COMPETITION COMMISSION OF INDIA

Case No. 61 of 2013

In Re:

Surendra Prasad **Informant**

And

1. Maharashtra State Power Generation Co. Ltd. **Opposite Party No. 1**

2. Nair Coal Services Pvt. Ltd. **Opposite Party No. 2**

3. Karam Chand Thapar & Bros (CS) Ltd. **Opposite Party No. 3**

4. Naresh Kumar & Co. Pvt. Ltd. **Opposite Party No. 4**

CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Mr. Justice G. P. Mittal
Member

Appearances: Shri M. M. Sharma, Ms. Deepika Rajpal and Shri Anand Shree, Advocates for the Informant.

Shri Biswajit Bhattacharya, Senior Advocate with Shri Chetan S. Dhore, Advocate alongwith Shri Vijay Menon, CEO and Shri Sadanandan Nair, GM for OP-2.

Shri Sameer Parekh, Shri D. P. Mohanty and Ms. S. Lakshmi Iyer, Advocates alongwith Shri Ashok Maheshwary, Head (Legal) and Shri Ratnesh Nandkeoliyar, Dy. General Manager for OP-3.

Shri Vijay Singh, V. P. (Operations) for OP-4.

Order under Section 27 of the Competition Act, 2002

1. The present information has been filed under Section 19(1)(a) of the Competition Act, 2002 ('the Act') by Shri Surendra Prasad ('the Informant') against Maharashtra State Power Generation Co. Ltd. ('Opposite Party No. 1/ OP-1/ MAHAGENCO'), Nair Coal Services Pvt. Ltd. ('Opposite Party No. 2/ OP-2/ NCSL'), Karam Chand Thapar & Bros. (CS) Ltd. ('Opposite Party No. 3/ OP-3/ KCT') and Naresh Kumar & Co. Pvt. Ltd. ('Opposite Party No. 4/ OP-4/ NKC') alleging, *inter alia*, contravention of the provisions of Sections 3 and 4 of the Act.

Facts

2. Facts, as stated in the information, are being briefly noted below.

3. MAHAGENCO has been incorporated by the Government of Maharashtra for generation of power in the State of Maharashtra. For the purpose of running its 7 Thermal Power Stations ('TPSs'), it obtains raw

coal from the subsidiaries of Coal India Limited ('CIL') [*viz.* Western Coalfields Limited ('WCL'), South-Eastern Coalfields Limited ('SECL'), Mahanadi Coalfields Limited ('MCL')] and Singareni Coal Company Limited ('SCCL'). In order to procure quality coal and to make proper supervision of the said supply through rail and other modes of transportation, MAHAGENCO engages services of liasoning agents.

4. The Informant avers that in March, 2005, MAHAGENCO had invited tenders for coal liasoning, to supervise the quality and quantity of coal supplied to its TPSs from the subsidiaries of CIL. Four companies submitted their bids to the said tender process *i.e.* B.S.N. Joshi & Sons Ltd. ('BSN') and OP-2 to OP-4. The rate quoted by BSN was the lowest. However, the said company was not awarded the work in spite of being the L1 bidder due to commencement of litigation before the Hon'ble Bombay High Court. After prolonged litigation before the Nagpur Bench of the Hon'ble Bombay High Court in Writ Petition Nos. 2444 and 4514 of 2005 and thereafter before the Hon'ble Supreme Court in Civil Appeal No. 4613 of 2006, work order was finally issued to BSN in 2009. However, the same, after a while (9 months) was terminated. The termination of work order was stated to be pending arbitral proceedings under the Arbitration and Conciliation Act, 1996. Post-termination, the contracts were awarded by MAHAGENCO to OP-2 to OP-4 on area-wise basis and the Informant has alleged that since then, MAHAGENCO has been awarding contracts regularly in favour of OP-2 to OP-4 only in the geographically distributed market, which was actually agreed between them by means of entering into a cartel.

5. The Informant has stated that OP Nos. 2 to 4 being in collusion with OP-1 have conveniently divided amongst themselves 7 TPSs for doing liaison work by effectively thwarting any newcomer or any other existing company from participating in the tender process. It is also stated that

MAHAGENCO is favouring formation of such cartel, particularly between OP-2 to OP-4, as is clear from the fact that since September 2009, MAHAGENCO has floated 4 tenders for granting work of supervision and monitoring of loading of coal into wagons for its TPSs by rail mode from WCL, SECL, MCL and SCCL; however, the said tenders have been cancelled for various reasons. The Informant has alleged that cancellation of such tenders by MAHAGENCO resulted in OP-2 to OP-4 becoming beneficiaries of the stop-gap arrangement.

6. It is also stated by the Informant that OP-2 to OP-4 have violated clause (d) of Sub-Section (3) of Section 3 of the Act as they have engaged in collusive bidding for projects with MAHAGENCO thereby scuttling any competition between themselves and raising unnecessary dispute with regard to qualification of any other competitor in the market.

7. Lastly, it is submitted that there is also violation of clause (c) of Sub-Section (2) of Section 4 of the Act as together with MAHAGENCO, three of the leading players in the market of coal liaison/ quality/ supervision work, have all colluded to deny access to other players in the market and thereby were preventing new players, if any, from participating in the bidding process. Hence, it was alleged that there was a clear violation of Section 4 of the Act also by OP-1 alongwith OP-2 to OP-4.

8. Based on the above averments and allegations, the Informant has filed the instant information before the Commission.

Directions to the DG

9. When the matter had initially come up for consideration, the Commission, by a majority order dated 11.12.2013 passed under Section

26(2) of the Act, had closed the information. However, in the appeal *i.e.* Appeal No. 43 of 2014 filed before the erstwhile Hon'ble Competition Appellate Tribunal (Appellate Tribunal), the said order of the Commission was set aside and the Director General (DG) was directed to investigate the case and submit its report to the Commission. Accordingly, the DG investigated the matter and, after seeking extension, submitted the investigation report to the Commission on 06.06.2016.

Investigation by the DG

10. On investigation, the DG noted that there existed a distinct pattern of quoting by OP-2 to OP-4 in respect of the tenders floated by MAHAGENCO during 2001 to 2013.

11. On the basis of evidence collected, statements of the representatives of OPs as well as third parties and other material available on record, the DG noted that in the tenders floated by MAHAGENCO for procurement of services of coal liasoning agents *vide* Tender No. T-03/2005 and subsequent tenders (till 2013), OP-2 to OP-4 had acted in a concerted manner by forming a cartel.

12. The DG noted that OP-2 to OP-4 had distributed the different TPSs in various MAHAGENCO tenders for coal liasoning. The said distribution is also depicted in Tender No. 03/2005 wherein allegations of cartelisation were first levelled by MAHAGENCO. Further, in the subsequent tenders till (last) tender of 2013, the same conduct (except in one instance) was observed by the DG. The conduct of these OPs in geographically dividing the tender areas and accordingly giving their quotations to carry out such division was found to be in violation of Section 3(3) read with Section 3(1) of the Act.

13. Further, the DG opined that through the said concert, OP-2 to OP-4 were directly determining the bid price which was a violation of Section 3(3)(a) read with Section 3(1) of the Act as these OPs first decided to divide the TPSs in different MAHAGENCO tenders and thereafter, to ensure such division, quoted accordingly in successive tenders. By sharing of tenders geographically, these OPs were also found to have contravened the provisions of Section 3(3)(c) read with Section 3(1) of the Act.

14. The said conduct of OP-2 to OP-4 was also found by the DG as amounting to bid rigging/collusive bidding in violation of Section 3(3)(d) read with Section 3(1) of the Act.

Consideration of the DG report by the Commission

15. The Commission considered the investigation report submitted by the DG in its ordinary meeting held on 26.07.2016 and decided to forward copies thereof to the parties (the Informant/ OP-2 to OP-4) for filing their respective replies/ objections thereto. Thereafter, the Commission heard the arguments of the parties on various dates and decided to pass an appropriate order in due course after conclusion of the arguments.

Replies/ Objections/ Submissions of the Parties

16. The parties (OP-2 to OP-4) filed their respective replies/ objections/ submissions to the report of the DG besides making oral submissions. The Informant, however, did not file any response to the DG Report. It instead chose to file rejoinders to the responses filed by OP-2 to OP-4.

Replies/ Objections/ submissions of OP-2/ NCSL

17. A preliminary objections was raised that the instant information ought

to have been summarily rejected as the Informant – an advocate who has purportedly filed the information being aggrieved by the sudden rise in electricity charges in the State of Maharashtra, has approached the Commission with unclean hands at the behest of a rival *i.e.* BSN. The Informant is an advocate associated with the Office of Shri Amit Khare, another advocate, who, in turn represents the interests of BSN. Aggrieved by termination of the contract by MAHAGENCO, BSN sought to take retributive action against the present OPs. Upon an RTI application filed by OP-2, it was revealed by MAHAGENCO that for the period in question *i.e.* 2009-10 to 2014-15, MAHAGENCO had been supplying electricity at the same rates which were notified in the year 2009 and there has been no increase in the tariffs paid by users of electricity catered to by MAHAGENCO. Further, the photographs produced by OP-2 of the Informant, Shri Amit Khare and Shri Arvind Joshi (Chairman of BSN) celebrating the outcome of Appeal No. 43 of 2014 in favour of BSN, post the order of the Appellate Tribunal have not been taken into consideration by the DG. The DG has committed an error in dismissing the relationship between the Informant on one hand, and Shri Amit Khare and BSN on the other.

18. It was also argued that the DG Report stands vitiated as the conduct of MAHAGENCO has not been investigated by the DG. The DG ignored the mandate of the Appellate Tribunal's order dated 15.09.2015 by not investigating MAHAGENCO.

19. It was pointed out that the canvas of Section 3(1) of the Act is pan-India and DG has not brought out any evidence of appreciable adverse effect on competition on such basis. Alternatively, it was argued that as per the decision of the Hon'ble Supreme Court of India in *Competition Commission of India* v. *Coordination Committee of Artists and Technicians of West Bengal Film and Television and others,* (2017) 5 SCC 17 (para 36), the Commission is required to determine the relevant

market in terms of the provisions of Section 2(r) of the Act.

