



**COMPETITION COMMISSION OF INDIA**

**Case No. 42 of 2012**

**In Re:**

**M/s Swastik Stevedores Private Limited**

**Jobra, Cuttack, Odisha**

**Informant**

**And**

**M/s Dumper Owner's Association**

**Atharabanki, Paradip Port,**

**Jagatsinghpur, Odisha**

**Opposite Party No. 1**

**M/s Paradip Port Trust**

**Jagatsinghpur, Odisha**

**Opposite Party No. 2**

**Paradip Port Stevedores Association**

**Opposite Party No. 3**

**CORAM**

**Mr. Ashok Chawla**

**Chairperson**

**Mr. S. L. Bunker**

**Member**

**Mr. Sudhir Mital**

**Member**

**Mr. Augustine Peter**

**Member**



**Mr. U. C. Nahta**

**Member**

**Appearances:**

**For the Informant:** Advocate Mr. A. K. Singh.

**For the Opposite Party No. 1:** Mr. Pinaki Mishra, Sr. Advocate with  
Advocate Mr. A. Panigrahi.

**For the Opposite Party No. 2:** Advocates Ms Sharmila Upadhayay and Mr.  
S. K. Mishra, DTM.

**For the Opposite Party No. 3 :** Advocates Mr. Swami Dharmendra Balyogi  
and Mr. Ashmi Mohan.

**Order under Section 27 of the Competition Act, 2002**

M/s. Swastik Stevedores Private Ltd. (hereinafter, the '**Informant**') has filed information in the present case under section 19(1)(a) of the Competition Act, 2002 (hereinafter, the '**Act**') against M/s Dumper Owners' Association (hereinafter, '**DOA**' or '**Opposite Party No. 1**') and M/s Paradip Port Trust (hereinafter, '**PPT**' or '**Opposite Party No. 2**') for their alleged infringement of the provisions of section 3 and section 4 of the Act in provision of the services of dumpers and hywas for intra-port transportation of cargo inside the Paradip Port prohibited area.

2. **Facts**

The facts of the matter, as culled out from the information, may be briefly noted:

2.1 The Informant is a company registered under the Companies Act, 1956, *inter-alia*, engaged in the business of stevedoring and intra-port



transportation of various type of cargo that are imported to and exported from India within the premises of Paradip Port. The Opposite Party No. 1 is an association of dumper owners registered under the Societies Registration Act, 1860 and has been working as a facilitator between the licensed stevedores and owners of dumpers and hywas for handling of cargo and their intra-port transportation inside the Paradip Port. The Opposite Party No. 2 is a registered port trust under the Indian Port Trust Act, 1908; functioning under the Ministry of Shipping, Government of India. It is the sole authority managing all activities being carried out in the port premises of Paradip Port.

2.2 The Opposite Party No. 1 is stated to be the only association inside the Paradip Port for making available dumpers and hywas of its members to the registered stevedores for intra-port transportation of cargo. It is stated that because of its monopoly position, stevedores are fully dependent on the Opposite Party No. 1 for supply of dumpers and hywas. It is averred that taking advantage of its monopoly position, the Opposite Party No. 1 in connivance with the Opposite Party No. 2, has been refusing to provide dumpers and hywas to the Informant and enlisting the Informant for availing the services of dumpers and hywas. As per the Informant, the said acts of the Opposite Parties are in violation of the provisions of sections 3 and section 4 of the Act.

2.3 Several instances have been cited in the information when the Opposite Party No. 1 has denied dumpers to the Informant. The first of such incidents occurred when the Opposite Party No. 1 denied dumpers to the Informant for unloading and intra-port transportation of cargo comprising 59,500 MT of coking coal imported from Australia through the vessel MV Galatea which reached Paradip Port on 6.10.2011. As a result, the vessel was stranded inside the Port and the cargo could not be unloaded and transported by the Informant.

2.4 Left with no option the Informant filed a writ petition [WP (C) No. 27527 of 2011] before the Hon'ble High Court of Odisha at Cuttack against the



Opposite Parties. The Hon'ble High Court passed an interim order on 17.10.2011 directing the Opposite Party No. 2 to issue necessary direction to the Opposite Party No. 1 to provide dumpers and hywas to the Informant for unloading and intra-port transportation of the said cargo.

2.5 It is averred that despite the said direction of the Hon'ble High Court of Odisha, the Opposite Party No. 1 did not provide any dumpers to it. The Opposite Party No. 2, being hand in glove with the Opposite Party No. 1, did not take any action against it for defying the order of the Hon'ble High Court. Resultantly, the Informant was constrained to file a contempt application before the Hon'ble High Court for non-implementation of its order.

2.6 It is the case of the Informant that despite repeated directions of the Hon'ble High Court, the Opposite Party No. 1 did not provide dumpers to it and the Informant was forced to hire dumpers by paying 5% more than the prevailing market rate.

2.7 The Informant *vide* its letter dated 18.11.2011 again requested the Opposite Party No. 1 to supply dumpers, hywas and allied services for its future assignments and to enlist it for deployment of dumpers, hywas, *etc.* Further, on 06.01.2012, the Informant requested the Opposite Party No. 1 to provide dumpers for intra-port transportation of cargo comprising 10,000 MT of iron ore imported through the vessel MV Christine B which had reached Paradip Port on 04.01.2012. In response, the Opposite Party No. 1 issued a letter on 09.01.2012 stating that a suitable convenient date and time may be fixed for finalisation of rates, terms and conditions *etc.*, for supply of dumpers.

2.8 Also, the Opposite Party No. 2 *vide* its letter dated 31.01.2012 directed the Opposite Party No. 1 to provide dumpers to the Informant at the same rate, terms and conditions as applicable to the existing stevedores and to enlist the Informant for supply of dumpers. On 02.02.2012, the Informant requested the Opposite Party No. 1 to execute necessary agreement to provide dumpers and



heavy machineries for accomplishment of its various overseas contracts. But, the Opposite Party No. 1 did not respond to above said directions and requests. As per the Informant, the said behaviour of the Opposite Party No. 1 is arbitrary and it is acting like a monopolist.

2.9 The Informant further alleged that the Opposite Party No. 1 and six stevedores enlisted with it revised the rate of dumpers and hywas for intra-port transportation of cargos in a meeting and the same was communicated by the Opposite Party No. 1 to all its six enlisted stevedores on 16.02.2012. The Informant was neither informed about the revision of rates nor about the proceeding of the meeting. As per the Informant, the members of Opposite Party No. 1 have formed a cartel to monopolise the services of dumpers and hywas inside the Paradip Port prohibited area which is in contravention of the provisions of section 3 of the Act.

