



COMPETITION COMMISSION OF INDIA
Reference Case No. 04 of 2019

In Re:

CP Cell, Directorate General Ordnance Service
Master General of Ordnance Service
CP Cell/OS Dte, Room No. 101
D-II Wing 1st Floor, Sena Bhawan
New Delhi - 110001

Informant

And

M/s UP State Handloom Corporation Limited
Hathkargha Bhawan, GT Road
Kanpur - 208005

Opposite Party No. 1

M/s J&K State Handloom Development Corporation
5th Floor, J.L.N Bhawan Rail Head Complex
Jammu - 180004

Opposite Party No. 2

M/s Women Development Organisation
S-192, L.G.F, Greater Kailash, Part-1
New Delhi - 110048

Opposite Party No. 3

Manmohan Commercial Limited
35-B, Co-operative Industrial Estate Dada Nagar
Kanpur - 208022

Opposite Party No. 4

CORAM:

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Appearances:

For OP-1: Mr. Anandh Venkatramani, Advocate, Mr. Rama Shankar Maurya (Managing Director), Mr. Prabhakar Vardhan, and Mr. Jagdish Prashad Dinkar, Officers.



For OP-2: Mr. Satsih Kumar Thaploo, Project Manager, Mr. Vinod Koul, Ex. Asstt. General Manager, and Mr. Anal Kumar Gupta, Ex. Managing Director

For OP-3: Mr. Parvez Bashista, Advocate

For OP-4: Mr. Utasav Mukherjee, Mr. Jaiveer Kant, Ms. Smriti Churiwal, Advocates, Mr. Parikshit Surekha, Director

ORDER

1. The present reference was filed by CP Cell, Directorate General Ordnance Service, Master General of Ordnance Service (**‘Informant/DGOS’**) under Section 19(1)(b) of the Competition Act, 2002 (**‘Act’**) alleging anti-competitive conduct under Section 3(3) read with Section 3(1) of the Act by M/s UP State Handloom Corporation Limited (**‘UPSHCL/OP-1’**), M/s J&K State Handloom Development Corporation (**‘JKSHDC/OP-2’**) and M/s Women Development Organisation (**‘WDO/OP-3’**). Later, the Commission arrayed Manmohan Commercial Limited (**‘MCL/OP-4’**) as an opposite party after receipt of the Investigation Report of the DG (hereinafter, OP-1, OP-2, OP-3 and OP-4 are collectively referred to as **‘OPs’**).

Facts, in brief, as stated in the Reference

2. The Informant had issued a Request for Proposal (**‘RFP’**) No. A/59876/Durries/Clo-1/DGOS/OS-PII/Proc Sec dated 15.12.2015 (**‘Tender’**) for procuring 818,009 durries IT OG (**‘durries/Item’**), in which nine firms participated but only six firms were technically qualified for opening their respective commercial bids. After opening the commercial bids, it was observed that not only the bid prices of OPs were quoted in a very close range, but the quantity offered by the OPs was such that the total quantity offered by them exactly added up to the total quantity in the Tender. The rates and quantity offered by the OPs are summarized in the table below:

S. No.	Firm Name	Status	Rate (Rs.)	Quantity
1	UP Handloom / OP-1	L-2	646	415,000
2	JK Handloom / OP-2	L-3	648	135,000
3	Women Development Organisation / OP-3	L-4	649	268,009
Total Quantity				818,009



3. On the basis of above, the Informant alleged that OPs colluded to offer the rates and quantity for the Tender.

Direction to the Director General ('DG') under Section 26(1) of the Act

4. The Commission noted that the bidders in the Tender placed their bids in a close range and also trifurcated/ allocated quantity amongst themselves. Such trifurcation/ allocation of quantity raised a strong suspicion of some understanding/ meeting of minds amongst the OPs while bidding. The Commission also noted that there was wide difference in the bid price of the remaining qualified bidders. The Commission further noted that the minutes of meeting of members of the Commercial Negotiation Committee (CNC) constituted by Informant highlighted that benchmarking of price was done on 25.10.2016, *i.e.* prior to the opening of commercial bid of six technically qualified firms on 22.11.2016, and the benchmark rate was fixed at Rs. 450/- (Basic) per unit. The Commission observed that the bids of OP-1, OP-2 and OP-3 were different from the benchmarked price and the possibility that they were submitted with a minor difference in order to avoid identical bid prices could not be ruled out. Thus, it *prima facie* appeared to be a case of contravention of Section 3(3)(d) read with Section 3(1) of the Act, and the Commission, *vide* order dated 21.02.2020 passed under Section 26(1) of the Act, directed the DG to cause an investigation into the matter and submit its report.

Investigation by the DG

5. The DG carried out investigation based on the information collected from the Informant, OPs and various third parties and submitted the Investigation Report to the Commission on 02.03.2021. Issue-wise findings of the DG are summarised below:

Issue I: Whether the bidders, while bidding for the Tender, indulged in bid rigging

6. In order to ascertain the basis of bid prices quoted by OP-1, OP-2 and OP-3 and to bring out the rationale of bid quantities offered by the three OPs, key personnel of the OPs were summoned by the DG and their respective statements were recorded on oath, and the same is given below.



7. Mr. Jagdish Prashad Dinkar, Senior Manager (Production) of OP-1, stated before the DG on 02.12.2020 that there is no internal mechanism for preparing, processing and submitting quotes; however, for defence tenders viz. tenders for paramilitary, army, navy and air force, procurement of items such as durries, towel, bed sheets, pillow covers, etc., OP-1 has entered into an agreement with OP-4. He further stated that OP-4 prepared, processed and submitted the bids on behalf of OP-1 and that it is not privy to the quantity and price quoted by OP-4 in the Tender. Mr. Dinkar also submitted that OP-1 has no production facility for producing any defence product, including durries. With respect to the exact remainder of the quantity quoted by the OPs, Mr. Dinkar stated that it clearly indicates that the three OPs have entered into a collusive agreement to share the quantity on offer for the Tender, and further stated that it is not possible to share the total quantity without a prior discussion with other opposite parties.
8. The DG also searched official email(s) of OP-1 and found an email dated 09.10.2018 sent by Mr. Parikshit Sureka, Director of OP-4, addressed to the Informant *i.e.* Director General Ordnance Services, wherein, Mr. Sureka was authorized to attend the CNC meeting on behalf of OP-1 for another tender. When Mr. Dinkar was confronted with this email, he stated that the email and its attachment (letter to DGOS) is an authorization given to Mr. Parikshit to negotiate with DGOS on behalf of OP-1. Mr. Dinkar also pointed out that, in the aforesaid email, there were two more attachments signed by Mr. Prabhakar Vardhan, Assistant Manager of OP-1, authorising Mr. Mahendra Sureka and Mr. Parikshit Sureka of OP-4 to represent OP-1 as per the agreement dated 19.09.2013.
9. In addition, OP-1 submitted copies of three agreements dated 09.09.2013, 02.09.2014 and 02.09.2019 entered into between OP-1 and OP-4. The DG found that, as per the terms and conditions of these agreements, OP-4 intended to make OP-1 participate in defence tenders for items such as durries, towels, bedsheets, pillow covers sarees, *etc.*, for which OP-1 would receive 2.5 % of the total consideration of work order completed by OP-4, as administrative charges.