20. Further, several complaints were received against BSN by MAHAGENCO from all its 7 TPSs on various counts such as abnormal increase in transit loss, receipt of rakes in bunching, non-availability of required staff, quality complaints *etc*. BSN grossly underperformed the tender contracts and the said performance got aggravated due to its predatory rates.

21. Also, the findings of the DG with regard to various other power generation companies like MPPGENCO, GNFC *etc*. were extraneous to the present matter, being beyond the scope of investigation.

22. Next, the alleged distinct pattern of quoting by OP-2 to OP-4 is merely a mathematical consequence of costing methods adopted by OP-2 to OP-4 in determining the appropriate bid for the impugned tenders. As has been stated on record by the representatives of OP-2 to OP-4, the costing method applied by them is largely based on internal assessment. Such internal assessment coupled with the largely similar nature of work and similar economic parameters applied by OP-2 to OP-4 leads to an inevitable conclusion that bids, especially amongst the market leaders engaged in coal liasoning in the State of Maharashtra, would fall within a narrow band, while falling well short of being identical.

23. Further, the narrow band within which these quotes fall is also a mathematical certainty as the prices quoted by all are based on tonnage (*i.e*. rupees per metric ton). A small difference in the prices quoted by a particular party would lead to exponentially larger repercussions over the entire course of the contract. Moreover, OP-2's internal costing has been explained both in the written reply and in the statements made by Shri Vijay Menon, CEO of OP-2 to the DG. It is, thus, clear that the following parameters were considered by OP-2 while concluding the price bid to be

placed during the tender process: market trend, coal scenario, terms and conditions of the tender and penal provisions, employees' salaries and wages, PF contributions, other benefits such as LTC, reasonable profit margin, statutory payments such as service tax *etc*., and RBI index on inflation over the preceding years, amongst others. A vast majority of these factors would remain constant for all parties determining a prudent and financially sustainable price quote while placing bids during the tender process. It was for this reason that the bids placed by well-established and seasoned entities in the business of coal liaisoning fall within a narrow band.

24. Furthermore, the existence of bids within a narrow band, far from being a product of collusive bidding, is a common feature of the coal liaisoning market. To buttress the point, reference was made to the price bids submitted by bidders in respect of the tenders floated by various other power generation companies.

25. The geographical spread of OP-2 to OP-4's respective primary areas of operation - which was alleged to be due to collusive activity - was in fact, a consequence of each party's well-established infrastructure. The central feature of establishing an infrastructure catering to the work of coal liasoning is that of developing human resources. This entails training of all personnel, which is mandated by law *i.e*. the Mines Vocational Training Rules, 1966. Employing personnel for the purpose of coal liasoning entails extensive technical training and supervisory staff, which takes time as well as financial expenditure to be incurred by the contractor.

26. The finding of the DG that OP-2 propped up "dummy bidder", was denied.

27. Adverting to the DG's assumption that since the advocate's fees in the proceedings before the Appellate Tribunal was shared between OP-2 and OP-3 and hence, there must have been an element of collusion at play, it was stated that these were legal proceedings before the Appellate Tribunal and since the interests of both the parties in question were affected and aligned, they were well within their legal rights to share the burden of common legal representation.

28. Furthermore, the finding of the DG that exchange of pre-bid queries and account statements between OP-2 to OP-4 bring out understanding between them was denied as being devoid of any basis. Queries shared between the parties concerned were nothing but technical queries relating to penalty clauses, linkage materialisation, loading and unloading requirements *etc*. in order to have a better grasp of the requirements of the prospective tender in order to ensure that the parties met the technical eligibility criteria with the underlying aim to simplify the entire process. Further, since the parties concerned have been in the field of coal liasoning for a considerable period of time, they also have in their employment, technically trained staff in various niche areas of coal liasoning due to which it was a common practice amongst the parties concerned to take limited assistance of other parties in some areas of their job. Moreover, such assistance is also sought in emergent circumstances such as non-availability of trained manpower. Account statements were shared simply for financial clarity amongst the parties.

29. With regard to the deposition of Shri Rohit Kumar Mishra – a former employee of BSN - before the DG whereby he has claimed that an unidentified person called and allegedly threatened him with dire consequences should he make such statement under oath, it was stated that this individual remains unidentified entirely, let alone having been identified as Shri Chetan Dhore, Advocate of OP-2. Further, in the

absence of any corroborative evidence of this charge, to impute it to a practising advocate of the Bar was uncalled for and prejudicial to the present proceedings.

30. Lastly, OP-2 also raised objections to the fact that the sole Informant in the present matter was not allowed to be cross-examined by the very parties against whom he has levelled serious allegations.

Replies/ Objections/ Submissions of OP-3/ KCT

31. At the outset, raising objection to the DG conducting investigation into the tenders of various other power generation companies which were not subject matter of the present case, it was submitted that the DG does not have any *suo motu* powers to initiate investigation and the DG may investigate only such matters which the Commission directs based on the material which was the basis of the *prima facie* order. Violation of principles of natural justice by the DG was also alleged as the DG had relied upon testimonies of various parties/ witnesses without affording the right to cross-examine them to OP-3.

32. Adverting to the main findings of the DG, it was submitted that the analysis conducted by the DG was erroneous. The DG in the report started from the tender of 2005 and compared the same to the tender of 2006 and the tender of 2013. The nature of each tender was completely different at different periods of time and as such, those three tenders could not have been compared. The tenders during the period 2005-2009 were with respect to all the TPSs of MAHAGENCO in regard to all the collieries. Thus, these were composite tenders/ contracts which were to be awarded to any one party for the entire work of coal liasoning of MAHAGENCO. As opposed to this, tenders in the years 2010-2012 were for different power stations and different bidders were to be awarded

work for different power stations *i.e.* the tenders were power station-wise. Furthermore, the 2013 tender was again completely different and was divided based on the coal company concerned. Successful bidders were awarded the contract with respect to one coal company for supply of coal to various TPSs of MAHAGENCO.

33. Further, the tender floated by MAHAGENCO on 03.03.2005 was the principal basis on which the DG had reached the conclusion which was against OP-2 to OP-4. A perusal of the tender document and the bid would show that in fact, the rates for individual components were not at all relevant to determine as to who should be awarded the contract. The conclusion of the DG that the prices were quoted in a manner so as to divide the different TPSs amongst the bidders is fallacious. Under the said tender of the year 2005, the entire work of coal liasoning was to go only to one of the bidders. Thus, there was no occasion or logic for the bidders to quote similar amount for different component/ activities under the said tender. The tender was not to be awarded based on the individual rates for individual activities. The report of the DG was liable to be rejected on this ground alone.

34. Also, the difference between the bid of BSN and OP-2 was in the range of Rs. 52 crores while the price difference between the bids of OP-2 and OP-4 was about Rs. 85 Lacs. Such bids could hardly be considered as identical.

35. Next, BSN was the lowest bidder in this tenders, and therefore, the entire contract was awarded to BSN for all the power plants of MAHAGENCO for movement/ transport of coal from all coal companies *viz.* WCL, SECL, MCL and SCCL. Thus, the power plants were not sought to be divided by the rates quoted for different power plants as suggested by the DG.

36. With regard to the bid for T-16/2013, it was submitted that by the time of this tender, MAHAGENCO had completely changed its policy and was inviting bids based on collieries. There were 6 bidders including Aka Logistics, South Indian Corporation Limited and M/s Aggarwal and Co. The contracts were awarded as follows:

(i) NSCL (OP-2) was awarded Western Coal Fields;
(ii) KCT (OP-3) was awarded Mahanadi Coal Fields;
(iii) NKC (OP-4) was awarded South-Eastern Coal Fields; and
(iv) South India Corporation Limited was awarded Singareni Collieries.

South India Corporation Limited is not an Opposite Party herein and it has been awarded the contract for Singareni Collieries. Therefore, it cannot be said that the parties had coordinated their action in any manner. A bare look at the tender of 2013 would show that a party - which was not one of the OPs - was awarded Singareni Colliery. Further, the bids were awarded to those four parties coal companies/ coal field-wise. From those coalfields, coal was supplied to various TPSs of MAHAGENCO.

37. Thus, the conclusions of the DG that various TPSs were divided amongst OP-2 to OP-4 from the year 2005 stands negated. The contracts awarded in the year 2013 were for two years and were performed till the year 2015-2016. Thereafter, MAHAGENCO discontinued the process of awarding contracts. Offers were sent to all the parties who participated in the 2005 tender based on the rates offered by BSN. However, in subsequent tenders, the rates which were offered to MAHAGENCO were substantially high due to which various tenders were cancelled and the *ad-hoc* arrangement continued.

38. OP-3 has already stated in its reply that it was making losses in MAHAGENCO's projects but continued executing the same for the sake of good relations and qualification requirements.

39. With regard to the evidence collected by DG, it was stated that the Report of DG is not based on direct evidence of cartel, but only on alleged circumstantial evidences and it was on the basis of these alleged circumstantial evidences that the DG has reached a conclusion of "understanding between the parties". Cartelisation is a serious allegation and leads to penal consequences and as such, the same cannot be imputed on the basis of surmises and conjectures.

40. The Report of the DG is liable to be rejected as it is based upon the tender of 2005, which was prior to coming into force of the provisions of Section 3 of the Act (which came into force only on 20.05.2009) and the provisions of the Act are not retrospective in nature.

41. With regard to the relationship between OP-2 to OP-4, it was stated that these parties work as sub-contractors for each other in various contracts, where a particular party does not have adequate infrastructural facilities. It was for the reason of reconciliation of accounts that the OPs shared their ledgers. Further, rebutting the DG's inference from OP-2 and OP-3 engaging a common counsel before the Appellate Tribunal, it was submitted that there was no conflict of interest between these parties, which would require them to approach different lawyers and since the common lawyer was having expertise in the branch of law, these OPs approached the same counsel.

42. No loss whatsoever has been caused to MAHAGENCO as OP-2 to OP-4 have been working at the rates fixed in 2005. In fact, MAHAGENCO has even abandoned the practice of outsourcing the coal liasoning work since 2015.