2.10 The Informant *vide* its letter dated 19.04.2012 requested the Opposite Party No. 2 to issue necessary direction to the Opposite Party No. 1 for supply of dumpers on the same terms and conditions as has been executed with its enlisted stevedores. Accordingly, the Opposite Party No. 2 directed the Opposite Party No. 1 to enlist the Informant to provide dumpers to it on demand at the rate, terms and conditions as applicable to other enlisted stevedores in compliance with the direction of the Hon'ble High Court. The Opposite Party No. 1 *vide* its letter dated 29.05.2012 replied that its membership cannot be taken as a matter of right as it is purely a voluntary, non-statutory and private association of like-minded dumper owners. The Opposite Party No. 1 claimed that it considered enlisting the Informant for the provision of dumper and hywas services but kept the same pending due to the complaints it received from some dumper owners regarding non-payment of dues by the Informant. It was also stated in the reply that once the cases against the Informant are disposed of and the Informant withdraws all the baseless allegations against the Opposite Party No. 1, it may reconsider enlisting the Informant for providing dumpers on commercially prudent and feasible terms, provided that the Informant would have to



produce a bank guarantee of the entire demanded transportation cost or make advance payment for the same.

2.11 It is also the case of the Informant that it had entered into an agreement with M/s MRTC India Pvt. Limited ('MRTC'), an enlisted stevedore with the Opposite Party No. 1, for supply of dumpers and hywas for making intra-port transportation of cargos. But, the Opposite Party No. 1 did not allow MRTC to provide dumpers to a non-listed member like the Informant.

2.12 Based on the above facts and averments, the Informant has requested the Commission to cancel the registration of the Opposite Party No. 1 and declare its arrangement with the Opposite Party No. 2 inside the Paradip Port prohibited area as void; to restrain the Opposite Parties from abusing their dominant position and impose penalty as may be appropriate keeping in view the wilful and deliberate abuse of dominant position by the Opposite Parties; to direct the Opposite Parties to pay compensation to the Informant; and to pass such other order(s) as the Commission deems fit and proper.

3. Finding a *prima facie* case of violation of the provisions of the Act in the matter, the Commission *vide* its order dated 04.10.2012, under section 26(1) of the Act, directed the Director General (hereinafter, 'DG') to conduct an investigation into the matter. Accordingly, DG investigated the matter and submitted the investigation report to the Commission on 31.10.2013.

#### 4. **DG's Investigation**

4.1 Primarily, the following two pertinent issues have been addressed in the DG report: (i) examination of the alleged abuse of dominant position by the Opposite Party No. 1 as per the provisions of section 4 of the Act, and (ii) examination of existence of any anti-competitive agreement between the Opposite Parties and the alleged infraction of the provisions of section 3 of the Act.



4.2 For examination of the alleged infringement of the provisions of section 4 of the Act, the DG, as per the requirement of applicability of section 4, has first examined whether the Opposite Party No.1 is an enterprise in terms of section 2(h) of the Act. As per the DG report, the Opposite Party No. 1 is itself not directly engaged in the provision of the services of dumpers and hywas for intra-port transportation operations inside the prohibited area of the Paradip Port, which is the relevant market in the instant case. Its activities are limited only to allocation of dumpers of its members to the parties/enlisted stevedores requisitioning the same for intra-port transport operations within the Paradip Port prohibited area. As per the DG report, even though the services being rendered by the Opposite Party No. 1 are bereft of any monetary considerations and it is not directly engaged in the provision of the services of dumpers, the Opposite Party No. 1, by virtue of being engaged in the activity of provision of services of allocation of dumpers, is an 'enterprise' in terms of section 2(h) of the Act.

4.3 It is observed in the DG report that since the Opposite Party No. 1 did not own dumpers and that its service being limited to only allocation of dumpers of its members on requisition to the users/stevedores, the market for the said service is distinct from the services of dumpers for intra-port transportation being rendered by its constituent members. Thus, the Opposite Party No. 1 as an enterprise is operating in a different market *i.e.*, in the market of provision of services of allocation of dumpers; not in the market of services of dumpers for intra port transportation operations in the Paradip Port prohibited area. Accordingly, it is concluded by the DG that since the Opposite Party No. 1 is a non-player in the relevant market, its conduct is not liable to be examined under the provisions of section 4 of the Act.

4.4 As per the DG report, the members of the Opposite Party No. 1, by virtue of their association, have entered into an agreement through a Memorandum of Association (hereinafter, 'MoA'). During the course of DG investigation it has been found that the Opposite Party No. 1 is allocating dumpers owned by its members as per its sole discretion and being the single point source of



supply of dumpers for stevedoring, it is controlling the provision of dumper services inside the Paradip Port prohibited area. It has also been reported that by denying services of dumpers to the Informant, the Opposite Party No. 1 has limited the provision of the said services. Accordingly, the DG has concluded that, the options of the stevedores to engage dumpers from any alternate sources being limited, by denying services of dumpers to the Informant, the Opposite Party No. 1 has limited and controlled the provision of the said services which is in contravention of the provisions of section 3(1) read with section 3(3)(b) of the Act.

4.5 It is also observed in the DG report that besides being engaged in the activity of allocation of dumpers of its members, the Opposite Party No. 1 is also engaged in the practice of negotiating and finalising rates of dumpers and hywas on behalf of its members with some stevedores who have formed an association in name of Paradip Port Stevedores Association (hereinafter, '**Opposite Party No. 3**' or '**PPSA**'). The practice of mutual negotiation and finalization of rates by the two associations *i.e.*, the DOA and PPSA is found to be in the nature of direct or indirect determination of purchase or sale price which is in violation of the provisions of section 3(1) read with section 3(3)(a) of the Act. Further, the five office bearers of the Opposite Party No. 1 namely, Shri Amiya Kumar Sahoo, President; Shri Bhagban Swain, Vice President; Shri Tusharkanta Bhoi, Secretary; Shri Himanshu Pattanaik, Assistant Secretary; and Shri Ajay Kumar Samal, Treasurer are also equally responsible for the practices of the Opposite Party No. 1 that have been found to be anti-competitive under the provisions of section 3(1) read with sections 3(3)(a) and 3(3)(b) of the Act.

4.6 As regards the role of PPSA, the DG has found that PPSA is directly or indirectly determining the purchase prices of the services of dumpers thereby contravening the provisions of section 3(1) read with section 3(3)(a) of the Act. PPSA is found to be following the practice of negotiating and finalizing rates of dumpers and hywas with Opposite Party No. 1 and reserving the exclusive right to do so on behalf of its members as well as non-members. It





is also reported that four office bearers of PPSA namely, Shri Anarjyami Pattanaik, Secretary; Shri Mahimananda Mishra, President; Shri R.K. Gosh, Treasurer; and Shri Sarat Kumar Hati, Vice-President are equally complicit in the said practices that have been found to be anti-competitive under the provisions of section 3(1) read with section 3(3)(a) of the Act.

4.7 As per the DG report, grant of permission by the Opposite Party No. 2 to the dumpers owned by the members of the Opposite Party No. 1 for intra-port transportation operations inside the Paradip Port prohibited area does not tantamount to an exclusive agreement between the Opposite Party No. 1 and the Opposite Party No. 2. Further, the Opposite Party No. 2 has not been found to be involved in the process of negotiation and finalization of rates of dumpers between the Opposite Party No. 1 and PPSA. Accordingly, it is concluded by DG that the Opposite Party No. 2 has not infringed any of the provisions of the Act.