10. Mr. Dinkar also stated before the DG that there is a possibility that the digital signature of the officials of OP-1 for filling up bids for defence tenders may have been in the possession of OP-4. Mr. Dinkar further stated that Mr. Mahendra Kumar Sureka is a key personnel of OP-4 who may have been part of the alleged collusive arrangement.
11. Mr. Mahendra Sureka, Director of OP-4, stated before the DG that a Memorandum of Understanding ('MoU') existed between OP-1 and OP-4, whereby, OP-1 procured items such as durries, towel, bed sheets, pillow covers etc. from OP-4 in case of defence tenders. Mr. Sureka also confirmed that, as per the terms and conditions of MoU, OP-1, after receiving the full remuneration value of any specific tender, deducted 2.5% of the payment as administrative charges and remitted the remaining amount to OP-4. Mr. Mahendra Sureka stated before the DG on 11.01.2021 that the final decision regarding the price and quantity were taken by OP-4 on behalf of OP-1 in case of defence tenders, and he was the final authority to decide the price and quantity to be quoted in such bids.
12. As per the Investigation Report, Mr. Mahendra Sureka of OP-4 was aware of the terms and conditions of the Tender, specifically Part III, wherein, it is mentioned that the bidder has to be the original manufacturer of the stores or provider of services. Further, he also stated that it was never revealed to Informant that OP-4 was the original manufacturer of durries and all the replies for any communication regarding the Tender were prepared by OP-4 on behalf of OP-1.
13. With respect to the rationale for quoting the bid quantity of 415,000 durries in case of the Tender, OP-4, *vide* reply dated 13.01.2021 to the DG, submitted that the average monthly capacity of durries production by OP-4 was 41,500 durries and considering the delivery period of 10 months in case of the Tender, OP-4 on behalf of OP-1 had quoted 415,000 durries in the Tender. Further, with respect to quoting the price bid of Rs. 646/- per unit for the Tender, OP-4 submitted that in case of earlier tender of durries, OP-4 had quoted a rate of Rs. 609/- per unit. Due to upward market trend and unforeseen delay in the completion of purchase order whereby penalty for delay is imposed by procurer, it was decided by OP-4 to quote Rs. 646/- in the Tender.



14. Mr. Mahendra Sureka also stated before the DG that the price and quantity bids quoted in the Tender showed that the bids were quoted as part of a cartel arrangement, and the breakup of 818,009 durries into three parties could not be a coincidence. He also stated that his company or any staff of his company was not part of any cartel arrangement and that an internal inquiry/ audit was conducted by his company where no evidence of malafide practice was found.
15. As per the Investigation Report, Mr. Sureka also confessed that his company *i.e.*, OP-4, was getting bid related information from one Mr. Vinay of the Informant. The DG also found that OP-4 was receiving financial and technical details of the Tender and other information including confidential communications between the Informant and the Office of DG at the time of investigation and related to investigation through Mr. Vinay.
16. Mr. John Mohammad Bhat, Marketing Officer of OP-2, stated before the DG on 21.12.2020 that Mr. Vinod Koul, the then AGM of OP-2 had prepared the details regarding the quantity and price bids to be quoted in the Tender. It was stated that the Tender was an electronic tender and as personnel of OP-2 in Jammu were not well versed with the application process through the electronic medium, Tender details were sent to him in Delhi and he was asked to get it processed through a cyber cafe at Daryaganj, Delhi with directions to upload the details on the Informant's website.
17. With respect to the exact trifurcation of the total quantity in the Tender by the OPs, Mr. Bhat stated before the DG that the quantity bid of 268,009 durries quoted by OP-3 did raise suspicions of bid rigging. Further, with regard to the details of persons who were privy to the price and quantity bids quoted by OP-2, Mr. Bhat stated that Mr. Vinod Koul was privy to the price and quantity bids quoted by OP-2 for the Tender, and other officers who were privy to such details could be confirmed by Mr. Koul himself.
18. Mr. Vinod Koul, the then AGM, stated before the DG through video conferencing on 21.01.2021 that he himself along with Mr. Anal Kumar, the then Managing Director of OP-2, and Mr. John Mohammad Bhat, Marketing Officer, were the key personnel



involved in the preparation, processing and submission of quotes for the Tender. Further, with regard to the reason behind quoting the exact remainder of quantity bid of 135,000 durries without knowing the exact quantity to be quoted by OP-1 and OP-3, Mr. Koul stated that initially OP-2 was considering to quote 150,000 durries but after discussion with Jammu and Kashmir Bank Ltd. ('J&K Bank') which was financing OP-2, the final bid quantity for the Tender was reduced to 135,000 Durries.

19. With regard to the rationale behind quoting the price of Rs. 648/- by OP-2, Mr. Koul stated that the raw material for manufacture of durries was sourced from the National Handloom Development Corporation and while calculating cost of yarn, carriage loading-unloading, weaving, dyeing, pre-dispatch inspection charges, packing charges and mark up for profit, the cost of each durrie was around Rs. 650/- to Rs. 652/-; however, in order to quote a more competitive price bid it was decided by OP-2 to quote below Rs. 650/- *i.e.* at Rs. 648/- per unit for the Tender.
20. Mr. Koul also stated before the DG that he had never met the other two OPs and attributed the price and bid quantity of OP-2 being closer to the rates of the two OPs, to be a mere coincidence. He further stated that OP-2 was never a part of any cartel arrangement and that no capacity verification of OP-2 was undertaken by the Informant in respect of the Tender. It was also stated that OP-2 was in financial difficulties and, thus, it was decided to quote 135,000 units.
21. Mr. H.D. Sharma, Adviser (Marketing) of OP-3, with regard to the details of the persons involved in the preparation, processing and submission of bids for the Tender, stated before the DG on 05.01.2021 that initial estimates were prepared by a committee of OP-3 comprising Ms. Renuka Sharma (President of OP-3), Ms. Saroj (Member of OP-3) and others. He also stated that he was the final authority for finalizing the bid quoted for the Tender.
22. With respect to the quantity of 268,009 durries and price of Rs. 649/- quoted by OP-3 in the Tender, Mr. H.D. Sharma stated that the exact bid of 268,009 durries by OP-3 was



on the basis of internal calculation. He also submitted that the breakup of internal calculation would be provided by OP-3 by 08.01.2021, but failed to do so. With respect to the bid price of Rs. 649/- quoted by OP-3, Mr. Sharma stated that the price bid of Rs. 649/- quoted by OP-3 was on the basis of cost estimates of production.