43. Further, the bidders generally raise queries relating to terms and conditions of the tender, penalty likely to be imposed by the employer, quality criteria *etc*., which made the bidding process easier for all competitors. Therefore, the conclusion of the DG, based upon OP-2 to OP-4 exchanging letters/pre-bid queries, showed an erroneous understanding of the tendering process.

44. The allegation of making 'dummy bidder' was also denied as based on surmises and presumptions.

45. Lastly, with regard to the DG's observation that OP-2 to OP-4 quoted lower rates for chosen TPSs, it was submitted that lower prices were quoted since OP-3 had adequate infrastructural facilities at the concerned coal mines and TPSs. Besides, MAHAGENCO, being one of the largest power generating companies in the country, OP-3 wanted to maintain good relationship with it. Additionally, it was a commercial decision as performing contracts with MAHAGENCO helps OP-3 in enriching its experience of handling large volume of liasoning contracts which puts OP-3 on a better pedestal while bidding for other similar businesses across the country for pre-qualifications.

Replies/ Objections/ Submissions of OP-4/ NKC

46. At the outset, it was pointed out that though the Appellate Tribunal *vide* its order dated 15.09.2015 ordered the DG to investigate the matter, the DG had no statutory basis for conducting the said investigation under Section 26 of the Act without a subsequent order of the Commission under Section 26(1) of the Act recording reasons as to why the investigation should be conducted. Failure to pass such an initiation order under Section 26(1) of the Act renders the entire investigation by the DG void in the very first instance.

47. Further, even assuming for the sake of argument that the DG's investigation was validly commenced on the basis of the order of the Appellate Tribunal, it appeared from the DG Report that the DG had chosen to conduct an investigation going beyond the scope of both the Appellate Tribunal's order and the information provided by the Informant which was only limited to investigation into the MAHAGENCO tenders.

48. Raising issue regarding retrospective application of the Act, it was argued that it seemed that the DG had exclusively relied on facts and "evidence" that related to pre-2009 tenders to make a finding of anti-competitive conduct against OP-4. There was simply no indication or finding in the DG Report that OP-4's conduct in the post-2009 tenders was either anti-competitive, or the result of any "agreement" that was reached prior to 2009.

49. Further, the DG Report seemed to implicate OP-4 as being part of a "cartel" based entirely on interviews and statements made by OP-4's competitors without independently testing the accuracy of such statements or giving OP-4 an opportunity to offer explanation or counter the contents of such statements. It is a well-established legal principle that a party against whom any oral evidence or statements are being relied on, should be given the opportunity to test the veracity of such statements including through cross-examination, which opportunity in the present case was not afforded to OP-4. Consequently, all the findings in the DG Report with respect to OP-4 that were based only on statements made by the officials of OP-2, OP-3 and OP-4 during the investigation should be disregarded. A review of the DG's Report clearly indicates that the DG had "cherry-picked" parts of the statements made by such officials to find anti-competitive conduct by OP-4. It seems that the DG's Report was oriented towards finding a contravention and consequently the DG has selectively relied on parts of statements instead

of appreciating such statements in the context of the questions asked.

50. With regard to findings of the DG upon dummy bidder, it was submitted that the DG, in the course of investigation, appeared to have found that OP-2 made "cover bid" through M/s Aggarwal & Associates. Even though the finding on engaging a "dummy bidder" was based entirely on evidence against OP-2, the DG extended that finding to OP-4 and stated that without an understanding with the two other bidders (*i.e.*, OP-4 & OP-3), "*it would have been a purposeless exercise to have a dummy party*". Therefore, the DG extended the scope of the finding to OP-4, even though there was no fact or evidence on record in the DG Report which indicated OP-4's involvement in such an arrangement. Similarly, there was no evidence against OP-4 of influencing witnesses during investigation.

51. With regard to identical rates it was argued that the mere fact of identity in prices quoted by the parties bidding for a tender, is not indicative of collusion and there are multiple reasons why parties to a bid may quote prices that are similar and sometimes even identical which the DG has simply failed to consider. OP-4 has its own commercial reasons for quoting prices in bids, and the DG cannot simply conclude that the parties have acted as part of a cartel without a specific finding of fact that clearly excludes the possibility of an independent action. In so far as OP-4 was concerned, the DG has not provided any additional direct evidence whatsoever.

52. Further, the procurement of tender documents was a mere secretarial task which involved no discussion or meeting of minds. When tenders are floated, this is publically announced and the fact that multiple parties may have purchased tender documents on the same day or time is by no means indicative of existence of an agreement to enter into a cartel.

53. In the absence of any evidence that OP-4 was part of any alleged cartel arrangement, the DG chose to rely on records of phone calls made/ received by OP-4 to and from officials of the other OPs. The DG has arrived at this conclusion by relying on call details records (CDRs) of certain individuals from OP-2, OP-3 and OP-4 for the last one year *i.e.* 2015 to 2016. The conclusions drawn and the evidence tendered by the DG in drawing such conclusions are entirely unsupported, since (i) there was absolutely no indication that any of the calls made by the company to its competitors related to a "cartel arrangement" or to any matter which was the subject of the DG's investigation; and (ii) in any event, the CDRs pertain to a period of time which was not even the subject of the present investigation.

54. The only direct "evidence" that the DG Report cited on the company's participation in the alleged "cartel" pertained to an alleged meeting in 1999, which itself cannot form the basis of any finding of cartelisation since: (i) the alleged meeting was more than 10 years before the commencement of the Act and the period of present investigation; (ii) during the cross-examination, the relevant witness, Shri Arvind Joshi of BSN, has himself stated that (i) he has not attended any such meeting with OP-4; (ii) no person from OP-4 has ever attended such meetings; and (iii) his basis of knowing of such meeting was only through hearsay. Therefore, that evidence cannot be relied upon to show that OP-4 was part of any alleged "cartel" with its competitors.

55. The very limited adverse findings by the DG regarding OP-4's conduct demonstrated that although there was no indication of its participation in any cartel, its role, if any, was very limited. Such limited involvement of a party to an anti-competitive agreement has been considered as a mitigating factor in the European Commission's Guidelines on the method of setting fines in cartel enforcement.

56. Even if the Commission were to uphold the DG's Report that there were instances of alleged bid rigging in MAHAGENCO tenders, there has been simply no impact on market or competition in these tenders (and therefore, no appreciable adverse effect on competition) as a result of any such agreement.

57. Also, OP-4 is a small and medium sized enterprise (SME). SMEs often lack the market size for leverage to impact the market or to compete against well-established players. Any penalty imposed on SME is likely to ruin its own viability and impact the overall economy. Any alleged anti-competitive agreement that involved OP-4 has not caused any appreciable adverse effect on competition in India given the scope of the coal liasoning market as a whole and OP-4's minimal role in this market which may be seen as a mitigating factor.

58. Lastly, OP-4 is engaged in several activities which form a substantial part of its revenue, other than providing coal liasoning services which is the subject matter of this investigation. OP-4 is primarily engaged in rendering services of identification, sourcing and delivery of raw materials, fuel, evacuation and stocking of finished products in the steel, power, cement and other industrial sectors. Given that coal liasoning is a small part of OP-4's business, OP-4 did not have any incentive to indulge in collusion with the other OPs. Further, should the Commission decide, despite the explanations offered above, to impose a penalty on OP-4, such penalty should be proportionate and limited to the revenue derived from this business alone.

Analysis

Background

59. Before appreciating the issues arising in the present matter, it would be appropriate to note the background of the case culminating in the present inquiry.

60. MAHAGENCO operates 7 TPSs located at Koradi, Nasik, Bhusawal, Paras, Parli, Khaparkheda and Chandrapur in Maharashtra. The raw material for running the power stations is coal which is obtained from the subsidiaries of CIL *viz*. WCL, SECL, MCL and SCCL. It is observed that Bhusawal and Paras TPSs are largely served through SECL; Koradi and Khaparkheda TPSs are largely served by MCL; and Nasik and Chandrapur TPSs are largely served by WCL.

61. In March, 2005, MAHAGENCO invited bids *vide* Tender No. T-03/2005 (which has been described by the DG in the investigation report as the 'impugned tender') for award of contract of coal liasoning work for its TPSs. The period of contract was for two years and estimated quantity of coal to be transported from the subsidiaries of CIL to TPSs of MAHAGENCO was 27 million metric tonnes per year. Four bidders namely OP-2 to OP-4 and BSN participated in the said tender. The rates quoted by BSN were the lowest and the tender committee of MAHAGENCO decided to award the contract to it.

62. However, OP-2 filed a Writ Petition bearing No. 2444 of 2005 before the Hon'ble High Court of Judicature at Bombay, Nagpur Bench against MAHAGENCO challenging the eligibility of BSN and sought its exclusion from the tender process for non-fulfilling the essential qualifying requirements. The Hon'ble High Court disposed of the said

petition on 24.08.2005 with a direction to MAHAGENCO to take the necessary decision. Finally, MAHAGENCO took a decision to award the contract to BSN.

63. Again, Writ Petition No. 4514 of 2005 was filed in the Hon'ble High Court of Judicature at Bombay, Nagpur Bench by OP-2 challenging the decision of MAHAGENCO to award the contract in favour of BSN. The said Writ Petition was finally heard and disposed of in terms of judgment and final order dated 19.10.2005 wherein the Division Bench of the Hon'ble High Court quashed the subject tender as also the decision to award the same to BSN and further a direction was given reserving liberty to MAHAGENCO to issue a fresh tender.

64. Aggrieved by the said order of Division Bench of Hon'ble Bombay High Court, Nagpur Bench, BSN filed a Special Leave Petition (SLP) before the Hon'ble Supreme Court. The SLP was converted into Civil Appeal No. 4613 of 2006 and was allowed by the Supreme Court *vide* judgment dated 31.10.2006, directing MAHAGENCO that it shall consider the offer of the Appellant (BSN) upon consideration of the matter afresh as to whether it even now fulfils the essential tender conditions or not. If BSN now satisfies the terms of the tender conditions, the contract may be awarded in its favour for a period of one year by MAHAGENCO, but such contract shall take effect after one month from the date of the said agreement so as to enable the private respondents (OP-2 to OP-4 herein) to wind up their businesses.

