009 to presume that the opposite parties could have shared the information and therefore, there was meeting of minds. It is, argued that there was no evidence to suggest if any of the opposite parties discussed the particular Rate Contract in question in the said meeting. Participation in a meeting of the association cannot be a ground for assuming meeting of minds for the purpose of quoting rates. It is pointed out that the agenda of the meeting was '*...to discuss various problems which they would like to discuss with the DGSD...*' It is argued that there was no



evidence to suggest that any of the opposite parties discussed the particular Rate Contract in the meeting. So far as the reliance by the DG upon the meeting of FII held on 13.03.2009 at Calcutta to infer demand of members of FII as to guidelines for distribution of bulk orders is concerned, the same is sought to be explained by the opposite party that the DG S&D was also of the same view in as much as it was '*...considering to issue guidelines so that the supply orders are distributed amongst the RC holders equitably...*'

17. As regards the conclusion of the DG regarding sharing of information amongst the competitors based upon possession of certain documents of other opposite parties with one of the opposite parties, the opposite parties replied that it was a mere presumption and hence such conclusion was not sustainable in eyes of law. Also, other opposite parties cannot be held responsible for the conduct of one opposite party.

18. Conclusions of the DG regarding quantity restrictions were also sought to be justified by the opposite parties.

19. Lastly, it has been urged that the present case was not a case of conscious price parallelism and there was no circumstantial evidence to infer violation of the Act on the part of opposite parties.

20. The Commission examined the information, the report of the DG and the replies/ objections of the opposite parties thereto besides perusing the material available on record. The following point falls for consideration before the Commission:

Whether the opposite parties have contravened the provisions of section 3 of the Act?

21. In the present case, the reference as filed on behalf of DG S&D essentially alleges *inter alia* bid rigging and market allocation by the parties named therein while bidding against the Tender Enquiry dated 14.06.2011 floated by DG S&D for concluding Rate Contracts of product (Polyester



Blended Duck Ankle Boot Rubber Sole) for the Rate Contract Period from 01.12.2011 to 30.11.2012.

22. The tenders were opened on 29.07.2011. The all-inclusive rates quoted by the opposite parties may be summarised as under:

Tender Enquiry No. : AB(DUCK) / WL-6/RC-11050000/1112/66

Date of Opening. : 29.07.2011

RC Period : 01.12.2011 to 30.11.2012

Sl.No	Name of Company	Quotation No. & Date	Rates offered					
			Black/Brown/Green/Khaki Size			Disruptive Size		
			4 – 6	7 – 9	10 – 12	4 – 6	7 – 9	10 - 12
1	H.B Rubber Pvt. Ltd	HBR/TENDER/2011 -12/061 26.07.2011	394	396	403	399	402	410
2	R.S Industries	RSI/Q/11-12 25.07.2011	395	397	401	400	402	406
3	M.B Rubber Pvt. Ltd	MBR/TENDER /2011/398 26.07.2011	393	400	404	399	402	407
4	Rajkumar Dyeing & Printing Works Pvt. Ltd	RKD/30/11-12/95 25.07.2011	395	398	401	400	403	406
5	Puja Enterprises	Dated 28.07.2011	393	399	404	398	405	408
6	Derpa Industrial Polymers Pvt. Ltd	DIPL/DGSS&D -RC-PBDAB 28.07.2011	396	398	401	401	403	406
7	Preet Footwears	PF/2011-2/856 27.07.2011	395	398	401	400	403	407
8	A.R Polymers Pvt. Ltd	TEN/2011/ARP /43 26.07.2011	394	396	403	399	402	410
9	Tirupati Footwears Pvt Ltd.	Nil dated 28.07.2011	394	396	404	400	402	410
10	S.S Rubbers	SSR/DAB/2011 -12/02	393	400	404	398	405	409



		Dt.26.07.2011						
11	Shiva Rubber Industries	Nil dated 24.07.2011	395	397	401	399	402	407