23. With regard to Letter No. WDO/2021/01 dated 05.01.2021 filed by OP-3, wherein it was mentioned that the Informant apprised the authorized person of OP-3 to quote the exact quantity bid of 268,009 durries for the Impugned Tender, Mr. H.D. Sharma failed to provide any details or particulars of any personnel of Informant who informed OP-3 to quote the exact quantity bid of 268,009 durries for the Tender.
24. With respect to the price and quantity quoted by OP-3 in the Tender indicating that the bids were quoted as part of a collusive arrangement, Mr. H.D. Sharma stated that the price and quantity bids for the Tender quoted by all three parties appeared to be an outcome of a cartel arrangement, however, he denied any role of OP-3 in such cartel.
25. During investigation, the DG also analysed call detail records (CDR) of various key persons of OP-3, and OP-4 and Mr. Vinay of Informant. The DG found from the CDR of Mr. Mahendra Sureka and Mr. Parikshit Sureka of OP-4 that they were in regular contact with Mr. Vinay of Informant from 01.01.2020 to 31.12.2020 and from 10.02.2020 to 10.02.2021, respectively.
26. The DG further noted that the CDR of Mr. H. D. Sharma of OP-3 showed that an outgoing call was made by Mr. H. D. Sharma to Mr. Vinay of Informant on 05.01.2021 at 20:58, just after his deposition in the DG office, which is an indication of collusive arrangement between OP-3 and Mr. Vinay of Informant.

Issue II: Whether the conduct of bidders amounts to violation of provisions of Section 3(3) read with Section 3(1) of the Act.

27. As per the Investigation Report, Mr. Jagdish Prashad Dinkar of OP-1 admitted to the existence of an agreement between OP-1 and OP-4 for procurement of defence tenders.



The DG noted that OP-1 violated the terms and conditions of the Tender which required that the supplier has to be an original manufacturer of the product. Further, Mr. Dinkar also admitted that the close price bids and the trifurcation of quantity bids for the Tender among the three OPs was indicative of a cartel arrangement and pointed out that in all probability OP-4 is the likely culprit of the cartel arrangement.

28. According to the DG, the WhatsApp chat/ communication between Mr. Vinay of the Informant and Mr. Parikshit Sureka of OP-4 showed a prior understanding/ agreement between OP-4 and said Mr. Vinay. This understanding didn't merely end at sharing of information pertaining to the Tender but also the sharing of information on investigation. Further, the CDR analysis of Mr. Mahendra Sureka and Mr. Parikshit Sureka of OP-4 showed that both were in regular contact with Mr. Vinay.
29. The DG noted that Mr. H. D. Sharma of OP-3 failed to provide any coherent explanation for quoting the exact quantity bid of 268,009 durries by OP-3. The CDR analysis of Mr. H.D. Sharma showed that he was in contact with Mr. Vinay of Informant during the investigation.
30. On the basis of the above evidence/ materials/ statements of parties, the DG reached a finding that the OPs herein acted in contravention of the provisions of Section 3 of the Act.

Issue III: Persons in charge of and responsible for the conduct of business of OPs, liable for contravention of the Act.

31. On the basis of above mentioned statements and analysis of call details and WhatsApp communications, the DG found that OPs acted in contravention of Section 3(3)(d) read with Section 3(1) of the Act. The DG also identified nine individuals of the OPs who were responsible for the conduct of business of OPs and were liable for contravention of Section 48 of the Act. Among the individuals identified by the DG, three individuals namely, Mr. Rama Shankar Maurya, Mr. Prabhakar Vardhan and Mr. Jagdish Prashad



Dinkar were found to be responsible for the conduct of business of OP-1; three individuals viz., Mr. Anal Kumar Gupta, Mr. Vinod Kaul and Mr. John Mohammad Bhat were found to be responsible for conduct of OP-2; Mr. H. D. Sharma was found to be responsible for conduct of OP-3; and Mr. Mahendra Kumar Sureka and Mr. Parikshit Sureka of OP-4 were found responsible for the conduct of business of OP-4.

32. The Commission considered the Investigation Report filed by the DG and decided to forward copies of the same to the OPs and the persons identified by the DG under Section 48 of the Act for filing their written objections/ suggestions, if any, thereto. The OPs and their individuals filed their replies and gave their oral and written submissions which are summarised below. The Commission also observes that the Investigation Report was also forwarded to the procurer, being the Informant, which curiously neither filed its objections/suggestions to the Investigation Report nor appeared in the oral hearing of the parties and even did not file its written submissions/arguments, pursuant to separate opportunity granted for this purpose.

Submissions/ objections of parties to the DG Report

Submission of OP-1

33. OP-1 stated that it is a government owned company established in 1973, in which the Central Government has 22.58% shares and the State of Uttar Pradesh holds 77.42% shares. It primarily works by procuring the product from individuals and weavers by providing them with yarn, paying them wages and training them on the technical know-how for production of the Items.
34. OP-1 submitted that it has an arrangement with OP-4 by way of an MoU dated 09.09.2013 and agreements dated 02.09.2014 and 02.09.2019. It is stated that the purpose behind these agreements was to enable utilisation of OP-4's expertise to enable OP-1 to participate in a greater number of tenders.



35. OP-1 submitted that the MoU and agreements were effectively, efficiency enhancing joint-venture (JV) arrangements and pursuant to these JV Agreements, OP-1 bid in certain defence tenders. It is also submitted that as a part of this JV Agreement, OP-1 participated in the Tender where it bid for a quantity of 415,000 durries, at a price of Rs. 646/- per durrie.
36. OP-1 averred that the Tender was not cancelled owing to any conduct of OP-1 or any cartel arrangement or bid rigging, it was cancelled since L1 was unable to honour the consignment and that after cancellation of the supply order, procurement of durries were discontinued altogether.
37. OP-1 stated that the major findings and conclusions in the DG Report do not allege or find a contravention of Section 3(3)(d) *inter se* OP-1, OP-2 and OP-3. Further, OP-1 submitted that that the DG report does not state as to how an MoU/ Agreements between OP-1 and OP-4 can be said to be in violation of Section 3 of the Act. Also, the DG Report did not find OP-1 or any of its personnel to be in collusion with OP-4 and/or the Informant.
38. As per OP-1, Mr. Vinay of the Informant played a critical role in the Tender and this aspect was neither investigated by the DG nor was Mr. Vinay called for deposition or made a party to the investigation. Further, the DG has not found any evidence of communication between OP-1, OP-2 or OP-3 and has not found any basis of the existence of an agreement among them under Section 3(3)(d) of the Act.
39. OP-1 averred that on the one hand, the DG Report states that there is no incriminating evidence pertaining to the Tender implicating OP-1 and OP-4, and on the other hand, without explaining how the ingredients of Section 3 of the Act are met in the case against OP-1 or other OPs, the DG has found contravention of Section 3 of the Act.
40. OP-1 stated that the DG relied on WhatsApp conversations between Mr. Parikshit Sureka of OP-4 and Mr. Vinay of Informant which started in June 2017, whereas, the Tender



was of December 2015 and bids were placed on 11.01.2016. It also stated that the DG's reliance on these communications cannot be a basis for concluding that such an arrangement existed 2 years prior to the actual communications.