65. Finally, MAHAGENCO, *vide* its work order dated 03.01.2009, awarded coal liaisoning work to BSN for a period of one year. The contract agreement was signed by BSN on 04.02.2009 and the work commenced on 07.03.2009.

66. Subsequently, as per MAHAGENCO, several complaints were received from all of its seven TPSs after commencement of work by BSN, on various counts such as abnormal increase in transit loss of coal, receipt of rakes in bunching, non-availability of required staff/absence of staff at loading point, receipt of coal mixed with shales, stones and extraneous material, delay in submission of railway receipt (RR) *etc*. It was brought out by the TPS authorities concerned that the services being rendered by BSN were very poor and far from satisfactory.

67. In view of the alleged non-performance by BSN, a show cause notice was issued to it on 02.05.2009 by MAHAGENCO and ultimately, the contract of BSN was terminated with effect from 12.09.2009. On termination of contract with BSN, MAHAGENCO issued offer letters to OP-2, OP-3, OP-4 and 2 other agents. But, only OP-2, OP-3 and OP-4 gave their consent for the work for different selected TPSs. Accordingly, MAHGENCO, based on the consent letters of OP-2, OP-3 and OP-4, issued work orders to OP-2 for Nasik and Chandrapur TPSs *vide* order dated 25.09.2009, to OP-3 for Koradi, Parli and Khaperkheda TPSs *vide* order dated 25.09.2009 and to OP-4 for Bhusawal and Paras *vide* order dated 25.09.2009. At this stage, it may be observed that the rates offered to these vendors were the same which were quoted by BSN in the tender floated in March, 2005.

68. In the aforesaid backdrop, the instant information has been filed by the Informant alleging essentially that OP-2 to OP-4 have distributed tenders amongst themselves of MAHAGENCO by dividing the work of coal liaisoning for different TPSs since 25.09.2009 *i.e.* when the TPSs were allotted to these OPs after termination of agreement with BSN for Tender No. 03/2005. It is the case of the Informant that as a result of such division, Nasik and Chanderpur TPSs have been allotted to OP-2; Koradi, Parli and Khaperkheda TPSs have been allotted to OP-3; and Bhusawal and Paras TPSs have been allotted to OP-4.

69. It has been further alleged that such arrangement of OP-2 to OP-4 continued from 2009 to till date (*i.e.* 2013) as post - 2009 award of contracts in favour of these OPs, MAHAGENCO floated tenders for liaison, work on four other occasions, but on all these occasions, the tenders were cancelled due to various reasons. As a result, OP-2 to OP-4 became beneficiaries of stop gap arrangements put in place by OP-1. It has also been alleged that whenever a new entrant tried to participate in the tenders and became L1, these OPs challenged the credibility and qualifications before courts making the entire process *sub-judice* resulting in cancellation of tenders.

Preliminary objections

70. Before examining the impugned conduct of OP-2 to OP-4 on merits, it would be appropriate to first dispose of the various preliminary and jurisdictional issues raised by OP-2 to OP-4.

71. Firstly, an objection was taken by OP-4 that even though the Appellate Tribunal *vide* its order dated 15.09.2015 directed the DG to investigate the present matter, the DG had no statutory basis for conducting such investigation under Section 26 of the Act without a subsequent order of the Commission under Section 26(1) of the Act recording reasons why the investigation should be conducted. Failure to pass such an initiation order under Section 26(1) of the Act renders the entire investigation by the DG void in the very first instance.

72. The Commission has noted the submission only to be rejected. Since investigation in the present matter was ordered by the Appellate Tribunal, it is absolutely incorrect and improper on part of OP-4 to contend that the Commission ought to have sat in appeal over the direction of the Appellate Tribunal and passed its own order recording its

own reasons. Not only such a contention is *ex facie* untenable, but acceding to the same would be an act of judicial indiscipline in hierarchical set up besides bordering on contempt of the direction of the Appellate Tribunal.

73. Secondly, the principles of natural justice have been alleged to be violated as the DG has relied upon the testimonies of various parties/ witnesses without affording the right to cross-examine such witnesses to the parties under investigation.

74. In this regard, it may be noted that under the scheme of the Act read with Regulation 41 (5) of the Competition Commission of India (General) Regulations, 2009 ('General Regulations'), the Commission and/ or the DG, as the case may be, has the discretion to receive evidence either by way of Affidavit or by directing any person to lead oral evidence in the matter. If the Commission and/ or the DG, as the case may be, directs such evidence to be led by way of oral submissions, the Commission and/ or the DG, as the case may be, may, if considers 'necessary' or 'expedient', grant an opportunity to the party against whom such oral submissions are sought to be relied upon, an opportunity to cross-examine such witness. Hence, the power to allow cross-examination is solely a discretionary power and the same cannot be claimed as a matter of right as is the case under the Indian Evidence Act, 1872, all provisions of which have specifically not been made applicable to the proceedings under the Act. At the same time, it is to be kept in mind that such discretion cannot be exercised by the Commission and/ or the DG, as the case may be, arbitrarily, but has to be exercised on sound judicial principles. If the DG relies upon any material against any party in its report, it will have to confront the said material to the party concerned, one way of which is through giving an opportunity of cross-examination.

75. In the present case, the DG had allowed various requests for cross-examination, as and when moved by OP-2 to OP-4, including the cross-examination of Shri Arvind Joshi, Director of BSN by OP-2 to OP-4.

76. Thereafter, before the Commission, after submission of the investigation report by the DG, only two applications for cross-examination were moved: one by OP-3 on 30.09.2016; and the other by OP-2 on 05.01.2017. *Vide* the application dated 30.09.2016, OP-3 sought cross-examination of Shri S.B. Soni, Chief Engineer of OP-1. The said application was disposed of by the Commission *vide* order dated 05.10.2016, whereby cross-examination of Shri S.B. Soni, Chief Engineer of OP-1 was not allowed by the Commission, as OP-3 could not elaborate any reason for seeking such cross-examination and could not prove that the DG has 'heavily' relied upon the statement of Shri S.B. Soni, Chief Engineer of OP-1 against OP-3 as claimed by OP-3.

77. The other application seeking cross-examination, moved on 05.01.2017 by OP-2, was allowed by the Commission *vide* its order dated 17.01.2017 and the cross-examination of the two witnesses, Shri Ram Babu Agrawal and Shri Rohit Kumar Mishra as asked for, was allowed. Apart from these two, no other cross-examination request was received by the Commission.

78. In these circumstances, it does not now lie in the mouth of OP-2 to OP-4 to contend that they have not been granted an opportunity of cross-examination and the DG report stands vitiated for such reason.

79. Further, it may be noted that, apart from such specific opportunities of cross-examination, OP-2 to OP-4 have always had the liberty to challenge the statement made by any witness before the DG, by way of disputing the same, in their objections/ suggestions/ submissions filed to the DG Report. However, no such statement has been expressly disputed by OP-2 to OP-4 either in their written objections/ suggestions/

submissions to the DG Report, or during the oral hearings held on 26.07.2017 and 14.09.2017.

80. Consequently, in view of the same, the plea of violation of the principles of natural justice, on account of non-grant of any opportunity of cross-examination, is completely unfounded and devoid of merit.

81. Third, preliminary objection taken was that the instant information ought to have been summarily rejected as the Informant – an advocate, who has purportedly filed the instant information being aggrieved by the sudden rise in electricity charges in the State of Maharashtra, has approached the Commission with unclean hands at the behest of a rival *i.e.* BSN. The Informant is an advocate associated with the Office of Shri Amit Khare, another advocate, who, in turn represents the interests of BSN. Aggrieved by termination of its contract resulting from Tender awarded by MAHAGENCO, BSN sought to take retributive action against OP-2 to OP-4.

82. The Commission has considered the issue very carefully and is of the opinion that investigation in the present matter was ordered by the Appellate Tribunal and as such, when the investigation has been completed pursuant to the direction of the Appellate Tribunal and the parties have been heard at length on merits, it is not necessary, rather impermissible, to delve into this aspect. In this regard, it may be noted that even during the inquiry before the Commission, the investigation report was circulated outside by the then counsel for the Informant in a collusive manner through Shri Arvind Joshi of BSN whereupon the Commission had to record the statements of Shri Arvind Joshi who was found present in the premises of the Commission during the proceedings and Shri Amit Khare, the then counsel of the Informant. The Commission had passed the following order on 08.11.2016:

".....It is beyond doubt that the investigation report in the present case was procured by M/s B.S.N. Joshi & Sons Ltd. in a fraudulent manner through the collusive conduct of Shri Arvind Joshi and Shri Amit Khare, Advocate, as detailed hereinabove. This is clearly borne out from the contradictory statements given by them, as noted above.

Such a conduct renders them liable to be proceeded under Section 45 of the Act which states that if a person makes any statement which he knows or has reasons to believe to be false in any material particular, such persons are to be punished with fine which may extend to rupees one crore.

The apology as tendered by Shri Khare would be considered at the final stage of the proceedings. At the same time, the Commission directs the Informant and Shri Amit Khare or any other counsel engaged by the Informant not to share or disseminate the contents of the investigation report to any person under any circumstances. Failure to comply with this stipulation shall invite appropriate action of the Commission under the scheme of the Act."

83. Having considered the matter anxiously, the Commission now deems it appropriate to give quietus to this aspect. Accordingly, the Commission accepts the apology tendered by Shri Amit Khare - the earlier counsel for the Informant – with a firm warning not to repeat such conduct in future.

84. Fourthly, OP-2 to OP-4 have raised an objection to the DG report by arguing that the same is beyond the scope of reference. The DG, in its report, framed issues only *qua* MAHAGENCO tenders, but while conducting investigation, the DG enlarged the scope of investigation by *suo moto* conducting investigation with respect to tenders of various power generation companies as well including of MPPGENCO, GNFC, NTPC and Bokaro.