23. From the above, it is noticed that each of the opposite parties had quoted six rates depending upon the colour/ print and the size slab of the product. Within each category, the bidders quoted almost similar rates with a price differential in rates in the range of only about 1%. The DG also examined the quotations given by the bidders including the opposite parties herein against the previous tender floated by DG S&D for the product for the relevant Rate Contract period (01.09.2010 to 31.08.2011) and observed that within each category the bidders quoted near identical rates and the variation in the rates was in the range of 1%. The rates quoted by the opposite parties for the RC period 01.09.2009 to 31.08.2010 were also found exactly identical for each category with a price differential of only one *paisa* in two of the six rates quoted. Similarly, the rates quoted by the opposite parties for the RC period 01.09.2008 to 31.08.2009 were also found exactly identical for each category with a price differential of only one *paisa* in four of the six rates quoted.

24. During the course of the investigation, the DG specifically put to the opposite parties the identical or near identical pattern of quotations with a price differential of only about 1%. In response thereto, the opposite parties maintained that since raw material and other costs for all the manufacturers were more or less the same, as such, their quoted prices were also almost same. Besides, some of the opposite parties were unable to give a reasonable explanation as to how the rates quoted were so similar. Some simply feigned ignorance, some termed it as co-incidence and yet some could not recollect.

25. It may be observed that the definition of 'agreement' as given in section 2(b) of the Act requires *inter alia* any arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings. The definition, being inclusive and not exhaustive, is a wide one. The understanding may be tacit, and the definition



covers situations where the parties act on the basis of a nod or a wink. There is rarely a direct evidence of action in concert and the Commission has to determine whether those involved in such dealings had some form of understanding and were acting in co-operation with each other. In the light of the definition of the term 'agreement', the Commission has to find sufficiency of evidence on the basis of benchmark of 'preponderance of probabilities'.

26. In view of the above and further considering the fact that since the prohibition on participating in anti-competitive agreements and the penalties the offenders may incur being well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret and for the associated documentation to be reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful conduct between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of the existence of an agreement.

27. In the present case, indisputably the opposite parties quoted near identical rates with reference to the Tender Enquiry under reference for RC period 01.02.2011 to 30.11.2012. The Commission observes that the quotation of near identical rates by the firms is no doubt suggestive of and indicative of formation of a cartel but the same in itself is not conclusive and determinative of the issue.

28. In this regard, the Commission notices from the report of the DG that as per the copies of Annual Accounts for the year 2010-11 submitted by the opposite parties, there are significant differences in the size of operations of the different opposite parties in terms of their turnover which ranges from about Rs.284 lakhs to Rs.3971 lakhs. Further, from the DG S&D Registration Certificates of the opposite parties, it was observed by the DG that not only



the product range varies between different opposite parties but their production capacities of different items for which they are registered, too are different. Even with respect to the specific product, the installed capacity of the opposite parties ranges from 48,000 pairs *per annum* to 2,40,000 pairs *per annum*. Moreover, these opposite parties are also located in different geographical regions.

29. The Commission also agrees with the conclusion of the DG that the raw material cost was a major component of the total cost of the product and that Rubber and Latex constitute a substantial cost component in the total cost of the raw materials. As observed by the DG the rates of Rubber and Latex were prone to significant fluctuations over a given period of time as per the data of prices posted on the website of Rubber Board and, as such, identical/ near identical estimation of average cost of raw materials (including cost of a major raw material whose prices are subject to significant fluctuations) over the Rate Contract period by different opposite parties is improbable. In such a situation, it is difficult to accede to the explanation and justification advanced by the opposite parties that since raw material and other costs for all the manufacturers were more or less same, their quoted prices were also almost same.

30. Moreover, from the DG report, it is apparent that the approximate profit component/ margins of the opposite parties varied from 2% to 15%. In such a scenario, it necessarily follows that the cost component of the opposite parties ought to have been different if the final rates quoted by the opposite parties remained identical/ near identical. This falsifies the explanation and justification advanced by the opposite parties that manufacturing cost being same, the rates quoted were identical.