41. OP-1 submitted that the basis of concluding contravention of Section 3 of the Act by the investigation was not an agreement amongst OP-1, OP-2 and OP-3 but exchange of certain sensitive information between Mr. Parikshit Sureka of OP-4 and Mr. Vinay. The said Mr. Vinay had exchanged certain sensitive information relating to tenders and that since Mr. H. D. Sharma of OP-3 was in contact with Mr. Vinay, the DG concluded that there is a collusive arrangement. OP-1 claimed that this does not prove existence of an agreement *inter se* OP- 1, OP-2 and OP-3, to rig their respective bids in the Tender. Further, there is not even a hint of an allegation that there is any hub and spoke cartel in the present case, with Mr. Vinay or some other officer of the Informant being the hub.
42. OP-1 stated that mere price parallelism could not be a basis of finding of a cartel. It is averred that OP-1 had quoted bid of Rs. 646/- per durrie, OP-2 had quoted Rs. 648/-, OP-3 had quoted Rs. 649/- and UP Industrial Co-operative Association Limited (UPICAL/L-5) also tendered a bid around the same range, *i.e.* Rs. 655/-, but no allegation was made against L5 bidder. It is stated that the present case is not solely of price parallelism, but also the fact that the bid quantities appear to be trifurcated, however, such an assertion would be in complete ignorance of the plausible explanations for the prices and quantities provided by OP-1 and OP-2, and that Mr. Vinay or some other officer of the Informant had indicated to OP-3 what quantity and/ or price to quote based on the bids already entered by OP-1 and OP-2.
43. With respect to the finding of DG that OP-1 violated Para 5 of Part III of the Impugned Tender, which required the seller (bidder) to declare that it is the original manufacturer of the goods being sold to the tendering authority, OP-1 stated that it was OP-4 that is manufacturing durrries, and violation of this tender condition cannot be a contravention of Section 3 or any other provision of the Act. OP-1 also stated that the DG faulted in its finding that the authorisation given by it to OP-4 to deal with/ engage with government



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departments for representing/ negotiating on behalf of OP-1, is a violation without referring to which relevant provisions of the Act has been violated in this regard.

44. OP-1 submitted that the DG Report does not explain lack of checks and balances in the JV Agreement, and if the JV Agreements are to be faulted under the Act, it needs to be demonstrated that the terms are such that they are in contravention of the provisions of the Act i.e., the JV Agreements have caused or are likely to cause an appreciable adverse effect on competition.
45. Further, Mr. Prabhakar Vardhan, officer of OP-1 was never called by the DG for his deposition and has been implicated under Section 48 purely on the basis of a statement of Mr. Mahendra Sureka of OP-4 that he used to be present during discussion when bids were placed.
46. OP-1 stated that OP-4 has already submitted the rationale for bidding for 415,000 durries stating that the quantity offered is based upon its proven capacity of durries; however, the DG without either accepting or rejecting this explanation, and without seeking any further explanation/ document in support of the proven capacity, has completely ignored this explanation.
47. As regards quoting Rs. 646/- as the bid price, OP-1 stated that earlier it supplied durries to DGOS at the rate of Rs. 609/- per piece and due to late delivery, a 10% LD (fine for late delivery) was imposed. Further, keeping in mind the unforeseen delays and upward market trend, a price of Rs.646/- was quoted.
48. OP-1 further submitted that it along with OP-4 has acted independently of OP-2 or OP-3 and the quantity and price were not based on any agreement amongst OP-1, OP-2 or OP-3 and there has been no bid rigging or collusive bidding by OP-1.
49. The individuals of OP-1 who were held liable under Section 48 of the Act namely Mr. Jagdish Prasad Dinkar, Senior Manager, Production Division; Mr. Prabhakar Vardhan, Assistant Manager, Production Division; and Mr. Rama Shankar Maurya, Managing



Director, submitted their separate responses. The submissions of these individuals of OP-1 are along similar lines and summarised below.

50. It is submitted by all the three individuals of OP-1 that Section 48 of the Act is only applicable to contraventions set out in Chapter VI of the Act and an interpretation of the statute as a whole would suggest that it was never intended to be applied to contraventions of Section 3 of the Act, and is erroneously sought to be done in the present case. Further, Section 48, a penal provision cannot apply to a contravention under Section 3 of the Act, because if an individual is to be punished for contravention of Section 3, the sanction provisions set out in Section 27 must be fundamentally intended to be applied to individuals covered under Section 48. It is submitted, however, that an individual covered by Section 48 cannot, fundamentally, be punished under Section 27.
51. It is further stated that the use of the word turnover, in Section 27(b) of the Act, could only be applied to a company or at best to a sole proprietorship or partnership and said term cannot include persons, who are/ were salaried employees. Further, the Act defines turnover as including the value of sale of goods or services. In view of this, Section 27(b) cannot be applied to individuals drawing a salary falling within the ambit of Section 48 of the Act.
52. It is stated in their submission that the only basis for holding Mr. J.P. Dinkar liable under Section 48 is that the Informant mentioned Mr. Dinkar as the key person of OP-1. It is averred that Mr. Dinkar is not in charge of the company, or responsible to the company for the conduct of its business and at the relevant time, he was an Assistant Manager in the production division, hence, Section 48(1) can have no applicability.
53. It is further stated that the only basis of holding Mr. Prabhakar Vardhan liable under Section 48 is the fact that Mr. Mahendra Sureka of OP-4 in his statement on 11.01.2021, stated that coordination with the authorised officer, i.e., Mr. Prabhakar Vardhan, used to take place and after which OP-4 would finally decide the bid prices and quantity; and the



fact that Mr. Vardhan allegedly executed certain undated letters in favour of directors of OP-4, granting them permission to represent/ negotiate with government departments.