85. For appreciating this issue, it would be appropriate to excerpt the relevant para from the DG report itself:

> *.....The understanding between the OPs for the tenders of different power generation companies for example MAHAGENCO, MPPGENCO, GNFC, NTPC, Bokaro which came to the knowledge during investigation can only be possible when the parties were operating as a cartel.*

86. The Commission hence, finds merit in the submissions made by the parties. Not only that specific allegations in the information pertained to MAHAGENCO tenders, MAHAGENCO was also impleaded as OP-1 in the present information. In these circumstances, the Commission observes that there was no occasion for the DG to have made the above noted observations which are purely speculative and conjectural in nature. There is no material on record to have given a finding of cartel against OP-2 to OP-4 in respect of the tenders floated by other power generating companies. Hence, the same are not being considered by the Commission while analysing the conduct of the parties in this case.

87. Next, Shri Biswajit Bhattacharya, the learned senior counsel appearing on behalf of OP-2 submitted before the Commission that the DG Report stands vitiated as the conduct of MAHAGENCO has not been investigated by the DG. The DG ignored the mandate of the Appellate Tribunal's order dated 15.09.2015 by not investigating MAHAGENCO.

88. To appreciate this contention, it would be appropriate to note the relevant para from the judgment of Appellate Tribunal itself:

> *"The Director General shall now conduct investigation into the allegations contained in the information filed by the appellant under Section 19(1)(a) and submit a report to the Commission within three months. However, it is made clear that while making investigation,*

the Director General shall not proceed on the premise that Respondent No. 2 [MAHAGENCO] was a part of the cartel."

89. No doubt, the purport of the order of the Hon'ble Appellate Tribunal was to caution the DG not to proceed against MAHAGENCO upon the premise that it was part of the cartel. Hence, the DG, upon investigation, did not deem it appropriate to proceed against MAHAGENCO presumably because a cartel can be formed only by players who are engaged in the similar activities. In these circumstances, nothing would have turned up by even investigating MAHAGENCO in the present matter when the allegations of cartelisation could have been analysed only against the bidders under the scheme of the Act as provided under Section 3(3) read with Section 3(1) of the Act.

90. Lastly, on the jurisdictional issue, Shri Bhattacharya argued that the DG has not brought out any evidence of appreciable adverse effect on competition on pan-India basis in terms of canvas of Section 3(1) of the Act. Further, as per the decision of the Hon'ble Supreme Court of India in *Competition Commission of India* v. *Coordination Committee of Artists and Technicians of West Bengal Film and Television and others,* (2017) 5 SCC 17 (para 36), the Commission is required to determine the 'relevant market' in terms of the provisions of Section 2(r) of the Act.

91. At the outset, the Commission notes that for examining the conduct of the parties relating to contravention of the provisions of Section 3 of the Act, it is not necessary that the same has to be done on a pan-India basis as such conduct can also be examined at regional or local level. Further, the Commission observes that even though the DG might not have defined the 'relevant market' specifically, it is evident that the entire investigation was done by the DG, not in abstract, but in the context of coal liasoning services as underlying subject matter of the investigation within the geographic boundaries of the State of Maharashtra. In these

circumstances, the objection of the learned senior counsel is more imaginary then real and nothing further needs to be commented upon the same.

92. Having disposed of the preliminary and jurisdictional issues, the Commission now proceeds to examine the following substantive issue *i.e.* whether OP-2 to OP-4 entered into any anti-competitive agreement in respect of provision of coal liasoning services pursuant to tenders floated by MAHAGENCO?

93. Noting the background of the case detailed out earlier in this order, it is seen that the instant information was filed by the Informant alleging essentially that OP-2 to OP-4 had distributed the tenders of MAHAGENCO by dividing amongst themselves, the work of coal liasoning for different TPSs since 25.09.2009 *i.e.* when the TPSs were allotted to these OPs after termination of work order of BSN for Tender No. 03/2005. It is the case of the Informant that as a result of this division, Nasik and Chanderpur TPSs have been allotted to OP-2; Koradi, Parli and Khaperkheda TPSs have been allotted to OP-3 and Bhusawal and Paras TPSs have been allotted to OP-4. Further, such arrangement of OP-2 to OP-4 continued from 2009 till 2013, as post-2009, MAHAGENCO floated tenders for liaison work on four different occasions but on each of these occasions, the tenders were cancelled due to various reasons and as a result, OP-2 to OP-4 became beneficiaries of the stop gap arrangement put in place by MAHAGENCO.

94. At the outset, it may be observed that the thrust of the investigation of the DG was centred around as to whether there was any anti-competitive arrangement put in place by OP-2 to OP-4 to rig the bids in respect of the services rendered by them pursuant to the various tenders floated by MAHAGENCO. Though the DG examined the tenders starting from 2005 to 2013, the period of contravention that may be examined can only

be from the period starting from 20.05.2009 (*i.e.* when the provisions of Section 3 of the Act dealing with anti-competitive agreements were notified) to 2013. It already stands settled by the decision of the Hon'ble Supreme Court of India in *Excel Crop Care Limited* v. *Competition Commission of India & Another* (2017) 8 SCC 47, that while examining the conduct of the parties, the DG can well look into the past and subsequent conduct of the parties to ascertain the trends in behaviour even though the findings will be confined to a period post-notification of the relevant provisions of the Act.

95. In this backdrop, the Commission examines the sequence of events in this case, which on being pieced together would reflect whether or not OP-2 to OP-4 put in place an anti-competitive arrangement in respect of the tenders floated by MAHAGENCO.

Identical basic rates quoted by OP-2 to OP-4 in tender No. T-03/2005

96. The Commission notes that the genesis of the impugned conduct of OP-2 to OP-4 can be found in the impugned Tender No. T-03/2005 which was floated by MAHAGENCO on 03.03.2005 for coal liaisoning, quality and quantity supervision for its TPSs. The period of contract was for two years. The estimated quantity was 27 Million MT per year. The bid was scheduled to be opened on 24.03.2005. In this tender, 5 bidders *viz.* OP-2, OP-3, OP-4, BSN and M/s Agrawal & Associates purchased the tender documents. Except M/s Agrawal & Associates, the remaining four bidders submitted price bids. The rates quoted by the bidders for different works in the said tender are noted below:

Table-1

(Rs/ MT)

Name of Bidders	Linkage materialisation, shortage minimisation and quality monitoring	Monitoring of coal supplies over Ropeways for Koradi TPS	Monitoring of coal supplies over Ropeways for Chandrapur TPS	Monitoring of coal supplies over Unit Train System for Chandrapur TPS	Incentive for establishing linkage and supply of coal as per the requirements of Power Stations	Incentive for supply of D Grade coal above datum level quantity from WCL to TPSs of MSEB	Incentive for supply of Umrer coal above the datum level quantity for Nasik and Bhusawal TPSs
	Rs. 'P'	Rs. 'Q'	Rs. 'R'	Rs. 'S'	Rs. 'T'	Rs. 'U'	Rs. 'V'
NKC	12.50	56.00	56.00	56.00	10.00	72.00	72.00
KCT	12.50	50.00	50.00	50.00	10.00	72.00	75.00
NCSL	12.50	52.00	45.00	45.00	10.00	72.00	72.00
BSN	**5.70**	**0.50**	**0.50**	**0.50**	**0.12**	**0.20**	**0.30**

97. As is evident, the starting point of concerted action had its origin in the impugned tender of 2005 wherein OP-2 to OP-4 quoted identical rates of Rs. 'P', Rs. 'T' and Rs. 'U'. To ascertain the reasons for such identity of rates, the DG examined the representatives of the OP-2 to OP-4 at great length.

98. On perusal of their testimonies, the Commission is of the opinion that their depositions did not reveal any justification for quotation of such identical rates, OP-2 to OP-4 could not give any basis of working of the costing carried out by them before quoting such identical rates. It is instructing to note that such identity of rates was not found to be present when these OPs bid for selected TPSs and decided to become L1 for the chosen TPSs by allocating market amongst themselves. This aspect has been elaborated in the analysis done under the next point in the succeeding paras while analyzing the pattern of allocation of TPSs amongst OP-2 to OP-4. Therefore, tender of 2005, is the starting point of the collusive and concerted behaviour although provisions of Section 3 of the Act were not in force at that time.

Pattern of allocation of TPSs amongst OP-2, OP-3 and OP-4

99. On the basis of the details furnished by MAHAGENCO, it appears that OP-2 to OP-4 had divided the TPSs amongst themselves by quoting rates in response to the tenders floated by MAHAGENCO in a manner that each of these OPs got the TPSs of their choice. To appreciate the arrangement, the following table may be useful which clearly indicates the market allocation resorted to and agreed by OP-2 to OP-4:

Table-2

(Rs. PMT, Bold font reflects lower rates amongst OP-2 to OP-4)

TPS	Rates of NCSL	Rates of KCT	Rates of NKC	Rates of others	Tender No
Chandrapur	**14.50**	15.00	15.50		T-13/2006
	8.81	9.50	9.30		T-34/2008
	48.25 **52.10** **56.30**	51.20 54.27 57.80	52.40 55.91 59.35	71.50 78.50 85.00	T-10/2009 (Dec. 2009) Rates for 3 years
	8.50	8.75	8.90		T-02/2010
	34.50	38.75	36.25		T-04/2012
Bhusawal	24.50	23.00	**22.00**		T-13/2006
	9.95	9.75	**9.35**		T-34/2008
	49.85 53.41 57.74	48.20 51.57 55.13	**45.40** **49.05** **52.95**		T-10/2009 (Dec. 2009) Rates for 3 years
	9.30	9.55	**9.10**	14.80	T-02/2010
	47.25	45.00	**41.45**		T-04/2012
Parli	16.00	**14.90**	16.50		T-13/2006
	10.30	**9.97**	10.60		T-34/2008
	49.45 5530 5958	**48.10** **5195** **5610**	54.10 56.81 60.04		T-10/2009 (Dec. 2009) Rates for 3