5. **Reply/Objections of the Opposite Party No. 1(DOA)**

5.1 The Opposite Party No. 1 in its reply to the DG report has stated that the decision whether a trade practice is restrictive or not has to be arrived at by applying the 'rule of reason' principle and not the doctrine of 'per se'. The Opposite Party No. 1 has submitted that it operates with the objective to avoid unhealthy business practices of the individual dumper owners and to facilitate smooth handling of stevedoring activities at Paradip Port. It plays the role of a facilitator for engaging the dumpers and hywas on a pro-rata and rotational manner ensuring that each dumper owner gets a fair chance for engagement of his vehicle. Further, a stevedore may employ his own dumpers or hire the same by making a simple requisition to the Opposite Party No. 1. In such case, the stevedore has to make payment directly to the dumper owners for their services and not to the Opposite Party No.1.

5.2 It is submitted that for every standard shipment, for handling of cargo on an average 40 to 45 dumpers and hywas are required. In such case, it becomes highly onerous on the part of a stevedore to engage such large number of



dumpers from different sources by contacting the individual dumper owners. Further, the dumper owners when negotiated with directly used to charge higher rates from the stevedores. As per the Opposite Party No. 1, after its advent stevedoring became uniform, cost effective and every independent dumper owner is getting a fair chance of engagement. Contrary to the allegations, the Opposite Party No. 1 has submitted that it has broken the monopolistic and exploitative behaviour of the individual dumper owners and discouraged their anti-competitive practices in the Paradip Port prohibited area.

5.3 The Opposite Party No. 1 has objected to the finding of the DG that it is a single point source of supply of dumpers at the Paradip Port prohibited area and it is limiting and controlling the provisions of services of dumpers for intra-port transportation in said area and has termed this finding as baseless and not supported by any material evidence. The Opposite Party No. 1 has cited the reply of M/s Adani Enterprise submitted before DG wherein M/s Adani Enterprise admitted that it has an arrangement with M/s Orissa Stevedores for providing dumper, *etc.*, due to which it did not send requisition to the Opposite Party No. 1 for dumpers. The Opposite Party No. 1 has also cited the reply submitted by M/s Karamchand Thapar before DG wherein it was submitted that dumpers can also be requisitioned from other sources, not only from the Opposite Party No. 1.

5.4 It is submitted by the Opposite Party No. 1 that there is absolutely no restriction on the stevedores to hire/lease dumpers from any private party and the Opposite Party No. 2 has granted the requisite permission for the same. The finding of the DG in this regard is contradictory as on the one hand it states that each licensed stevedore is free to hire/lease dumpers from any other source with the necessary permissions from the Opposite Party No. 2 and on the other hand it states that the Opposite Party No. 1 is the single point source of supply in the Paradip Port prohibited area.



5.5 On the non-compliance of the High Court orders, the Opposite Party No. 1 has submitted that the Informant had not approached it for the supply of dumpers and hywas. This was done by the Informant with the malafide intention to not let it comply with the orders of the Hon'ble High Court. It is submitted that there has never been any complaint in the past by any stevedore that the Opposite Party No. 1 has denied supplying dumpers to him.

5.6 The Opposite Party No. 1 has also submitted that the DG has misunderstood the statement of its Secretary, Shri Tusharkanta Bhoi and the direction of the Opposite Party No. 2 to dumper owners association to cap the number of dumpers at 368. This step was taken by the Opposite Party No. 2 to ensure level playing field and to provide equal opportunity to all the dumper owners. Further, there is no embargo on the entry of private dumpers and hywas inside the Paradip Port and they can independently apply for entry permits from the Opposite Party No. 2.

5.7 The Opposite Party No. 1 further stated that it had definite reasons to demand bank guarantee/advance payment from the Informant for providing dumpers to it. It has submitted that the finding of the DG that by reserving the exclusive right to negotiate and finalise the rates on behalf of the members as well as non-members and stipulating upon the service provider to make such rates applicable to all its users amounts to directly or indirectly determining prices in contravention of the provisions of the section 3(1) read with section 3(3)(a) of the Act is baseless and misplaced. It is further, submitted that price fixing can be called anti-competitive only when it does not take consumer's interest into account.

5.8 It has also been contended that it is nobody's case including the Informant, that fixing of prices of dumpers for intra-port transportation by the Opposite Party No. 1 is above market rate or in any manner predatory and adversely affecting the non-members. It has further been submitted that none of the other non-member stevedoring companies have complained till date about



the functioning of the Opposite Party No. 1. Further, PPSA has their consent for negotiating and finalizing the rates of dumpers with it and decisions taken are acceptable to them.

5.9 On the findings of the DG regarding liability of its office bearers for the contravention of the Act, the Opposite Party No. 1 has replied that no anti-competitive practices are being carried out either by it or by its office bearers. Since there is no basis of this finding of the DG, the question of its office bearers being complicit and liable for acting in contravention of the provisions of section 3(1) read with sections 3(3)(a) and 3(3)(b) of the Act does not arise.

6. **Reply/Objections of the office bearers of the Opposite Party No. 1(DOA)**

6.1. In response to the Commission's direction dated 13.05.2014, the following office bearers of the Opposite Party No. 1 have submitted their replies/objections to the investigation report of DG:

- i) Shri Amiya Kumar Sahoo, President;
- ii) Shri Bhagban Swain, Vice President;
- iii) Shri Tusharkanta Bhoi, Secretary;
- iv) Shri Himanshu Pattanaik, Assistant Secretary; and
- v) Shri Ajay Kumar Samal, Treasurer

6.2. Shri Amiya Kumar Sahoo, President of the Opposite Party No. 1 has denied the allegations of anti-competitive practices and has submitted that the Opposite Party No. 1 comprises around 280 members who are loosely bound together as an association to facilitate smooth handling of stevedoring activities and to avoid unhealthy business practice at the Paradip Port prohibited area. He has submitted that the association plays the role of a facilitator for engaging the dumpers and hywas on a pro-rata and rotational manner thereby ensuring that each dumper owner gets a fair chance for



engagement of its machinery. He also submitted that without having due regard to the functioning of the Opposite Party No. 1, the DG has held that it is contravening the provisions of section 3(1) read with sections 3(3)(a) and 3(3)(b) of the Act. It has been submitted by Shri Amiya Kumar Sahoo that the present case is the first isolated incident wherein the Informant has made baseless allegation of anti-competitive practices followed by the Opposite Party No. 1 and the instances relied upon by the Informant are solely relating to the requisitions exclusively made by it in support of which it has presented wrong facts. It has also been submitted that the finding of the DG that the Opposite Party No. 1 is the single point source of supply and that it limits and controls the provisions of service of dumpers in the Paradip Port prohibited area is baseless and not supported by material evidence. On the finding of price fixation, he has submitted that fixing of prices can be called anti-competitive when the same is carried out without taking into account the interest of consumers.

6.3. Other office bearers of the Opposite Party No. 1 have submitted similar responses as that of Shri Amiya Kumar Sahoo, President of the Opposite Party No. 1.