54. It was submitted that Mr. Prabhakar Vardhan was not in charge of the company, or responsible to the company for the conduct of its business and at the relevant time, he was an Assistant Manager in the production division. Hence, Section 48(1) can have no applicability regarding Mr. Prabhakar Vardhan.
55. Further, the sole basis of holding Mr. Rama Shankar Maurya liable under Section 48 was the fact that Mr. Mahendra Sureka of OP-4 in his statement of 11.01.2021 stated that the Tender/ business proposal was discussed with the Managing Director of OP-1, after which coordination with the authorised officers used to take place, and pursuant thereto OP-4 would finally decide the bid prices and quantity.
56. As per the submission of individuals of OP-1, holding Mr. Rama Shankar Maurya and Mr. Prabhakar Vardhan responsible solely on the statement of Mr. Mahendra Sureka, is unsustainable. Mr. Maurya on his part submitted that he had no knowledge of the exact quantity and bid price quoted in the Tender or the manner in which such figures were arrived at. Further, he also had no knowledge of OP-4's contacts with Mr. Vinay of Informant and the communications between Mr. Vinay and Mr. Parikshit Sureka were from a period when Mr. Maurya ceased to have an association with OP-1.
57. OP-1's individuals, while denying that any penalty should be imposed upon them, also requested the Commission to consider following mitigating factors:
 - i. The Tender was cancelled not for any fault of OP-1 or the other OPs, or on the basis of any allegation of cartelisation or bid rigging and no AAEC is/ was caused by any conduct of OP-1
 - ii. OP-1 is a 100% government owned corporation that operates on a no-profit basis for the benefit of poor weavers across the state of Uttar Pradesh and its objective is to empower poor handloom workers and not to make profits;



- iii. Mr. Jagdish Prashad Dinkar, Mr. Prabhakar Vardhan and Mr. Rama Shankar Maurya were merely employees of OP-1, performing their assigned duties and had no knowledge or any ill intentions in relation to the Impugned Tender or with regard to any of the allegations levelled against OP-1 or OP-4;

Submission of OP-2

58. As regards quoting Rs. 648/- as the bid price, OP-2 justified the same by stating that the costing details were finalized by its management at that time after considering all the parameters necessary for manufacturing durries which involved factors like cost of raw cotton, transportation, finishing and a mark-up, which was purely in the interest of OP-2 for revenue generation and thereby up keeping the livelihood of the downtrodden weavers who were almost jobless. Further, the cost details were discussed with the then Managing Director of OP-2 and, accordingly, cost sheet was prepared and the price of Rs. 648/- per piece was finalized for placing the bid.
59. In so far as the quantity for placing bid was considered, OP-2 stated that parameters like financial resources and production capacity of OP-2 was considered by the management and the Tender was prepared and submitted online by the management through a cybercafe, based in New Delhi.
60. Mr. Anal Gupta, Managing Director of OP-2 submitted that the quantity of 1,35,000 durries furnished by OP-2 was arrived at after thorough discussion about the resources/capacity of OP-2. Further, OP-2 stated that it had calculated and gone through its financial resources and the final figure was arrived at after considering all the factors regarding financial constraints and resources available.
61. With respect to the finding of DG that there was some sort of a connivance in the whole episode in arriving of quantity quoted in the bid/tender and rates, OP-2 and Mr. Anal Gupta denied any link/ association with any of the other party figuring in the instant case.



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62. Mr. Vinod Koul, ex-AGM of OP-2, submitted that once the information was compiled as required in the bid, the same was sent to OP-2's Regional Office at New Delhi, for uploading as OP-2 had no expertise in such bids. It is stated that this job was entrusted to Mr. John Mohammad Bhat and was done by him honestly through a cyber cafe located at Daryaganj, New Delhi.
63. OP-2 further averred that it had no knowledge of OP-1 or OP-3 participating in the bid. Further, it was an in-house decision of OP-2 to participate based on the capability and availability of resources and weavers and there is no question of entering into any sort of understanding, collusion or rigging with OP-1, OP-3 and OP-4.
64. As per OP-2, DG's finding relating to quoting the quantity by OP-2 in the Tender vis- a-vis discussion with its bankers was wrong and OP-2 averred that it has an account with J&K Bank only, which was taken into consideration for arriving at the quantity to be quoted. OP-2 stated that it had to approach for finances in case the order was allotted and the role of the bank was only to provide finances against any order keeping in view the sanctioned cash credit limit.

Submission of OP-3

65. OP-3 submitted that in a monopsonistic/ oligopsonistic market, where there is only one or a few buyers, the conditions are such that sellers can make a reasonable prediction regarding the demand and further usually there is a repetitive bidding process and the products are identical and specialized, hence the likelihood of price parallelism is natural.
66. It submitted that being L4, no quantity was awarded to OP-3 as the L1 bidder was HP State Handicraft & Handloom which quoted Rs.428/-, per durrie in its bid whereas, the other bidders quoted within the range of Rs. 646-655/- and due to the said quotation the entire quantity was awarded to the L1 bidder.
67. OP-3 submitted that the DG, instead of following law, obtained evidence from OP-3 in an improper manner by issuing summons. The summons only mentioned that the



attendance of Mr. H. D. Sharma of OP-3 was required to seek clarification on the reply submitted by OP-3; however, upon reaching the office personally, cross examination of Mr. H. D. Sharma was conducted by the DG which was over the contents of the reply of OP-3 by leaps and bounds.

68. OP-3 averred that the DG has selectively picked and chosen the evidence submitted by OP-3 with a pre-determined mind-set as apart from it all other OPs are government undertakings.
69. With regard to finding of the DG that CDR analysis of Mr. H. D. Sharma shows that OP-3 had been in contact with Mr. Vinay of the Informant, OP-3 stated that the DG acted in complete contravention of the provisions of the Act and the DG while summoning CDRs also summoned the CDR belonging to the son of Mr. H. D. Sharma namely Mr. Rachit Sharma, who was 19 years old at the time of the said tender. It is averred that said act of the DG is complete malafide exercise of power and a breach of the fundamental right as guaranteed by the Indian Constitution. Further, the DG from a perusal of the said CDR found that Mr. H. D. Sharma had not been in contact with any of the people/ corporations during or immediately after the tender in question, however, the said CDR demonstrated that Mr. H. D. Sharma spoke to Mr. Vinay on two occasions i.e., 05.01.2021 and 08.02.2021, much after the initiation of the inquiry in question, and the DG did not read the situation correctly.
70. With respect to the finding of the DG that bid submission time and date shows that OP-3 had bid lastly at 12.10 am on 12.01.2016, and submitted the exact quantity bid of 268,009 durries, which would not have been possible without getting prior information from other OPs through Mr. Vinay of DGOS acting as a conduit, OP-3 has stated that the DG has tried to portray that Mr. H. D. Sharma was in contact with Mr. Vinay from DGOS during the tendering process and hence acted as a conduit. However, the record clearly portrays that the said finding is incorrect and it is not understandable as to how Mr. H. D. Sharma speaking to Mr. Vinay in the year 2021, could mean that Mr. Vinay acted as a conduit qua the tendering process even in the year 2015.



71. OP-3 submitted that there were no financial transactions qua OP-3 and other bidders, which was discovered by the DG and no communication whatsoever qua OP-3, *inter se* the other OPs was observed. Further, the IP address used by the OP-3 for filing the tender was not used by any other bidder and there existed no similarity between the documents submitted. OP-3 also stated that the CDR qua OP-3, shows no calls etc., during or after the tendering process and there lies no evidence of OP-3 either meeting/ participating in any other tenders with the remaining bidders.