TPS	Rates of NCSL	Rates of KCT	Rates of NKC	Rates of others	Tender No
					years
	9.75	**9.50**	9.95		T-02/2010
	44.00	**41.50**	48.75		T-04/2012
Paras	17.50	16.50	**14.50**		T-13/2006
	8.50	8.90	**8.10**		T-34/2008
	48.30 49.45 56.21	46.15 49.45 52.91	**43.35** **46.85** **50.55**		T-10/2009 (Dec. 2009) Rates for 3 years
	8.15	8.05	**7.80**		T-02/2010
	47.25	45.00	**41.45**		T-04/2012
Koradi	14.50	**13.50**	Not participated		T-04/2005 for 2 TPSs only.
	16.00	**15.00**	16.25		T-13/2006
	55.00	68.70	Not Participated	72.20	T-12/2007 for 2 TPSs
	10.50	**10.06**	10.95		T-34/2008
	27.70	**24.10**	27.10	29.80	T-35/2008 for 2 TPSs
	54.05 58.37 62.90	**51.10** **55.20** **59.60**	53.00 55.92 60.44	74.50 81.00 87.30	T-10/2009 (Dec.,2009) Rates for 3 years
	10.20	**9.95**	10.40		T-02/2010
	24.75	**23.95**	29.50		T-03/2010 for 2 TPSs
	65.00	**61.50**	67.50	18.00	T-04/2012
Khapardheda	16.00	**15.25**	16.50		T-13/2006
	52.90 57.13 61.56	**49.85** **53.85** **58.10**	54.00 57.24 60.76		T-10/2009 (Dec.,2009) Rates for

TPS	Rates of NCSL	Rates of KCT	Rates of NKC	Rates of others	Tender No
					3 years
	9.65	**9.30**	9.40	14.80	T-02/2010
	65.00	**61.50**	67.50	18.00	T-04/2012
Nasik	**13.50**	14.50	Not Participated		T-04/2005 for 2 TPSs only.
	17.50	18.25	18.50		T-13/2006
	85.00	99.87	Not Participated	101.23	T-12/2007 for 2 TPSs
	10.25	10.55	10.95		T-34/2008
	23.95	24.65	26.85	29.45	T-35/2008 for 2 TPSs only
	45.95 **49.65** **53.60**	58.60 62.32 63.43	59.90 64.12 67.91		T-10/2009 (Dec.,2009) Rates for 3 years
	9.95	10.35	10.20		T-02/2010
	23.75	24.80	29.50		T-03/2010 for 2 TPSs only
	41.25	43.50	45.50	34.00	T-04/2012

100. From the aforesaid, it is evident that in Tenders No. T-13/2006, T-34/2008 and T-10/2009 (which was floated in Dec.2009), OP-2 had quoted lower rates for Chandrapur and Nasik TPSs as compared to OP-3 and OP-4; OP-3 had quoted lower rate for Parli, Koradi and Khaperkheda TPSs as compared to OP-2 and OP-4; and OP-4 had quoted lower rates for Bhusawal and Paras TPSs as compared to OP-2 and OP-3. In Tender No. T-02/2010, OP-2 had again quoted lower rates for Chandrapur and Nasik TPSs as compared to OP-3 and OP-4; OP-3 had quoted lower rates for Parli, Koradi and Khaperkheda TPSs as compared to OP-2 and OP-4;

and OP-4 had quoted lower rates for Bhusawal and Paras TPSs as compared to OP-2 and OP-3. In tender No. T-04/2012, OP-2 had again quoted the lower rates for Chandrapur and Nasik TPS as compared to OP-3 and OP-4. OP-3 had quoted lower rates for Koradi, Khaperkheda and Parli TPSs as compared to OP-2 and OP-4; and OP-4 had quoted lower rates for Bhusawal and Paras TPSs as compared to OP-2 and OP-3. In Tender No. 04/2005 which was floated only for TPSs Koradi and Nasik, OP-3 was L1 for Koradi and OP-2 was L1 for Nasik. In Tender No. T-12/2007 which was also for the said 2 TPSs only, OP-2 was L1 for both these TPSs. In both these tenders, OP-4 did not participate. Again, in Tenders No. T-35/2008 and T-03/2010 which were limited to TPSs Koradi and Nasik, OP-3 was L1 for Koradi and OP-2 was L1 for Nasik. In both these tenders, OP-4's rates were higher compared to L1 rates of OP-2 and OP-3.

101. Hence, the market allocation by OP-2 to OP-4 is self-evident and the same can be easily appreciated from the following trend which emerges from the appreciation of *modus operandi* of these OPs in respect of the various tenders of MAHAGENCO which have been tabulated in the above table:

Table-3

TPS	Tender No	OP quoting lower rate
Chandrapur	T-13/2006 T-34/2008 T-10/2009 T-02/2010 T-04/2012	NCSL
Nasik	T-04/2005 T-13/2006 T-12/2007 T-34/2008 T-35/2008	NCSL

TPS	Tender No	OP quoting lower rate
	T-10/2009 T-02/2010 T-03/2010 T-04/2012	
Bhusawal	T-13/2006 T-34/2008 T-10/2009 T-02/2010 T-04/2012	NKC
Paras	T-13/2006 T-34/2008 T-10/2009 T-02/2010 T-04/2012	NKC
Koradi	T-04/2005 T-13/2006 T-34/2008 T-35/2008 T-10/2009 T-02/2010 T-03/2010 T-04/2012	KCT Note: NCSL was L1 for Koradi only in T-12/2007 and the said tender was even cancelled.
Khaparkheda	T-13/2006 T-34/2008 T-10/2009 T-02/2010 T-04/2012	KCT
Parli	T-13/2006 T-34/2008 T-10/2009 T-02/2010 T-04/2012	KCT

102. In this connection, the Commission also notes that even when MAHAGENCO changed its policy of granting coal liaisoning contract to the successful suppliers in the year 2013, the said market allocation arrangement amongst OP-2 to OP-4 continued. It may be noted that prior to 2013, work was allotted TPS-wise, but in the said year MAHAGENCO started awarding tenders colliery-wise. In Tender No. T-16/2013, the rates quoted by L-1 bidders for supply of coal from four coalfields to 7 thermal power stations of MAHAGENCO are tabulated below:

Table-4

Name of the party	**For linkage materialisation, adequate loading and movement of sized coal for various TPS of MAHAGENCO by rail mode from Western Coalfields Ltd. (WCL)**	**For linkage materialisation adequate loading and movement of sized coal for various TPS of MAHAGENCO by rail mode from Mahandadi Coalfields Ltd. (MCL)**	**For linkage materialisation, adequate loading and movement of sized coal for various TPS of MAHAGENCO by rail mode from South Eastern Coalfields Ltd. (SECL)**	**For linkage materialisation, adequate loading and movement of sized coal for various TPS of MAHAGENCO by rail mode from Singareni Collieries Co. Ltd. (SCCL)**
	T-16WCL33144	**T-16MCL33134**	**T-16SCCL33145**	**T-16SECL33136**
NCSL	**58.50**	98.50	82.50	54.25
KCT	61.00	**97.00**	81.50	52.00
NKC	63.25	100.50	**78.00**	53.75
Aka Logistics	Not quoted	110.00	95.50	61.50
Agrawal & Associates	Not quoted	Not quoted	91.00	Not quoted
M/s South India Corp Ltd	Not quoted	Not quoted	Not quoted	**33.00**

103. It can be observed from the above that OP-2 was L1 for linkage materialisation by rail mode from WCL; OP-3 was L1 for linkage materialisation by rail mode from MCL; OP-4 was L1 for linkage materialisation by rail mode from SECL; and South India Corp. Ltd. was a new entrant and L1 for linkage materialisation by rail mode from SCCL collieries.

104. As observed earlier in para 60, Bhusawal and Paras TPSs are largely served through SECL; Koradi and Khaparkheda TPSs are largely served through MCL; and Nasik and Chandrapur TPSs are largely served through WCL.

105. Resultantly, it is seen that even after floating of tender colliery-wise instead of TPS-wise, OP-2 to OP-4 followed the same practice of quoting lower rates for selected TPSs whereas the other two OPs were quoting higher rates to secure the chosen TPSs respectively as per the arrangement of division of market.

106. The DG examined at length the representatives of these OPs regarding the consent given by them only for pre-selected TPSs for which these OPs had originally quoted respective lower rates.

107. From the perusal of the statements of the representatives of these OPs, it emerges that the justification given by them for quoting lower rates for the selected TPSs and higher for the others where other two bidders had quoted lower rates, was essentially that they had existing infrastructure at those TPSs only. Thus, it is apparent that OP-2 to OP-4 did not compete in securing business as would have been expected as prudent business behaviour in a competitive market. Rather, OP-2 to OP-4 seem to be comfortable in continuing with their existing businesses under an arrangement to divide the market.

108. The DG also asked specific queries to the representatives of OP-2 to OP-4 and thereafter concluded that these OPs as such, had no constraints if they had to move their business operations to other TPSs' areas and the infrastructure required for coal liasoning is not such which cannot be easily replaced or involves excessive replacement cost.

109. In this connection, the Commission has gone through the statement deposed by Shri S. B. Soni, Chief Engineer of MAHAGENCO who was asked about the infrastructural requirements required for coal liasoning business. For felicity of reference, the statement of Shri Soni is reproduced *in extenso*:

> *"Statement of Shri S.B. Soni, Chief Engineer, MAHAGENCO*
>
> *Q8 What kind of infrastructure does a coal liasoning agent/contractor require for doing the coal liasoning work.*
>
> *Ans The requirement of infrastructure are always mentioned in tender document and bidder has to essentially fulfill those requirements. Generally, 3-4 persons/supervisors are required around the clock to monitor and supervise the loading of rakes. The agent also requires an office near the siding/colliery where 1-2 managerial staff generally required. The staff is also required to liaise with railway office. The manpower of 2 persons including one supervisor is required at the TPS at the time of arrival of rakes. Apart from the requirement of manpower, the agent is not required to deploy any other infrastructure either at the TPS or siding excluding offices etc. All the staff of the agents are authorized by MAHAGENCO to work at siding. The staff of agent entering the TPS is required to take gate pass only. The copy of work order is also given to TPS by the head office/coal office and on that basis only the agents staff is got issued the gate pass. The staff of other agent who has not been issued the work order for that TPS cannot*

be issued gate pass. The staff working at siding is also required to have a vocational training certificate for safety purpose given by DG Mines and Safety as per provisions of Mines Act. This certificate is given after 30-40 days training. There is no educational qualification for the said certificate."