## 7. **Reply/objections of the Opposite Party No. 2(PPT)**

7.1 The Opposite Party No. 2 in its reply has submitted that its main role is to provide infrastructural facilities such as berths, storage yards *etc.*, to the importers and exporters for loading, unloading and storage of cargo. The roles and responsibility of stevedores is to facilitate/provide logistics support for loading and unloading of cargo from the vessel. There are 33 stevedoring firms which have been licensed by it under Paradeep Port Stevedoring Regulation, 2009.

7.2 As per the Opposite Party No. 2, some of the stevedores have formed an association in the name of Paradeep Port Stevedores Association on whose request it used to issue entry passes to the dumpers and hywas. Subsequently,



entry passes were issued directly to the dumpers based on the request of the Opposite Party No. 1.

7.3 The Opposite Party No. 2 has submitted that the Opposite Party No. 1 is purely an independent body and it has no employee/employer relationship with the Opposite Party No. 2.

7.4 It is submitted that the Opposite Party No. 2 has not indulged in any monopolistic or restrictive trade practices. It has no way put any embargo on the entry of dumpers from outside and any party desirous of hiring cargo from outside can do so. It is absolutely open for members/non-members of PPSA to arrange their own dumpers. It is also submitted that the Opposite Party No. 2 has always played a proactive role for fostering healthy competition among the stevedores and other agents to provide various services like loading and unloading of cargo, intra-port transportation of cargo and dispatch of cargo by rail and road. Further, the Opposite Party No. 2 has no role to play in engagement of dumpers except issuance of entry passes to them on payment of charges as per the Port scale of rates. Also, no restriction is imposed by the Opposite Party No. 2 to engage dumpers other than those owned by the members of the Opposite Party No. 1 for intra-port transportation work by the licensed stevedores. Entry permits were directly being issued to the Opposite Party No.1 to save time and paper work as the stevedores raised the issue of loss of time due to late reporting of dumpers at the work point. However, since 05.04.2014 port entry passes are directly issued only in favour of dumpers on the recommendation of any licensed stevedore.

7.5 The Opposite Party No. 2 has also replied that it has no role in fixation of tariff of dumpers for intra-port transportation of cargos. The rates are mutually decided by the stevedores and the Opposite Party No. 1 and there was no agreement between the Opposite Party No. 2 and the Opposite Party No.1 in this regard. The payment for services rendered by the members of the Opposite Party No. 1 is also made directly to them.



7.6 It is submitted that the situation prevailing at the Paradip Port is peculiar compared to other ports because it is handling dry bulk cargo which requires usage of dumpers and hywas. As per the Opposite Party No. 2, associations like the Opposite Party No. 1 do exist at some other ports in India such as Andhra Pradesh Lorry Association at Vishakapatnam Port.

7.7 It is also submitted that except the instant case no issues have been brought before it that required intervention. It intervened in this matter on receipt of instruction from the Hon'ble High Court of Odisha and issued required instructions/directions as per the provisions of the Port Trust rules.

8. **Reply/objections filed by Opposite Party No. 3(PPSA)**

8.1 PPSA in its response has submitted that it was not a party to the complaint submitted by the Informant on the basis of which the Commission referred the matter to the DG and there is no pleading in the information alleging any act of omission or commission on part of PPSA. Thus, the DG exceeded the scope of mandate conferred upon it by the Commission and has embarked upon a fishing and roving inquiry which is not permissible. It is further submitted that the DG should have limited the investigation to the four corners of information submitted and *prima facie* opinion formed thereupon by the Commission.

8.2 As per PPSA the conclusion drawn in the DG report is not supported by any material or evidence. It denied violation of any of the provisions of the Act and also denied that its office bearers are in any manner complicit in any anti-competitive activities.

8.3 PPSA has further submitted that it had not entered into any agreement with any entity which has the effect of adversely affecting competition in market. It also submitted that no material was placed before the DG to establish that PPSA was in any manner controlling the supply of dumpers and hywas to the stevedores.



8.4 PPSA has relied upon a letter dated 24.05.2013 and an affidavit dated 20.07.2013 submitted before the DG by the Opposite Party No. 2. The said letter states that no restriction is imposed by the Paradip Port to engage dumpers other than those owned by the members of the Opposite Party No. 1 for intra-port transportation work by the licensed stevedores. Clause No. 6(m) of the stevedoring license provides that the stevedores are to arrange necessary gears, equipments *etc.*, for their respective cargo. The affidavit dated 20.07.2013 states that no restriction is imposed by the Opposite Party No. 2 to engage dumpers other than those owned by the members of the Opposite Party No. 1 for intra-port transportation work by the licensed stevedores and recommendations from members of PPSA or other non-member stevedores is not required for issue of Port entry pass.

8.5 PPSA has also submitted that its role is only limited to negotiate rates with DOA at which the dumpers are to be supplied to stevedores. The objective is only to streamline and facilitate the hiring of dumpers and hywas at a standard rate to prevent over-charging. Further, the rate negotiated by it is optional and not mandatory for the stevedores and they have the option to make their own private arrangements.

8.6 It is submitted by PPSA that no evidence has been furnished by DG to establish contravention of the provisions of section 3(1) read with section 3(3)(a) of the Act by it. Thus, the finding of the DG in this regard is not maintainable and hence should be set aside.

## 9. **Reply/Objections of the office bearers of PPSA**

9.1 Based on the Commission's direction dated 13.05.2014, the following office bearers of PPSA have submitted their replies/objections in response to the investigation report of the DG:

- i) Shri Anarjyami Pattanaik, Secretary;





ii) Shri Mahimananda Mishra, President;

iii) Shri R.K. Gosh, Treasurer; and

iv) Shri Sarat Kumar Hati, Vice-President.

9.2 All the office bearers have submitted that they have adopted the arguments taken by PPSA in its reply filed before the Commission on 24.02.2013 as well as the submissions filed on behalf of PPSA on 30.04.2014. They have submitted that they have nothing additional to submit except that neither they nor any office bearers of PPSA have in any way acted in contravention of the provisions of the Act which would amount to anti-competitive behaviour. It has been stated that the findings arrived at by the DG against them are false and incorrect.

#### 10. **Issues and Analysis**

10.1 Having perused the facts of the matter; DG investigation report; objections filed by the Opposite Parties, the office bearers of the Opposite Party No. 1 and Opposite Party No. 3 in response to the DG report; other materials available on record and hearing the arguments of the learned counsel appearing on behalf the Informant, the Opposite Parties, the Commission feels that the following issues need to be determined to arrive at a decision in the matter:

(i) Whether there is contravention of the provisions of section 4 of the Act by the Opposite Party No. 1?

(ii) Whether the Opposite Parties have contravened provisions of section 3 of the Act? If so, whether the office bearers of Opposite Party No. 1 and Opposite Party No. 3 are also liable for the same?

#### 10.2 **Determination of Issue No. I: Whether there is contravention of section 4 of the Act by the Opposite Party No. 1?**



10.2.1 The Informant has alleged that the Opposite Party No. 1 has abused its dominant/monopoly position in providing dumpers to the stevedores inside the Paradip Port prohibited area. Before examination of the alleged violation of the provisions of section 4 of the Act by the Opposite Party No. 1, it is essential to determine whether the Opposite Party No. 1 is an 'enterprise' within the meaning of section 2(h) of the Act.