Submission of OP-4

72. While reiterating the submissions of OP-1, OP-4 averred that DG has not found any conclusive evidence with respect to the Tender or any prior/ future tenders showing any collusion between the OPs which affected the Tender.
73. OP-4 submitted that the DG failed to prove any meeting of minds or of entering into any agreement between the OPs with any direct and conclusive evidence/ communication/ agreement with respect to the Tender.
74. It was further submitted that the DG failed to consider the reasons given by OP-4 with respect to the final quantity offered by OP-1 and price bid and it has proceeded on the assumption that the division of quantity must be a result of an agreement amongst OP-1, OP-2 and OP-3.
75. With respect to the written agreements between it and OP-1, OP-4 stated that there is no evidence to suggest lack of checks and balances as OP-1 had contracted with OP-4 to utilise its expertise in the manufacturing sector to enable a mutually beneficial commercial arrangement which both the parties were well within their rights to do without any legal infirmity.
76. With regard to the exchange of information between Mr. Vinay of Informant and Mr. Parikshit Sureka, Director of OP-4, OP-4 stated that the DG failed to note that this



information exchange commenced approximately 1.5 years after the Tender and it does not even relate to the said tender. Further, OP-4 averred that the DG failed to demonstrate as to how the exchange of said information adversely affected the competition within India or has given an undue advantage to any of the OPs in any other tender.

77. As per OP-4, DG failed to demonstrate which clause of Section 3 of the Act has been violated by such *post facto* information exchange and this information exchange is not between competitors, but between someone allegedly at the tendering authority/ Informant and OP-4.
78. It is also submitted that the present reference is hit by delay and laches and averred that it is a settled position in law that an aggrieved party ought to address his legal remedies at the earliest possible opportunity, however, in the present case, the Tender is dated 15.12.2015, while information with respect to the present Reference was filed by the Informant/DGOS only on 06.09.2019, i.e., almost after a lapse of 4 years. Further, the delay in the investigation itself suggests that there was no adverse effect on the competition within India and the present reference appears to be motivated.
79. It further submitted that Clause 7 of the Tender noted that the technical and commercial bids could be submitted by the bidder or any person authorised by it, OP-4 being authorised by OP-1 could submit the bid on behalf of it. Therefore, the contention of the DG is baseless.
80. OP-4 claimed that though OP-1 and OP-4 entered into an agreement, wherein OP-4 prepares, processes and assists submission of defence tenders on behalf of the OP-1, however, the final bid price and quantity to be quoted is always submitted in the presence and after discussion with the authorised officer of the OP-1. Thus, it is wrong for Mr. J.P. Dinkar to suggest that OP-1 is not privy to the quantity and price quoted by the OP-4 and that Mr. Dinkar was not involved with the Tender and therefore, his statement is not reliable.



81. It submitted that Mr. Mahendra Sureka of OP-4 was the final authority to decide the price and quantity bids to be quoted in defence tenders, however, the said bids were discussed with authorised officers of OP-1 before submission as per the arrangement mutually decided between OP-1 and OP-4. OP-4 submitted that it did not have the digital signature of OP-1 and officers of OP-1 were present during the submissions of the final tender and the digital signatures of OP-1 were used by them.
82. OP-4 further averred that final price and quantity of the bids was decided after considering various factors such as market analysis, manufacturing capacity, previous participated tenders etc. and the quantity bid was given after due consideration of the its proven capacity of supply. Further, after careful analysis it was ascertained that the maximum manufacturing capacity for durries was 41,875 durries per month and to ensure that the Tender could be fulfilled, a conservative amount of 41,500 durries was taken to be the maximum supply capacity on a monthly basis. Since, the delivery period for the Tender was of 10 months, it quoted the amount of 415,000 durries. OP-4, thus, submitted that there was no understanding or collusive arrangement for the Tender with other bidders and it had quoted a bid of Rs. 609/- per unit for the previous tender and after considering the upward market trend and an unforeseen delay, a sum of Rs. 646/- per unit was quoted with a 6% increase in rate.
83. OP-4 contended that nothing has been placed on record by DG to indicate that OP-4, other OPs and Mr. Vinay of Informant were in contact during the Tender. Since the DG has not cross-examined Mr. Vinay, it is itself proof that the DG did not consider the communications with Mr. Vinay, a contravention of the provisions of the Act.
84. OP-4 submitted that Mr. Parikshit Sureka was never in contact with Mr. H.D. Sharma, that is why a request for his contact details was made to Mr. Vinay through WhatsApp chat dated 21.12.2020, which proves that there was no collusion/ agreement between the parties.



85. OP-4 further submitted that call records of Mr. Mahendra Sureka and Mr. Parikshit Sureka, are for the period commencing from 10.02.2020 to 10.02.2021, and tender in question was floated on 15.12.2015, while bids were submitted on 12.01.2016. Thus, it could not be assumed that OP-4 and its directors were in contact with the said Mr. Vinay, DGOS during the period of the Tender. It was further submitted that the WhatsApp chats of Mr. Parikshit Sureka and Mr. Vinay of Informant indicated that Mr. Parikshit Sureka did not have the contact details of Mr. H.D. Sharma of OP-3 prior to 21.12.2020. Therefore, the allegation of collusion of OP-4 with OP-3 is false, frivolous and baseless.
86. OP-4, while denying that any penalty should be imposed, prayed that the Commission may consider the following mitigating factors:
- i. OP-4 is a very small commercial enterprise and profit quotient of the company is extremely small.
 - ii. The average profits of OP- 4 for the last 3 financial years is approximately only Rs.12 Lakhs and OP-4 employs a number of local weavers and that the earnings and profits obtained from tenders are ultimately distributed among the weavers.
 - iii. No prior proceedings have been initiated against OP-4 before the Commission.

Analysis of the Commission

87. Having perused the information, Investigation Report of the DG, objections/ suggestions of the parties to the Investigation Report, oral submissions made by the OPs on 16.09.2021 and subsequent written argument, the Commission is of the view that the main issue in the matter is whether there was any agreement amongst OPs to fix prices and trifurcate quantity amongst themselves in the Tender issued by the Informant, resulting in bid-rigging that may fall foul of Section 3(3)(a)/ 3(3)(d) read with Section 3(1) of the Act.
88. At the outset, the Commission notes that Tender was issued by the Informant for procurement of 818,009 durries, in which nine firms participated but only six firms technically qualified for opening of their respective commercial bids. The Commission



notes that OP-1, OP-2 and OP-3 were declared as the L2, L3 and L4 bidders, respectively in the Tender while L1 bidder was one HP State Handcraft and Handloom Corporation Ltd. which had quoted Rs. 428/- per durrie and was awarded full quantity. The Commission also notes from submission of parties that L1 bidder was unable to honour its obligation on grounds of manpower and financial constraints and therefore, the Tender was cancelled by the Informant.