110. From the above, it was deduced by the DG that there is no such infrastructure required by the liasoning agent which can be said to be very extensive and elaborate which only the existing contactors who are working at the TPSs can have. It was observed that the infra-conditions are laid down in each tender and in some of MAHAGENCO tenders, many other third parties had participated. This was found to indicate that the reason given for quoting lower prices for particular TPSs where OP-2 to OP-4 are already working is not relevant and the same is only an afterthought of these OPs. It was further observed that the nature of work of a coal liasoning agent is such that the infrastructure required is not fixed, but manpower based. These OPs have also stated that they have trained staff who have training certificate from the DG, Mines Safety to work at colliery siding. However, when the DG asked as to whether such training is TPS specific, it has been replied in the negative by the representative of OP-4. It was also noted by the DG that every person working at mines including at the siding has to take a vocational training certificate from the DG, Mines Safety; however, the said training does not require any educational qualification and any person can easily take that certificate and start working in the mines.

111. In view of the above, the Commission is of the considered opinion that OP-2 to OP-4 have not been able to give any valid justification for quoting lower rates for the chosen TPSs as compared to other TPSs where the other two respective bidders had quoted higher rates and *vice versa* in a consistent manner over a long period of time. The Commission notes that such conduct of OP-2 to OP-4 goes a long way in pointing

towards a concerted action in geographically sharing the markets.

Purchase of tender documents by OP-2 to OP-4 on the same dates

112. During the course of investigation, MAHAGENCO was asked by the DG to file details of receipts of tender document/ fee deposited by OP-2 to OP-4 for different tenders. From the details provided by MAHAGENCO, it was observed that OP-2 to OP-4 have purchased the tender documents on the same day in a sequence for Tender No. 03/2005 in which the concerted action of these OPs has been first noticed. The details of such tender document purchase are noted below:

Table-5

Tender No. 03/2005		
Party	**Receipt No. for tender purchase**	**Date of tender purchase**
NCSL	6346558	03.03.2005
NKC	6346559	03.03.2005
KCT	6346560	03.03.2005
BSN	6346591	10.03.2005

113. It can be seen from the above that OP-2 to OP-4 had purchased the tender document on the same day and the serial number of receipts issued by MAHAGENCO is also in sequence. From this, it was inferred by the DG that either all these OPs purchased the tender document after discussion with each other or only one person went to purchase the tender documents at MAHAGENCO Office. Further, it was noted by the DG that such conduct cannot be a coincidence as in one other tender of 2008, a similar pattern was discernible:

Table-6

Tender No. 34/2008		
Party	**Receipt No. for tender purchase**	**Date of tender purchase**
NCSL	36450	12.06.2008
M/s Agarwal & Associates	36451	12.06.2008
NKC	36452	12.06.2008
KCT	36453	12.06.2008
BSN	36457	13.06.2008

114. Moreover, the DG also examined the representatives of OP-2 to OP-4 to seek their response in respect of such pattern followed by them in purchasing tender documents whereupon it emerged that the representatives of these OPs have admitted that purchasing of tender documents on the same day in sequential serial number is possible due to the fact that this was done by their local officials. In fact, it also came to light that sometimes, these OPs also gave their authorization to each other for purchasing of tender documents. This clearly reflects a concerted practice being resorted to by these OPs. The Commission also finds no merit in the plea of OP-4 that procurement of tender documents is a mere secretarial task which involves no discussion or meeting of minds. The Commission notes that such behaviour coupled with other factors in no uncertain terms reflects the close coordination amongst these OPs when they were expected to compete to secure maximum business for their firms. The Commission notes that it is not even the case of these OPs that the same was done to increase efficiency in providing services.

115. Before adverting to other circumstances pieced together by the DG, it is observed by the Commission that the DG made an elaborate investigation to establish propping up of dummy bidder *i.e.* one M/s Agrawal and Associates by OP-2 to give cover bids for different MAHAGENCO tenders. The Commission notes that the entire investigation was centred

around concerted behaviour exhibited by OP-2, OP-3 and OP-4. Thus, the investigation of the DG by focusing on OP-2 and M/s Agrawal and Associates was neither relevant nor of any consequence as firstly, M/s Agrawal and Associates is not a party to the present proceedings and secondly, there is nothing on record which connects OP-3 and OP-4 to this exercise of OP-2 in putting dummy bidder. In this regard, the Commission observes that the reasoning assigned by the DG that such effort of OP-2 would not have been possible without an understanding of OP-3 and OP-4 is purely a hypothesis which has not been tested by the DG or otherwise corroborated with independent evidence. In these circumstances, the Commission finds merit in the objection raised by OP-3 and OP-4 that the DG extended the said inference to them without any basis, based upon conjectures.

Exchange of letters/ pre-bid queries for MAHAGENCO tenders

116. The DG also found that OP-2 to OP-4 engaged into discussions with each other at every stage of tendering process even before submission of the price bid by way of exchanging e-mails and letters.

117. In this regard, it is seen that on 27.06.2013, Shri Ratnesh Nandkeoliyar of OP-3 sent an e-mail to Shri S.K Mahajan of OP-3 *vide* which copies of letters of OP-3 and OP-4 to MAHAGENCO were forwarded seeking clarification on different tender conditions. The DG noted in the report that the representatives of all the OPs had initially denied any such communication relating to the business and tenders. Hence, the DG confronted Shri Ratnesh with the said e-mail. It would be appropriate to notice the examination of Shri Ratnesh in this regard:

"Q27 Please clarify whether you and officials of M/s NCSL and M/s NKC ever exchanged clarification to be sought from MAHAGENCO before pre bid meeting in respect of MAHAGENCO tender.

Ans No.

Q28 I am showing you an e-mail dated 27.06.2013 (Exhibit-2) sent by you to Sh. S. K. Mahajan whereby you forwarded letters dated 17.06.2013 and 19.06.2013 (two letters) of M/s NKC and letter dated 13.06.2013 of M/s NCSL written to MAHAGENCO regarding points for pre bid queries in relation to tender No. T- 16/2013. It is seen that earlier in Q No. 27 you have specifically denied any exchange of letters. What do you have to say on this?

Ans Although in earlier Q. No. 27 I stated that there was no exchange amongst me and officials of NKC and NCSL, seeing my above mail I now recollect that we had exchanged clarifications/queries to be sought prior to pre bid meeting with each other. This was done at Nagpur. While I got the copy of above letters from NKC and NCSL, copy of KCT letter was provided to both of them. I forwarded said letters to Sh. S .K. Mahajan as it was a routine practice to keep him apprised of all the developments at Nagpur.

Q29 Please clarify whether you and officials of M/s NCSL and M/s NKC ever exchanged response of your respective company to MHAGENCO's letter for consent for extending validity of price bid date.

Ans. I recall that when such letters from MAHAGENCO asking for consent to extend the validity period of price bid were received in different tenders, and local officials of NKC and NCSL did exchange the proposed response of respective company to MAHAGENCO."

118. Thus, it was deduced by the DG that though Shri Ratnesh initially denied any communication with OP-2 and OP-4 to seek clarification from MAHAGENCO before pre-bid meeting but when he was shown the e-mail dated 27.06.2013, he stated that he could recollect about the said e-

mail whereby pre-bid queries were exchanged. He also admitted that the discussions were held at Nagpur and he got the copy of letters of OP-4 and OP-2 from their officials and also gave copy of OP-3's letter to them. He also admitted to have forwarded the said letters to Shri Mahajan to apprise him about the developments.

119. Thus**,** the DG noted that the said fact of exchange of pre-bid queries between these OPs for Tender No. T-16/2013 of MAHAGENCO showed that their agreement for geographically sharing the tenders and bid price fixing was continuing in 2013 also.

120. The Commission observes that the aforesaid conclusion of the DG also stands strengthened from the statement of Shri Ratnesh (Q. 29, quoted above) wherein he admitted that whenever MAHAGENCO had sought the consent of the bidders for extension of tender time, he on behalf of OP-3 and local officials of OP-4 and OP-2 used to exchange their proposed response with MAHGENCO. The said fact makes it plain that there was an understanding between OP-2 to OP-4 in the tenders floated by MAHAGENCO for coal liasoning.

121. OP-2 to OP-4 sought to play down such communication by contending that the bidders generally raise queries relating to terms and conditions of the tender, penalty likely to be imposed by the employer, quality criteria *etc*., which makes the bidding process easier for all competitors. Therefore, it was contended that the conclusion of the DG on the basis of such exchange of letters/ per-bid queries amongst OP-2 to OP-4 to establish an understanding, is erroneous.

122. The Commission is afraid that such attempts to justify the communications do not inspire confidence and cannot be accepted in any scenario. In competitive bidding, it is highly unusual that competitors would enter into any communication or exchange their proposed

responses to the procurer or exchange letters seeking clarifications/ queries prior to pre-bid meeting. The meeting of mind between the bidders prior to even pre-bid meetings clearly reflects a concerted arrangement amongst the bidders.

Financial transactions between OPs

123. The DG conducted an elaborate analysis of the books of OP-2 to OP-4 during the period 2005-06 to 2014-15 and concluded that these OPs had various transactions on their books which were done to share profits or make payments for cover bids in respect of various tenders.

124. It is not necessary to reproduce in detail the analysis conducted by the DG as OP-2 to OP-4 have not seriously disputed the entries and the bills analysed by the DG. Rather, the thrust of the response of these OPs in this regard is that they were working as sub-contractors for each other in contracts, where a particular party did not have adequate infrastructural facilities. For example, the work in Sambalpur was outsourced by OP-3 to OP-4 as OP-4 had adequate infrastructure facilities at Sambalpur. OP-3, however, stopped outsourcing work to OP-4 since 2015 as OP-3 developed its own infrastructural set-up at Sambalpur. It is for the reason of reconciliation of accounts that these OPs shared their ledgers.

125. The Commission finds the response quite revealing. In fact, it has clearly been admitted that these OPs were working as sub-contractors for each other and such clear admission seen in the light of several plus factors joined together by the DG unerringly indicates a deliberate and intentional arrangement agreed amongst these OPs. The Commission also finds it quite amazing that these OPs acted in a transparent manner in executing their understanding to such an extent that they even shared their ledgers *inter se*.