10.2.2 As per section 2(h) of the Act, "*enterprise*" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space".

10.2.3 The Commission notes that the DG in his investigation report has considered the Opposite Party No. 1 as an 'enterprise'. This conclusion of DG is apparently based on the premise that the Opposite Party No. 1 has been engaged in the activity of provision of services of allocation of dumpers of its members among stevedores which is distinct from the activity of its members *i.e.*, the provision of the services of dumpers, which is the relevant product market in the instant case. As per the DG report, even though the Opposite Party No. 1 is not directly engaged in the provision of the services of dumpers for intra-port transportation and the services rendered by it are bereft of any monetary consideration, since



it has been engaged in the provision of services of allocation of dumpers which itself is an activity, the Opposite Party No. 1 can be treated as an enterprise as per the provisions of section 2(h) the Act. However, the DG held that the conduct of the Opposite Party No. 1 is not liable to be examined under the provisions of section 4 of the Act as the Opposite Party No. 1 does not operate in the relevant market of “the provision of the service of dumpers for intra-port transportation operations in the prohibited area of the Paradip Port”.

10.2.4 The Commission is of the view that, as per the scheme of the Act, to qualify as an ‘enterprise’, any person or department of government has to be engaged in the activity specified under section 2(h) of the Act. It is noted that the Opposite Party No. 1 is an association of dumper owners and in itself it is only a facilitator of the services of dumpers and allocates dumpers of its constituent members. It is further observed that the Opposite Party No. 1 though engaged in allocating dumpers owned by its members amongst users/stevedores, it neither owns any dumpers nor receives consideration for the services of dumpers owned by its members. Its activity therefore, cannot be considered as the activity of an enterprise as reported by DG. It may be noted that, in a number of cases such as in Case No. 52 of 2010, *Eros International Media Limited v. Central Circuit Cine Association & others* and Case No. 56 of 2010 *Sunshine Pictures Private Limited v. Motion Pictures Association & others* the Commission has taken a view that trade associations which are not directly involved in economic activity cannot be termed as an “enterprise” under section 2(h) of the Act. Accordingly, the Commission is of the view that the Opposite Party No. 1 is not an enterprise in terms of section 2(h) of the Act. Therefore, its conduct cannot be examined under the provisions of section 4 of the Act. The Issue No. 1 is decided accordingly.

10.3 **Determination of Issue No. II: Whether Opposite Parties have contravened the provisions of section 3 of the Act?**



10.3.1 The Informant has alleged that there exists an arrangement between the Opposite Party No. 1 and the Opposite Party No. 2 in regards to the provision of the services of dumpers inside the Paradip Port restricted area because of which the Opposite Party No. 1 has denied enlisting the Informant for supply of dumpers and not allowing other dumper owners who are not its member to operate inside the Paradip Port prohibited area which amounts to limiting and controlling the provision of dumper services inside the Paradip Port restricted area as per the provisions of section 3 (3)(b) of the Act. It is also averred in the information that the Opposite Party No. 1 in collusion with the Opposite Party No. 2 has been fixing price of dumpers for intra-port transportation operations which amounts to directly or indirectly determining the sale price of provision of services under the provisions of section 3(3)(a) of the Act.

10.3.2 The following issues need to be determined in regards to the alleged contravention of the provisions of section 3 of the Act in the matter. Firstly, whether there exists any collusive arrangement/agreement between the Opposite Party No. 1 and the Opposite Party No. 2 in contravention of the provisions of section 3 of the Act. Secondly, whether Opposite Party No. 3 (PPSA) in collusion with the Opposite Party No. 1 (DOA) has fixed the purchase price of the services of dumpers in contravention of the provisions of section 3(3)(a) of the Act.

10.3.3 With regard to the alleged collusive arrangement between the Opposite Party No. 1 and the Opposite Party No. 2, the DG has reported that there is no material/evidence available on record which can substantiate that Opposite Party No. 1 and Opposite Party No. 2 have entered into any anti-competitive agreement or have any arrangement with regard to the provision of the services of dumpers inside the Paradip Port restricted area so as to limit or control the said services or/and fix the prices of dumpers for intra-port transportation or for any other reason. Also, the facts and circumstances of matter do not indicate any possibility of such collusion. Further, considering the role of the Opposite Party No. 2, which provides



necessary infrastructural facilities to the importers and exporters for smooth operations of port, the DG has reported that the Opposite Party No. 2 has no reason to collude with the Opposite Party No. 1 in respect of provision of dumper services inside the Port as it is not in a position to derive any benefit out of such collusion.

10.3.4 The Commission notes that there is no evidence either provided by the Informant or available on record which controverts the findings of the DG report. Thus, in the absence of any material or evidence on record regarding any anti-competitive agreement between Opposite Party No. 1 and Opposite Party No. 2, the Commission is of the view that the allegations against Opposite Party No. 2 for contravening the provisions of section 3 of the Act are not established. Accordingly, it is held that the Opposite Party No. 2 has not infringed any of the provisions of section 3 of the Act in the present case.

10.3.5 So far as the Opposite Party No. 1 is concerned, the Commission is in agreement with DG and is of the view that by virtue of their association the members of Opposite Party No. 1 have entered into an agreement amongst themselves through an MOA (Memorandum of Association) to pursue the common objectives stated therein. Since, the Opposite Party No. 1 is an association of enterprises, engaged in the provision of identical/similar services *i.e.*, provision of the service of dumpers, the decision taken by or practice carried on by the Association can be examined under the provisions of section 3(1) read with section 3(3) of the Act.

10.3.6 The Commission notes that the DG has reported that the Opposite Party No. 1, being a single point source of supply of dumpers, by its conduct of allocating dumpers of its members to the stevedores who are enlisted with it and refusing to supply the dumpers to the Informant has limited and controlled the provision of the said services in contravention of the provisions of section 3(1) read with section 3(3)(b) of the Act. To



substantiate this finding, DG has reported that the Opposite Party No. 1 is the single point source for procurement of dumpers of its members because any requisition for the dumpers has to be made by the intending users/stevedores to it and it has the exclusive right to assign dumpers of its member to them. In the name of streamlining the system of requisitioning of dumpers in the interest of the users and its members, the Opposite Party No. 1 exercises absolute control over the supply of dumpers owned by its members. Further, citing the admission of the Secretary of the Opposite Party No. 1, DG has reported that due to space constraints and other operational reasons the Opposite Party No. 2 has limited the number of dumpers deployed in the Paradip Port premises at 368 and all the 368 dumpers belong to the 280 members of the Opposite Party No. 1. Based on the above, DG has reported that the options for users to source dumpers from alternate sources in the Paradip Port premises are extremely limited and stevedores are mainly dependent on the Opposite Party No. 1 for the said services.

10.3.7 It was found during the course of investigation that the Opposite Party No. 1 had refused to supply dumpers to the Informant for unloading and intra-port transportation of its cargo from the vessel M V Galateia and this fact was established from the response of the Opposite Party No. 1 submitted to the DG wherein it was stated that the Informant had written letters to it for supply of dumpers. Further, the obstinate refusal by the DOA, inspite of the direction of the Hon'ble High Court of Odisha at Cuttack and consequent directions from the Opposite Party No. 2 to supply dumpers to the Informant for unloading and intra-port transportation of cargo from the vessel M V Galateia clearly showed that the Opposite Party No. 1 had denied dumper services to the Informant.