31. It is also a fact that the opposite parties are located in different States of the country with differences in the applicable taxes. The DG noted that at the time of Tender Enquiry dated 14.06.2011, for Punjab, Jharkhand and UP applicable CST/VAT was 13.5% whereas for West Bengal the same was 4%. The opposite parties had quoted their rates as inclusive of applicable taxes.



Thus, the Commission agrees with the conclusion drawn by the DG that the bidders from Kolkata had an advantage of 9.5% tax differential as compared to other bidders and if the rates had been quoted competitively, the rates of Kolkata based suppliers would have been lower than the rates of other competitors due to the advantage of lower tax rate. However, these bidders quoted rates identical / near identical to the other bidders. Quoting lower rates competitively by some of the opposite parties would have resulted in lowering of the Rate Contract Rate by DG S&D, to the detriment of the opposite parties located in higher tax rate States.

32. Furthermore, the opposite parties gave different and diverse reasons when asked about the basis for quoting identical rates. In the statements made before the DG during investigation, the opposite parties maintained a uniform stand that since raw material and other costs for all the manufacturers were more or less same, as such, their quoted prices were also almost same. However, before the Commission they gave different reasons for quoting same rates against the tenders of DG S&D. While estimation of cost has been taken as the basis by some of the opposite parties, some have stated to have quoted rates based either on the prevailing prices of raw materials and their estimation of future trend while others have stated to have quoted on the basis of previous quoted rates or the rates finalized in the previous Rate Contract adjusted to account for variation in prices of raw materials and other cost components.

33. From the DG report, it appears that certain opposite parties were either presently members, or had in the past been members of a trade federation *viz.* Federation of Industries of India (FII), Delhi. Some of the opposite parties, in their statements before the DG, maintained that the Federation did not provide a common platform for its members and that various issues were taken up by the members, as and when they arose, on an individual basis and not collectively. The DG, however, observed that a meeting of the opposite parties (members as well as non-members) had in the past been convened by FII on 20.10.2009 at PSK, Laxmi Nagar, District Centre, Delhi for eliciting views regarding various problems to be discussed with DG S&D in its forthcoming meeting. Without delving into the rival submissions on this aspect, the



Commission observes that the opposite parties did avail a platform under the Trade Federation to hold meetings.

34. Before concluding discussion on this aspect, it is pertinent to note that one of the opposite parties *viz.* M/s Preet Enterprises had submitted copies of certain documents being Performance Statements pertaining to other opposite parties *viz.* M/s Shiva Rubber Industries, M/s R.S. Industries, M/s S.S. Rubber, M/s Puja Enterprises, M/s MKU Private Limited (Group company of M/s A.R Polymers Pvt Ltd, one of the opposite parties), M/s M.B. Rubber Pvt. Ltd. and M/s Derpa Industrial Polymer Pvt. Ltd. The performance Statements contain details of total value of orders received, value of orders due for supply by the cut of date, value of orders supplied upto cut of date *etc.* pertaining to the party concerned and forms part of the bid documents submitted by the bidders. Ordinarily, the competitors are not privy to the information contained in the Performance Statement being specific to the party concerned unless shared between the competitors. From this, it would not be far-fetched to infer mutual sharing and exchange of information amongst the bidders prior to submission of bid documents.

35. On a careful consideration of entire circumstances *i.e.* quotation of near identical prices despite these units having been located in different geographical locations with varying tax structure and different margins; possession by one bidder of the Performance Statements of other bidders; meetings under the platform of Trade Federation; and failure on the part of the opposite parties to provide any plausible explanation for the same, it is safe to deduce that the opposite parties entered into an agreement to determine prices besides rigging the bid.

36. The another aspect which requires consideration is whether the restriction of total quantity to be supplied during the RC period and the restriction of maximum quantity to be supplied per DDO was a result of collusion amongst the opposite parties and whether there are any direct or indirect evidences of collusive agreement amongst the manufacturers in this respect.



37. In this regard, it may be noted that in the reference, it is alleged that all the opposite parties except one by restricting their offered quantity in spite of having higher installed capacity, had limited the production and supply and shared the market through mutual allocation. It has been alleged that by restricting the total quantity to be supplied during the Rate Contract period as well as restricting the maximum quantity to be supplied to a DDO, there was an agreement between the competing enterprises not to compete or to restrict the competition thereby violating the provisions of the Act.