89. The Commission also notes that the DG, *inter alia*, on basis of the exact trifurcation of quantity, submission of bids by all the three OPs within a period of 6 hours, similarity in bid prices, exchange of information between OP-3 and Mr. Vinay of Informant, exchange of information between OP-4 and Mr. Vinay of Informant and statements of officials of OPs before the DG regarding possibility of a cartel/ collusive arrangement has concluded that OPs have acted in contravention of provisions of Section 3 of the Act.
90. The Commission further notes from the DG Report that OP-1 is not an original manufacturer of durries as it procures the same from OP-4 by way of an MoU between them. Further, the DG also found that OP-4 prepares and processes bids on behalf of OP-1 for which OP-1 receives 2.5% of the total consideration amount. The DG also found that a representative of OP-4 was present to guide OP-1 in the entire process of filling of the online bids of defence tenders.
91. The Commission notes that OPs have argued that for contravention of Section 3(1) read with Section 3(3)(a)/ 3(3)(d) of the Act there must be an agreement amongst OPs and that in the present case, there is neither any direct nor any such indirect evidence in the Investigation Report indicating existence of any such agreement. Further, a collusive arrangement, for contravention of the Act, has to be amongst competitors and the alleged exchange of information between OP-4 and Mr. Vinay of procurer/ Informant is not the kind of collusion as contemplated under Section 3(3) of the Act. Moreover, such information exchange was in relation to a period of over 2 years after submission of bids in the Tender by the OPs. OP-1 has contended that the tender condition requiring that the supplier must be the original manufacturer could render OP-1 ineligible from



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participation in the tender but same cannot be said to have resulted in contravention of the provision of the Act.

92. The Commission notes that OP-3 has contended that the present situation is of a monopsony/ oligopsony market and tender in question is a repeat order and that in a market like this the conditions are such that a seller is usually aware about the action of other competitors and can predict the demand. Further, there is repetitive bidding and products are identical, hence in such a situation price parallelism is natural. OP-3 has also contended that price at which supply is to be effected is usually fixed post negotiations by the Informant. Further, the final allotment, irrespective of the price and quantity quoted, remains in the hands of the Informant, being the procurer.
93. The Commission also notes that OP-3 contended that throughout the investigation, the DG has not found an iota of evidence indicating any *consensus ad idem qua* OP-3 and other OPs and no evidence indicating any transactions and/or relations between the OP-3 *vis a vis* other OPs.
94. In the aforesaid background, the Commission, at the outset, finds it pertinent to mention that an agreement between competitors *i.e.*, enterprises who are engaged in identical or similar trade of goods or provision of services, is a *sine qua non* for establishing contravention in terms of the Section 3(3) of the Act. The Commission notes that the definition of 'agreement' as given under Section 2(b) of the Act requires an arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings. Once the existence of an agreement is established, such an agreement between such competitors shall be presumed to be anti-competitive and have an appreciable adverse effect on competition under Section 3(3) of the Act.
95. The Commission notes that a plea has been taken by OP-1 and OP-4 regarding communication evidence collect by the DG being of a much later period and not around the time when the Tender was issued or the bid was placed and thus being of no consequence. The Commission in this regard observes that communication evidence may



be hard to be found especially with passage of time, but that does not tie the hands of the investigation, from collecting and placing reliance on a later communication evidence, which may be indicative of a suggestive questionable past relationship that may have likely existed between the parties, not in consonance with provisions of Section 3(3) of the Act. The later evidence thus does not lose its credence entirely as suggested by the aforementioned OPs, and its appreciation would depend on the specific facts and circumstances of each case. However, for the reasons mentioned in the following paras, the Commission does not deem it fit to delve further on this aspect.

96. The Commission observes that the DG in its Investigation Report has placed reliance on the statements of the officers of OPs and requisitioned emails accounts, call records as well as WhatsApp communication of the officers of OPs; however, no contact or coordination, or communication, or meeting was found to exist between OP-1, OP-2, OP-3 and OP-4 immediately before or after the submission of bids in the Tender which could have established existence of an agreement or understanding or action in concert amongst OPs. In the present case, the basis of conclusion by the DG of contravention of Section 3 of the Act are separate communications between directors of OP-4 and Mr. Vinay of Informant and between representative of OP-3 and Mr. Vinay of Informant, much after period of submission of bids in the Tender.
97. The Commission has also perused the statement of Mr. Mahendra Sureka of OP-4 admitting in unequivocal terms his role in manipulating the bid process. He has submitted an unconditional apology before the DG with respect to the exchange of information. Accordingly, Mr. Sureka prayed that penalty, if any, be imposed at a negligible rate. The conduct of Mr. Sureka was suspect based on his own confession.
98. The Commission in the facts and circumstances of the present case and particularly evidences collected by the DG, observes that bidding for the Tender was not a fair process, particularly in light of the conduct of OP-4 and its directors viz. Mr. Mahendra Sureka and Parikshit Sureka, who were in touch with Mr. Vinay of the Informant, which is generally not observed in public procurement, to say the least. The same can also be



inferred in respect of the conduct of OP-3, particularly it's individual Mr. H.D. Sharma, who was in contact with Mr. Vinay even during the time of investigation by the DG. Undoubtedly, there is clinching evidence that Mr. Vinay was in contact with the persons named above, which might have facilitated placing exact number of quantities by the OPs, matching with the total quantities to be procured by Informant. Despite the same, the Commission is hesitant to observe the existence of a cartel as envisaged under Section 3(3) of the Act. As regards hub and spoke cartel, it could not be clearly established that OPs were acting as spokes in furtherance of an *inter se* arrangement with each other, with Mr. Vinay of the Informant acting as hub. Evidence only indicates separate communication between Mr. Vinay and OP-4 and between Mr. Vinay and OP-3. There is no evidence of communication between Mr. Vinay and OP-1 and OP-2 or that the said Mr. Vinay facilitated an *inter se* communication between the OPs. As regards the conduct of OP-1 and OP-4 in respect of the MoU between them, it is for the procurer to ponder over and take corrective and remedial action as deemed necessary.

99. The Commission notes from the Investigation Report that the Tender was cancelled by the Informant on account of the failure of L-1 to make supplies and later the procurer opting not to procure durries at all. In this regard, the contention raised by the OPs is that the Tender was cancelled, for reasons of L-1 not been able to effectively service the contract, and since the OPs herein were in the position of L-2, L-3, and L-4, no prejudice was caused under the Tender process and there exists no AAEC. The Commission is not impressed by this argument in the least as the requirement of Section 3(3) of the Act is existence of an agreement between the parties for conducts that falls within the instances enumerated under Section 3(3)(a) to (d) of the Act. Moreover, Section 3(3) read with Section 3(1) of the Act would be equally applicable in instances, like the present one, even if no effect was given to the agreement as there is not only a presumption of actual AAEC but also that of likely AAEC. Thus, any attempt to do a pernicious conduct with an underlying arrangement, regardless of its fructifying is enough trigger for the Commission to take corrective action as may be required in the facts and circumstances of each case. Agreements and arrangements under Section 3(3) of the Act ought to



receive a strict interpretation, subject only to the exceptions as laid down under the said provision.