10.3.8 Further, as per DG report the Informant *vide* its letter dated 06.01.2012 also requested the Opposite Party No.1 to provide dumpers, at the rates being paid by other stevedores for executing an assignment related to a vessel M V CHRISTINE B which had arrived at Paradeep Port on



04.01.2012. Instead of providing the dumpers, the Opposite Party No. 1 *vide* its letter dated 09.01.2012 invited the Informant for discussion regarding finalization of rates and the terms and conditions for the said service. DG also reported that the Opposite Party No. 1 has denied dumpers to the Informant to carry out a stevedoring assignment of the Steel Authority of India Ltd.(SAIL) for which the Informant *vide* its letter dated 26.04.2010 had requested the Opposite Party No. 1 for supply of dumpers.

10.3.9 On the contrary, the Opposite Party No. 1 has argued that it is not the single point source of supply of dumpers and it is not limiting and controlling provisions of the service of dumpers for intra-port transportation within the Paradip Port prohibited area. Also, it had neither enlisted any stevedore for providing dumpers and hywas nor entered into any agreement/understanding with any stevedore for supply of dumpers. As per the Opposite Party No. 1, any stevedore can avail the services of dumpers of its members by making a simple requisition to it. In support of its argument, the Opposite Party No. 1 has relied on the copies of requisition for dumpers received by it from some parties who are not licensed stevedores. It is submitted by the Opposite Party No. 1 that the licensed stevedores are free to hire/lease dumpers and hywas from other agency/service provider/individual owner. In support of its contention the Opposite Party No. 1 has cited the reply submitted by M/s Adani Enterprise before the DG wherein it is stated that M/s Adani Enterprise has an arrangement with M/s Orissa Stevedores Ltd. for providing necessary handling equipment like dumpers, *etc.*, Further, the Opposite Party No. 1 has cited the reply submitted by M/s Karamchand Thapar before DG wherein M/s Karam Chand Thapar & Bros (Coal Sales) Ltd., stated that dumpers can be requisitioned from any other source than the Opposite Party No. 1.

10.3.10 On capping of the number of dumpers at 368 by the Opposite Party No. 2, the Opposite Party No. 1 has submitted that it was done with a view to





ensure level playing field and to give equal opportunity to all the dumper owners and in no way it can curtail the entry of the private dumpers into the Paradip Port prohibited area. On the specific instance of denial of dumpers to the Informant, the Opposite Party No. 1 has stated that the Informant has never requested it for supply of dumpers and it had never received any advance from the Informant for supply of dumpers. Rather, the Informant had an arrangement/contract with MRTC for the provision of dumper services and the stated advance amount had been paid by the Informant to MRTC and not to the Opposite Party No. 1.

10.3.11 From the facts of the case it emerges that inside the Paradip Port prohibited area for the provision of dumper services the permission of the Opposite Party No. 2 in terms of issuing gate pass is a *sine-qua-non*. The Opposite Party No. 2 has also capped the number of dumpers which can operate inside the Port restricted area. Seemingly, the Opposite Party No. 2 provides gate pass to the dumpers for security reasons and has restricted the number of dumpers due to space constraints and other operational reasons. It is also observed that the Opposite Party No. 2 had given the responsibility of issuing the gate pass of dumpers to the Opposite Party No. 1. Apparently, by issuing the gate pass only to the dumpers of its members, the Opposite Party No. 1 used this responsibility in its favour with a view to control the services of dumpers inside the Paradip Port prohibited area.

10.3.12 Though DG has reported that the Opposite Party No. 1 is the single point of source for the supply of dumpers and hywas to the stevedores, it is observed that other sources are also available for supply of dumpers inside the Paradip Port prohibited area. The Commission notes that the Opposite Party No. 2 only puts restriction on the number of dumpers to be operated within the Port premises but has not given exclusive right to the Opposite Party No. 1 for the provision of said service. It is also revealed from the DG investigation that in some cases parties other than





the enlisted stevedores have also made requisitions for dumpers from the Opposite Party No. 1.

10.3.13 Even though the Opposite Party No. 1 may not be a single point source of supply of dumpers to the stevedores inside the Paradip Port prohibited area, the Commission observes that the option of alternate source of supply of dumpers for the stevedores is extremely limited. This is because of the fact that the Opposite Party No. 2 has capped the number of dumpers which can be operated at the Paradip Port premises to 368 and 280 members of the Opposite Party No. 1 own 368 dumpers. Thus, the option available for the non-enlisted stevedores for the said services is obviously restricted. It is observed that even though there is no restriction imposed by the Opposite Parties on the stevedores for making their private arrangement for dumper services, the fact cannot be denied that the control and management of all 368 dumpers of its members was in the hand of the Opposite Party No. 1 and it used its responsibility to issue entry gate pass to its advantage.

10.3.14 Also, from the analysis of details of entry passes issued by the Opposite Party No. 2 during 08.10.2012 and 31.10.2013 to the member and non-members of the Opposite Party No. 1, it is observed that the average numbers of days for which members of Opposite Party No. 1 employed their dumpers *etc.*, was 220 days per vehicle whereas for non-members of the Opposite Party No. 1 it was just 23.61 days per vehicle. Thus, out of total number of days for which dumpers, *etc.*, were employed during the said period, the share of non-members was merely 10.74 % against 89.26% share of members of the Opposite Party No. 1.

10.3.15 Further, in the name of better management of the service and ensuring fair share of business among its members, the Opposite Party No. 1 exercises complete control over the supply of dumpers owned by its members which enables it to provide or to deny the services of dumpers to any user/stevedore. Thus, the Commission is of the view that the



Opposite Party No. 1 has for all practical purposes controlled the provision of services of dumpers. It is also noted from the DG investigation that the Opposite Party No. 1 has denied the services of dumpers to the Informant for unloading and intra-port transportation of cargo from the vessel M V Galateia, in spite of a definite direction from the Hon'ble High Court of Orissa and subsequent direction from the Opposite Party No. 2. It had also denied dumpers to the Informant for a stevedoring assignment of SAIL. It is also noted that the Opposite Party No. 1, in the name of finalisation of rates and the terms and conditions, denied the services of dumpers to the Informant for executing an assignment related to the vessel M V Christine B.

10.3.16 From the sequence of events, circumstances of the case and findings of DG in this regard, it is amply clear that the Opposite Party No. 1 is not only controlling the services of the provision of dumper inside Paradip Port restricted area but also limiting the said services by denying it to the Informant and other stevedores who are not enlisted with it for the said service and who are dependent on it because of limited availability of the other sources of supply of dumpers. Accordingly, the Commission is in agreement with the findings of DG in this regard and is of the view that the above said acts of the Opposite Party No. 1 amount to limiting and controlling the provision of the services of dumpers inside the Paradip Port prohibited area which is in contravention of the provisions of section 3(1) read with section 3(3)(b) of the Act.