38. As noted by the DG, the quantity restrictions imposed by the opposite parties against the Tender Enquiry dated 14.06.2011 *vis-a-vis* their installed capacities for the product as per DG S&D Registration Certificates were as under:

S. No.	Name of the Company/ Firm	Installed capacity in pairs per annum	Total quantity restriction (in pairs)	Restriction per DDO (in pairs)
1.	H. B Rubber Private Limited	96000	50000	Not indicated
2.	M. B. Rubber Private Limited	180000	50000	10000
3.	Puja Enterprises	144000	150000	30000
4.	Derpa Industrial Polymers Pvt. Ltd.	144000	50000	10000
5.	Preet Footwears	120000	100000	20000
6.	Tirupati Footwears Pvt. Ltd.	72000	50000	10000
7.	S. S. Rubbers	144000	50000	10000
8.	Shiva Rubber Industries	240000	50000	10000
9.	R.S. Industries	240000	No restriction initially 50000 subsequently	-
10.	Rajkumar Dyeing & Printing Works Pvt. Ltd.	48000	50000	10000
11.	A.R. Polymers Pvt. Ltd.	144000	50000	20000

39. It is evident that nine opposite parties had restricted their total quantity for the RC period to 50000 pairs and the remaining two had restricted the same to 100000 and 150000 pairs respectively for the Rate Contract period



01.12.2011 to 30.11.2012. Further, six opposite parties had restricted their commitment per DDO to 10000 pairs, two opposite parties to 20000 pairs and one opposite party to 30000 pairs.

40. From DG S&D Registration Certificates, it was noted by the DG that the total installed capacity of all the opposite parties for the product in question is 15,72,000 pairs *per annum* whereas the opposite parties had restricted their total quantity to 7,00,000 pairs against the tender under reference.

41. The opposite parties could not give any valid justification in support of imposing quantitative restrictions. In fact, as noted by the DG, the opposite parties had started imposing quantity restrictions only from the Rate Contract period 2010-11 and no such restrictions were imposed by any of the RC holders during earlier years. Hence, such an action can only be a result of the collusive action by the opposite parties for mutual allocation of markets. Resultantly, it is held that the said opposite parties entered into an agreement/ arrangement to limit/ control the supply of the product and to share the market by mutual allocation.

42. The Commission notes that in terms of the provisions contained in section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can 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. Section 3(2) of the Act declares that any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void. Further, by virtue of the presumption contained in subsection (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.

43. Thus, in case of agreements as listed in section 3(3) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition; the onus to rebut the presumption would lie upon the opposite parties.

44. In the present case, the opposite parties could not rebut the said presumption. It has not been shown by the opposite parties how the impugned conduct resulted into accrual of benefits to consumers or made improvements in production or distribution of goods in question. Neither, the opposite parties could explain as to how the said conduct did not foreclose competition.

45. Reliance was made by the opposite parties on the decision of Hon'ble Supreme Court of India in the case of *Union of India v. Hindustan Development Corporation*, (1993) 3 SCC 499 to contend that even pure conscious price parallelism is not unlawful. The ruling is of no assistance as in the facts of the present case, apart from conscious price parallelism, there is overwhelming circumstantial evidence, as discussed in earlier paras, to infer the anti-competitive nature of the impugned actions.

46. In the result, the Commission is of the view that the opposite party bidders by quoting identical/ near identical rates had, indirectly determined prices/ rates in the Rate Contracts finalized by DG S&D and indulged in bid rigging/ collusive bidding in contravening of the provisions of section 3(1) read with section 3(3)(a) and 3(3)(d) of the Act. Further, the opposite parties by imposing quantity restrictions for the RC period as well as per DDO had controlled/ limited the supply of the product in question and shared the market of the product amongst themselves under an agreement/ arrangement and



through bid rigging in contravention of the provisions of section 3(1) read with sections 3(3)(b), (c) and (d) of the Act.