100. Adverting to the next contention of OP-1 that the arrangement between OP-1 and OP-4 was in the nature of a Joint Venture (JV) as envisaged under proviso to Section 3(3) of the Act, the Commission observes that JVs are understood to be entities formed with a special purpose/ collaboration to do business. To that extent, mere execution of an MoU or an agreement without anything further to create such a venture, cannot give it a semblance of a JV.
101. The Commission now shall deal with the submission of OP-1 that liability under Section 48 cannot be attracted without a determinative finding under Section 27 of the Act. The Commission finds that the said issue is no more *res integra* with the decision of the Hon'ble Delhi High Court in *Cadila Healthcare Limited and Anr Vs. CCI and Ors (LPA 160/2018 & CM APPL. Nos. 11741-44/2018)*, wherein, the Hon'ble High Court rejected Cadila's contention with respect to issuance of notice by CCI, to its directors under Section 48 of the Act and referred to a single bench judgment of its own Court in *Pran Mehra Vs. CCI & Anr*, where it was held as under:

"7. It is no doubt true that the petitioners can only be held liable if, the CCI, were to come to a conclusion that they were the key-persons, who were in-charge and responsible for the conduct of the business of the company. In the course of the proceedings qua a company, it would be open to the key-persons to contend that the contravention, if any, was not committed by them, and that, they had in any event employed due diligence to prevent the contravention. These arguments can easily be advanced by key- persons without prejudice to the main issue, as to whether or not the company had contravened, in the first place, the provisions of the Act, as alleged by the D.G.I., in a given case."

102. The Hon'ble High Court further held that:

"...This court is of opinion that the correct interpretation of law was given in Pran Mehra the reasoning of which is hereby confirmed, as is the reasoning in Ministry of Agriculture v M/s Mahyco Monsanto Biotech Ltd, which proceeds on a correct appreciation of the law. Accordingly, Cadila's grievance with respect to issuance of notice to its directors by citing Section 48 is without substance; it is hereby rejected. The impugned judgment cannot be faulted."



103. The said view has also been affirmed in another judgment of Hon'ble Delhi High Court in *Mahyco Monsanto Biotech (India) Pvt. Ltd. & Another vs. CCI & Others (LPA 637/2018 & CM. Nos. 47926/2018 and 47927/2018)* (Monsanto Judgement), which held as under:

“35. On a perusal of Section 27 of the Act, it is clear that it stipulates, the CCI on a finding that there is a contravention of Section 3 or Section 4, can pass orders against an ‘enterprise’ and a ‘person’ i.e. individual, who has been proceeded against, imposing penalty.

104. The Commission also negatives the contention of OP-1 that Section 48 will not apply in respect of a contravention under Section 3 of the Act, but is confined only to contraventions mentioned under Chapter VI of the Act, or that an individual covered under Section 48 of the Act cannot fundamentally be punished under Section 27 of the Act. The Commission in this regard observes that both Section 27 and Section 48 of the Act are cast in wide sweep. Also the language employed under Section 48(1) of the Act, applies to contravention of any of the provisions of the Act, including Section 3 of the Act, as well in its fold, and not merely the contraventions as provided under Chapter VI as has been contended by OP-1. The Commission observes that Hon'ble Delhi High Court has settled the issue in the *Monsanto* judgment, which is as under:

“Insofar as the plea of Mr. Kapur and Mr. Rao that Section 48 as it falls under Chapter VI, only relates to the contravention of Sections 42 to 44 of the Act, is also not appealing, inasmuch as the Section contemplates “on contravention of the provisions of the Act”, one shall be liable to be proceeded against and punished accordingly. The contravention of the provisions of the Act includes Sections 3 and 4, as is clear from Section 46, which is also in Chapter VI, stipulates lesser penalty for violating Section 3 in certain eventualities. If the interpretation as sought to be advanced by Mr. Kapur and Mr. Rao, is to be accepted / agreed to, then Section 48 shall become nugatory, and there shall be no penalty for violating the Act.”

105. The Commission also does not find any merit in the argument of OP-1, that salaried individuals do not have any ‘relevant turnover’ and as such cannot be assessed under Section 27(b) of the Act. In this regard, the Commission notes that in the *Monsanto* judgment, the argument has already been repelled by the Hon'ble Delhi High Court



“37. ...There cannot be any dispute that if the Company and the Officers / Directors are being proceeded against for violation of Sections 3 and 4, there has to be a consequence for violation. Mr. Kapur and Mr. Rao’s plea was that the word ‘turnover’ would not be applicable to Officers / Directors. The plea appears to be appealing on a first blush, but on a deeper consideration, if we agree with the submission made by Mr. Kapur and Mr. Rao then the very provision of penalty to be imposed on the Officers / Directors being ‘persons’ in terms of Section 27(b) would be rendered otiose / nugatory. In other words, there would not be any stipulation of penalty to be imposed on Officers / Directors even if they are found to be violating Sections 3 and 4. That cannot be the intent of Sections 27(b) and 48. Such a stipulation, surely requires a purposive interpretation.”

106. Further, the Hon’ble High Court in Para 39 of the same judgment has stated that

“...Mr. Kapur and Mr. Rao, in their submissions had relied on the general meaning of the word ‘turnover’ i.e. the income of a Company in a particular period, but the synonyms of the word ‘turnover’ (as per English Oxford Living Dictionary) are revenue, gross revenue, income, yield, volume of business, business sales. So, the turnover, in the context of Officers / Directors has to be interpreted as the income of the Officers / Directors from the Company, as there cannot be an income of an Officer / Director from an infringing product. We have been told, during the course of the arguments that the CCI has been imposing penalty on the income of the Officers / Directors of the Company. We agree with such an action.”

107. With respect to the submission of some of the individuals of OPs, that their liability cannot be examined under Section 48(1) of the Act, as they were not in-charge of the affairs of OP, the Commission notes that the investigation has found the liability under Section 48 of the Act, without delineating whether under sub-section (1) or sub-section (2) thereof. However, it is to be noted that if conduct (being any act of commission or omission) of an individual is clearly established in an inquiry, in relation to certain forbidden acts on behalf of the company, then the same gets covered under Section 48(2) and liability under Section 48(1) is a deeming provision which arises in respect of such individuals who are incharge of and responsible to the company for the conduct of the business of the company as well as the company.

108. Upon summing up the above discussion, the Commission is of the view that in the absence of persuasive evidence, it cannot be conclusively held that OP-1, OP-2, OP-3



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and OP-4 have contravened the provisions of Sections 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act. Further, since no liability has accrued on the OPs, consequently no liability can be fastened on the persons/ individuals identified by the DG under Section 48 of the Act. In view of the said finding, the Commission decides that it is not necessary to deal with any other issues raised by the OPs. Accordingly, the matter is ordered to be closed.

109. Before parting with the order, the Commission is of the firm view that competition law cannot be a panacea for the ills that plague public procurement, especially when some culpability will also lie at the doorstep of the procurer, as has been seen in the present case.

110. The Secretary is directed to communicate to the parties, accordingly.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Sangeeta Verma)
Member

New Delhi
Date: 03.11.2021

Sd/-
(Bhagwant Singh Bishnoi)
Member