10.3.17 On the issue of fixing the price for the provision of the services of dumper by the Opposite Party No. 1 (DOA) and Opposite Party No. 3 (PPSA), it is noted that the DG has come to a conclusion that the DOA and PPSA are collectively engaged in the practice of negotiation and finalisation of the rates for dumpers for intra-port transportation of cargo inside the Paradip Port prohibited area which is in violation of the provisions of section 3(1) read with 3(3)(a) of the Act. In support of this finding DG has produced material evidences in the form of minutes of



the meetings held between the DOA and PPSA on 24.01.2012, 05.08.2011, 16.03.2011, 28.05.2009, 03.02.2009, 02.12.2008, 13.11.2007, 07.08.2006, 10.11.2005, 09.07.2005, 18.07.2004, and 08.01.2004. DOA itself has also admitted that it is involved in negotiation of rates of dumpers for intra-port transportation with the PPSA. It is also reported by DG that out of thirty three licensed stevedores in the Paradip Port, eight stevedores are the member of PPSA which negotiate rates of dumpers, *etc.*, with the Opposite Party No. 1.

10.3.18 Contrary to the above findings of DG, DOA has stated that fixing of price is called anti-competitive only when the same is carried out without taking into account the interest of the consumers. The DOA has contended that PPSA has its consent for negotiating and finalizing rates of dumpers with it and decisions taken by PPSA is acceptable to all, including the non-member stevedores. The Opposite Party No.1 has stated that its object is to provide quick and efficient services at Government approved rates which are uniform. It is further argued that the fixation of price of dumpers is based on the price of diesel.

10.3.19 Regarding its involvement in negotiating rates of dumpers with the DOA, PPSA has contended that the DG has no jurisdiction to investigate PPSA as neither the Informant has alleged anything against it nor the Commission has directed the DG to do so. As per PPSA, the DG has exceeded the scope of the mandate given by the Commission and embarked upon fishing and roving inquiry which is not permissible. Further, PPSA has stated that DG's findings in this regard are not based on any material evidence whatsoever. PPSA has also submitted that it had not entered into any agreement with any entity which has adversely affected the competition in any market. PPSA has also submitted that its role is only limited to negotiate rates with DOA at which the dumpers are to be supplied to stevedores. The objective is only to streamline and facilitate the hiring of dumpers and hywas at a standard rate to prevent over-charging. Further, the rate negotiated by it is optional and not



mandatory for the stevedores and they have the option to make their own private arrangements.

10.3.20 From the perusal of the DG report and supporting materials produced by the DG in terms of minutes of the meetings held between the Opposite Party No. 1 and PPSA on different dates during 2004 to 2012 as enumerated *supra*, it is evidenced that the Opposite Party No. 1 was involved in the finalising rates of dumpers for intra-port transportation of cargos which is made applicable to all the members of the Opposite Party No. 1. This fact gets substantiated from the submission of the Opposite Party No. 1 itself. Further, the constitution of the DOA (Annexure 1 of the DG report) itself talks about having uniform rates for providing dumper services. It further provides constitution of '**Rate Committee**' which is authorised to finalise the rates for different work.

10.3.21 Under these circumstances it is evident that the members of Opposite Party No. 1 are not allowed to negotiate rates for providing dumper services to their customers, i.e., stevedores and are forced to abide by the rates decided by their association, i.e., DOA. Therefore, DOA is deciding rates of dumper services for its members and it shuts the independent decision making of individual members. From the bare perusal of the letter of the President, DOA, dated 16/02/2012 addressed to 6 stevedores named therein (Annexure 42 of DG report) it is abundantly clear that it is the DOA which is determining the rates of dumper services on behalf of its members and further enforcing it on those stevedores also who are not the members of PPSA and with whom no negotiation had taken place. Informant has already alleged that the revised rates were not negotiated with him and he was not even made aware of the upward revision. Based on the evidence as shown above the contention of the DOA that the rates are fixed after the concurrence of both the parties does not appear to be tenable.



10.3.22 Thus, in consonance with the findings of DG in this regard and the facts and circumstances of the case, the Commission is of the view that the Opposite Party No. 1 has indulged in the practice of determining the rates of the provision of dumper services for intra-port transport operations within the Paradip Port restricted area which amounts to determination of sale price of the services of dumpers which is in violation of the provisions of section 3 (1) read with 3(3)(a) of the Act. Accordingly, the Commission concludes that the Opposite Party No. 1 is found to have infringed the provisions of section 3(1) read with 3(3)(a) of the Act.

10.3.23 The Commission does not find any force in the contention of PPSA that the DG had no power to investigate its conduct as there was no allegation against it in the information and the Commission had not ordered any investigation against PPSA as not only some allegation against the stevedores enlisted with DOA (essentially members of PPSA) were made but also because the DG is well within its right to examine the conduct of any other entity also if the same is also related to the alleged anti-competitive conduct. However, the Commission is not in agreement with the findings of DG that the role of PPSA in negotiating rates of dumper and hywas for intra-port transport operations within the Paradip Port restricted area amounts to direct or indirect determination of purchase price of the services of dumpers which is in violation of the provisions of section 3(1) read with 3(3)(a) of the Act. The Commission observes that members of PPSA are the consumers of the services of dumpers and the members of the Opposite Party No. 1 are the supplier of the said services. As consumers of the services of dumpers, the members of PPSA can negotiate the rates with the Opposite Party No. 1 which cannot be construed as fixating of price in terms of the provisions of section 3(3) of the Act. Moreover, none of the members of the Opposite Party No. 1 has alleged that PPSA is forcing them to supply the dumpers and hywas below the market prices and they are suffering losses on that count. Further, while examining the role of the DOA in



determining the sale price of dumper services, it has been seen above that it is the DOA who is enforcing the determined rates on the stevedores including those who are not members of PPSA. Further, unlike DOA, PPSA has categorically stated that the rates negotiated by it are optional and not mandatory for the stevedores and they have the option to make their own private arrangements. Upon considering all these factors together, the Commission is of the considered view that PPSA has not contravened any of the provisions of section 3 of the Act.

10.3.24 Having established that the Opposite Party No.1 has contravened the provisions of section 3(1) read with sections 3(3)(a) and 3(3)(b) of the Act, as per the provisions of section 48 of the Act, it is to be determined that whether the office bearers of the Opposite Party No. 1 can be held liable for the above said contravention.

10.3.25 In this regard the Commission is of the view that in case of association of enterprises comprising of entities which themselves are enterprises, liability for anti-competitive conduct may arise two fold. While the association of enterprises may be liable for breach of section 3 of the Act embodied in a decision taken by the association, the constituent enterprises of the association may also be held liable for contravention of section 3 of the Act arising from an agreement or concerted practice among them. Moreover, the anti-competitive decision or practice of the association can be attributed to the members who were responsible for running the affairs of the association and actively participated in giving effect to the anti-competitive decision or practice of the association. The Commission has taken a similar view in many cases concerning trade associations such as in the matters of *Varca Druggist & Chemist and Ors. Vs. Chemists & Druggists Association, Goa* [MRTP Case No. C-127/2009/DGIR (4/28)], *Santuka Associates and AIOCD & Ors.* (Case No. 20/2011), etc.