47. Lastly, the Commission notes that the DG did not find any contravention of the provisions of section 3(4) of the Act in the present case. The Commission observes that the opposite parties being not at different stages or levels of the production chain in different markets as required for invoking the provisions of section 3(4) of the Act, the allegations contained in the reference *qua* the provisions of section 3(4) of the Act are misconceived.

48. In view of the above discussion, the Commission directs the opposite parties to cease and desist from indulging in such anti-competitive conduct in future.

49. As regards penalty under section 27 of the Act, the Commission notes that all the bidding companies who infringed the provisions of section 3 of the Act are responsible in equal measure and no mitigating circumstances were brought to the notice of the Commission by any of them. Considering the totality of facts and circumstances of the present case and the seriousness of contravention, the Commission decides to impose a penalty on each of the contravening company at the rate of 5% of the average turnover of the company. The total amount of penalty on each company is given in the chart below:

S.No.	Name	Gross turnover for 2008-09 (in Lakhs)	Gross turnover for 2009-10 (in Lakhs)	Gross turnover for 2010-11 (in Lakhs)	Average Turnover for Three Years (in Lakhs)	5 % of average turnover (in Lakhs)
1	M/s A.R. Polymers Pvt. Ltd.	1421.69	2503.67	3390.29	2438.55	121.93
2	M/s Puja Enterprises	208.56	173.37	281.72	221.22	11.06
3	M/s M.B. Rubber Pvt. Ltd.	2988.47	3169.24	3971.22	3376.31	168.82
4	M/s Tirupati Footwear Pvt. Ltd.	275.94	276.51	283.72	278.72	13.94

S.No.	Name	Gross turnover for 2008-09 (in Lakhs)	Gross turnover for 2009-10 (in Lakhs)	Gross turnover for 2010-11 (in Lakhs)	Average Turnover for Three Years (in Lakhs)	5 % of average turnover (in Lakhs)
5	M/s H.B. Rubber Pvt. Ltd.	834.97	998.25	1248.67	1027.30	51.36
6	M/s Rajkumar Dyeing & Printing Works (Pvt.) Ltd.	767.86	460.34	791.37	673.19	33.66
7	M/s Preet Footwears	710.5	715.29	849.32	758.37	37.92
8	M/s S.S. Rubbers	#	398.34	669.69	534.02	26.70
9	M/s R.S. Industries	##	1150.47	1352.32	1251.39	62.57
10	M/s Shiva Rubber Industries	435.79	242.31	394.4	357.5	17.88
11	M/s Derpa Industrial Polymers (P) Ltd.	1217.39	1244.29	2313.95	1591.876	79.59

M/s S.S. Rubbers expressed its inability to furnish details of actual production and sales turnover for the previous years and a copy of its annual accounts for the year 2008-09. The said opposite party informed the DG that its building and most of its records/ documents were destroyed in a fire accident in February, 2011. Hence, the penalty for M/s S.S. Rubbers was calculated on the basis of its turnover details available for the years 2009-10 and 2010-11.

M/s R.S. Industries expressed its inability to provide annual accounts for the year 2008-09 as possession of the factory premises stated to be disputed and under litigation. Hence, it was informed to the DG that the relevant records are inaccessible to it. Hence, the penalty for M/s R.S. Industries was calculated on the basis of its turnover details available for the years 2009-10 and 2010-11.

50. The directions contained in para 48 above, should be complied with immediate effect and the opposite parties are also directed to file an undertaking to this effect within a period of 30 days from the date of receipt of this order.

51. The Commission also directs the opposite parties to deposit the penalty amount within 60 days of receipt of this order.

52. The Secretary is directed to inform the parties accordingly.



**Sd/-
(Ashok Chawla)
Chairperson**

**Sd/-
(Geeta Gouri)
Member**

**Sd/-
(Anurag Goel)
Member**

**Sd/-
(M. L. Tayal)
Member**

**Sd/-
(S.N. Dhingra)
Member**

**Sd/-
(S. L. Bunker)
Member**

New Delhi

Date: 06/08/2013