10.3.26 DG investigation has found that all the five office bearers of the Opposite Party No. 1 namely Shri Amiya Kumar Sahoo, President; Shri Bhagaban Swain, Vice-President; Shri Tushar Kanta Bhoi, Secretary; Shri Himanshu Pattanaik, Asst. Secretary; and Shri Ajay Kumar Samal, Treasurer are equally complicit in the anti-competitive practices of controlling and limiting the provisions of dumper services and determining the prices of dumpers for intra-port transportation of cargos inside the Paradip Port prohibited area. In support of this findings DG has produced the minutes of meetings held between the office bearers of the Opposite Party No. 1 and PPSA on different dates between 2008 and 2012.

10.3.27 It is reported by DG that Shri Amiya Kumar Sahoo, President of the Opposite Party No. 1 had attended two meetings on 16.03.2011 and 24.01.2012; Vice-President of the Opposite Party No. 1 Shri Bhagaban Swain had attended three meetings on 02.12.2008, 03.02.2009, and 28.05.2009; Secretary of the Opposite Party No. 1 Shri Tushar Kanta Bhoi had attended two meetings on 16.03.2011 and 24.01.2012; Asst. Secretary of the Opposite Party No. 1 Shri Himanshu Pattanaik had attended three meetings on 28.05.2009, 16.03.2011 and 24.01.2012; and Treasurer of the Opposite Party No. 1 Shri Ajay Kumar Samal had attended four meetings on 02.12.2008, 28.05.2009, 16.03.2011 and 24.01.2012; wherein the decision regarding prices of the services of dumpers were taken. It is also reported by DG that the above said office bearers of the Opposite Party No. 1 are perpetuating the practices adopted by the Opposite Party No. 1 regarding controlling and limiting the services of dumpers inside the Paradip Port restricted area.

10.3.28 Even though the said office bearers of the Opposite Party No.1 have denied the DG findings in this regard they have not brought anything on record which could absolve them from their responsibility in terms of section 48 of the Act. Therefore, in concurrence with the DG finding in this regard based on the material/evidence collected and collated by DG,





the Commission is of the view that the office bearers of the Opposite Party No. 1 namely Shri Amiya Kumar Sahoo, President; Shri Bhagaban Swain, Vice-President; Shri Tushar Kanta Bhoi, Secretary; Shri Himanshu Pattanaik, Asst. Secretary; and Shri Ajay Kumar Samal, Treasurer are equally responsible along with the Opposite Party No.1 in the anti-competitive practices of controlling and limiting the provisions of dumper services for intra-port transportation of cargos inside the Paradip Port prohibited area which is in contravention of the provisions of section 3 (1) read with section 3 (3) (b) of the Act and determining the prices of dumpers for intra-port transportation which is in contravention of the provisions of section 3 (1) read with section 3 (3) (a) of the Act.

### **Conclusion**

10.4 In view of the findings recorded by the Commission, the Opposite Party No. 1 and its office bearers named in para 10.3.27 are directed to cease and desist from indulging in the acts/ conduct which have been found to be in contravention of the provisions of section 3 of the Act.

10.5 Furthermore, in terms of the provisions contained in section 27(b) of the Act, the Commission may impose such penalty upon the contravening parties, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse. It may be noted that the Opposite Party No. 1 has not brought to the notice of the Commission any mitigating factor for the above enumerated contravention during the course of hearing and have only preferred to justify their conduct on various grounds.

10.6 The Commission is of the considered view that the said anti-competitive conduct requires to be penalized to cause deterrence in future among the erring entities engaged in such activities. Therefore, it is imperative that the penalty imposed is adequate enough to create desired level of deterrence. Accordingly, in absence of any mitigating factor, the Commission, in





exercise of powers under section 27 (b) of the Act, decides to impose penalty on the Opposite Party No. 1 at the rate of 8% of their average turnover for the last three preceding financial years. The amount of penalty on the Opposite party No. 1 is calculated as under:

S. No	Name of the Party	Turnover/receipts in year Ended on 31.03.2011 (In Rs.)	Turnover/receipts in year Ended on 31.03.2012 (In Rs.)	Turnover/receipts in year Ended on 31.03.2013 (In Rs.)	Average Turnover/receipts (In Rs.)	8% of Average turnover (In Rs.)
1	The Opposite Party No. 1(DOA)	17,58,899	14,01,303	66,07,149	32,55,784	2,60,463

10.7 So far as the individual liability of the office-bearers of the Opposite Party No. 1 in terms of the provisions of section 48 of the Act is concerned, it may be noted that the Commission has already held that the impugned conduct of the office bearers named in para 10.3.27 are in contravention of the provisions of section 3(1) read with section 3(3)(a) and 3(3)(b) of the Act and their liability flows vicariously from the provisions of section 48 of the Act.

10.8 Accordingly, the Commission decides to impose penalty on the office bearers of the Opposite Party No. 1 who have been found responsible for the conduct of the DOA. Resultantly, considering the totality of facts and circumstances of the present case, the Commission decides to impose penalty on the following office bearers of the Opposite Party No. 1 @ 5% of the average income of the last three financial years and the Commission feels that imposition of penalty @ 5% of the average income of the last three financial years on the office bearers of the Opposite Party No. 1 who were responsible for the said anti-competitive conducts of the Opposite



Party No. 1 will cause deterrence effect in future among the erring persons engage in such acts. The total amount of penalty on each of the office bearers of the Opposite Party No. 1 who have found to be contravened the provision of the Act is worked out as follows:

**Office bearers of the Opposite Party No. 1 (DOA)**

S. No	Name of the Parties	Turnover/receipts in year Ended on 31.03.2011 (In Rs.)	Turnover/receipts in year Ended on 31.03.2012 (In Rs.)	Turnover/receipts in year Ended on 31.03.2013 (In Rs.)	Average Turnover/receipts (In Rs.)	5% of Average turnover (In Rs.)
1.	Amiya Kumar Sahoo	7,22,500	7,95,850	5,10,250	6,67,200	33,360
2.	Bhagaban Swain	7,24,507	5,65,775	6,34,738	6,41,673	32,084
3.	Tushar Kanta Bhoi	6,51,346	7,02,091	7,39,097	6,97,511	34,876
4.	Himanshu Pattanaik	1,90,000	3,33,867	3,20,000	2,81,289	14,064
5.	Ajay Kumar Samal	2,62,635 (For 2014)	2,08,612	2,27,480	2,32,909*	11,645
Total						1,26,029

10.9 The Commission also directs that the penalty shall be paid by the Opposite Party No. 1 and its office bearers within 60 days from the date of receipt of copy of this order.

10.10 Secretary is directed to send a copy of this order to the concerned parties for compliance immediately.

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

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



संघ



**Sd/-**  
**(Sudhir Mital)**  
**Member**

**Sd/-**  
**(Augustine Peter)**  
**Member**

**Sd/-**  
**(U. C. Nahta)**  
**Member**

**New Delhi**

**Dated: 21/01/2015**