Bogus expenses shown by OP-2 to OP-4 for showing less profits/ losses in MAHAGENCO tenders

126. It is observed that OP-2 and OP-3 have also taken a stand before the DG that for the work of MAHAGENCO taken by them in 2009 with regard to Tender No. 03/2005, they have suffered losses. OP-4 has also claimed such losses for the year *i.e.* 2010-11. All these OPs have submitted profit and loss certificates from their respective Chartered Accountants for MAHAGENCO tenders.

127. The DG examined the claim of these OPs suffering losses in great detail and based upon the evidence gathered, it emerged that commission/ money was exchanged on account of profit sharing between these OPs for different tenders. Hence, the plea of these OPs that they have suffered losses in MAHAGENCO tenders stands falsified. Moreover, the Commission is of considered opinion that the plea of suffering losses raised by these OPs is of no consequence when a concert is established which falls foul of the provisions of the Act.

128. Lastly, the DG took into account one more factor to establish concert amongst OP-2 to OP-4 *i.e.* sharing of advocate's fee by OP-2 and OP-3 during the proceedings before the Appellate Tribunal in 2014. On this aspect, the Commission is of the considered opinion that parties may engage a common counsel who is well-versed in a particular branch of law and such engagement can hardly be taken as a plus factor.

129. Similarly, the Commission has perused the call detail records (CDR) analysis conducted by the DG. It is seen from the DG Report that the entire CDR analysis was confined to the calls which were made during 2015 and 2016. As noted earlier, the findings of the DG in respect of contravention are confined upto 2013. Hence, reliance by the DG upon call details of 2015-16 to support findings of bid rigging during the

period 2005-2013 examined by the DG, is wholly irrelevant.

Conclusion

130. In view of the aforesaid discussion, the Commission is of the considered opinion that OP-2, OP-3 and OP-4 have entered into an arrangement in respect of the tenders floated by MAHAGENCO during the period 2005-2013 whereby they not only allocated the market but also rigged the bids.

131. Such anti-competitive arrangement stands proved through various pieces of evidence put together by the DG. They include quoting of identical basic rates by these OPs in respect of the tender floated by MAHAGENCO in 2005. Further, quoting of rates in a manner that each of these OPs could get the chosen TPSs also stands proved from the detailed analysis of the bids, conducted by the DG. Such parallel conduct and market allocation was further proved from the various plus factors which were noted by the DG including: no plausible explanation or justification for quoting identical basic rates in 2005 tender, no justification for quoting lower rates for chosen TPSs and remaining two OPs quoting higher rates for such TPSs in a mutual way so as to allocate TPSs amongst themselves, purchasing of tender documents by the OPs on same dates, exchange of letters/ pre-bid queries and financial transactions including sharing of ledgers and cooking of books by bogus entries to show losses in MAHAGENCO tenders.

132. In terms of the provisions contained in Section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 3(2) of the Act declares that any agreement entered into in contravention of the provisions contained in

sub-section (1) shall be void. Further, by virtue of the presumption contained in sub-section (3), any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which- (a) directly or indirectly determines purchase or sale prices; or (b) limits or controls production, supply, markets, technical development, investment or provision of services; or (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; or (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

133. Further, as per the explanation appended to sub-section (3) of Section 3 of the Act, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

134. In case of agreements as listed in Section 3(3) (a) to (d) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition in India; and onus to rebut the presumption would lie upon the parties. In the present case, OP-2 to OP-4 could not rebut the said presumption. Further, they have not been able to show how their impugned conduct resulted in accrual of benefits to the consumers or made improvements in the production or distribution of the goods in question *etc*.

135. As these OPs are engaged in similar business and are therefore operating

at the same level of the production chain, allegations of anti-competitive agreements, decisions or practices among them squarely stand covered within the ambit of Section 3(3) read with Section 3(1) of the Act.

136. Further, it may be noted that definition of an 'agreement' as given in Section 2(b) of the Act requires, *inter alia*, any arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings. The definition, being inclusive and not exhaustive, is a wide one. An understanding may be tacit and the definition under Section 2(b) of the Act covers even those situations where the parties act on the basis of a nod or a wink. There is rarely direct evidence of action in concert and in such situations, the Commission has to determine whether those involved in such dealings had some form of understanding and were acting in co-operation with each other. In light of the definition of the term 'agreement', the Commission has to assess the evidence on the basis of preponderance of probabilities.

137. Further, since the prohibition on participating in anti-competitive agreements and bid-rigging and the penalties which the infringers may incur are well known, it is normal for such practices and agreements to take place in a clandestine fashion, for meetings to be held in secret, and for associated documentation to be reduced to a minimum. The Commission in this regard notes that, in respect of cases concerning cartels which are hidden or secret, there is little or no documentary evidence and evidence may be quite fragmentary. The evidence may also be wholly circumstantial. It is therefore, often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia, which, taken together, may in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules. In the present case, as detailed earlier, the DG has

demonstrated a parallel conduct in quoting similar basic rates besides market allocation amongst the bidders through a detailed analysis of the various MAHAGENCO tenders. Further, the DG supported such behaviour with various plus factors, as analysed hereinabove in this order.

138. Applying the aforesaid legal test to the evidence detailed in the present case, the Commission is of the considered view that OP-2, OP-3 and OP-4, through their impugned conduct, have contravened the provisions of Section 3(3)(c) and Section 3(3)(d) read with Section 3(1) of the Act, by acting in a collusive and concerted manner which has eliminated and lessened the competition besides manipulating the bidding process in respect of the tenders floated by MAHAGENCO. The Commission is of the considered opinion that though the finding of the DG regarding the contravention against these OPs is confined to the period from 2005 to 2013, the findings of the Commission will be confined to the period post-notification of the relevant provisions of the Act (*i.e.* 20.05.2009) to 2013. The conduct of these OPs stands established from the series of actions taken by these OPs which have been detailed out in the preceding paras. To reiterate, such anti-competitive arrangement stands proved through various pieces of evidence put together by the DG. They include quoting of identical basic rates in respect of the tender floated by MAHAGENCO in 2005, quoting of rates in a manner so as each of them gets the chosen TPSs which stands proved from the detailed analysis of the bids conducted by the DG and various plus factors including no plausible explanation or justification for quoting of identical basic rates by these OPs in 2005 tender, no justification for quoting lower rates for chosen TPSs and the remaining two OPs quoting higher rates for such TPSs in a mutual way so as to allocate TPSs amongst themselves, purchasing of tender documents by these OPs on the same dates, exchange of letters/ pre-bid queries amongst OPs, financial transactions

inter se OPs including sharing of ledgers and cooking of books by bogus entries to show losses in MAHAGENCO tenders.

ORDER

139. Based on the above discussion, the Commission is of that opinion that the impugned acts/ conduct of OP-2, OP-3 and OP-4 are found to be in contravention of the provisions of Section 3(3)(c) and Section 3(3)(d) read with Section 3(1) of the Act.

140. OP2, OP-3 and OP-4 are directed to cease and desist from indulging in the acts/ conduct which have been found to be in contravention of the provisions of the Act.

141. The Commission, for the reasons recorded below, finds the present case fit for imposition of penalty as well. Under the provisions contained in Section 27(b) of the Act, the Commission may impose such penalty upon the contravening parties, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which is party to an anti-competitive agreement or abuse of dominance. Further, in cases of cartelisation, the Commission may impose upon each such cartel participant, a penalty of upto three times of its profit for each year of continuance of the anti-competitive agreement or ten per cent of its turnover for each year of continuance of such agreement, whichever is higher.

142. It is evident that the legislature has conferred wide discretion upon the Commission in the matter of imposition of penalty. It may be noted that the twin objectives behind imposition of penalty are: (a) to reflect the seriousness of the infringement; and (b) to ensure that the threat of

penalty will deter the infringing undertakings. Therefore, the quantum of penalty imposed must correspond with the gravity of the offence and the same must be determined after having due regard to the mitigating and aggravating circumstances of the case.

143. The Commission has given its thoughtful consideration to the issue of quantum of penalty and has considered the submissions advanced by the parties on the issue of quantum of penalty.

144. OP-2 argued that it has cooperated during the entire process of investigation besides furnishing various documents from time to time. It also argued that it is a small player having a market share of only around 3% in this business as there are 60 parties registered with Coal Merchants Association in this business of liasoning, supervision and movement of coal. It also argued that there was no complaint against it from the consumers and no loss was occasioned due to the impugned conduct. Lack of awareness about the provisions of the Act was also pleaded. It was pointed out that now the answering OP has educated its employees about the provisions of the Act by organising an awareness programme. It was also highlighted that OP-2 is first time offender and therefore, penalty may be imposed taking into consideration the size of the tenders, turnover of the company, share in the relevant market and other factors. It has enclosed a certificate from Chartered Accountant providing revenue/ receipts from work executed for MAHAGENCO. It was pointed out that the penalty, if any, has to be calculated based on relevant preceding three years upto 2013 *i.e.* 2010-11, 2011-12 and 2012-13. OP-3 though not specifically pleaded on the quantum of penalty, but it has submitted that no losses whatsoever have been caused to MAHAGENCO as these OPs had been working at the rates fixed in 2005. It has also furnished a certificate from its Chartered Accountant certifying its revenue (billing amount) from MAHAGENCO tenders. OP-4 has argued that it has fully cooperated with the DG during investigation and its role

in the cartel, if any, was very limited. No appreciable adverse effect on competition has resulted due to the alleged bid rigging. It was also pointed out that it is a small and medium sized enterprise. Also, coal liasoning is a very small part of its overall business. Lastly, it was argued that only the turnover from the provision of coal liasoning service should be taken into consideration in case the Commission decides to impose penalty upon it. It has provided turnover details for coal liasoning business for the financial years 2013-14, 2014-15 and 2015-16.

145. In this connection, it would be apposite again to refer to the recent decision of the Hon'ble Supreme Court of India in *Excel Crop Care Limited* case (*supra*). One of the issues which fell for consideration before the Hon'ble Supreme Court in this case was as to whether penalty under Section 27(b) of the Act should be imposed on the total/ entire turnover of the offending company, or only on the "relevant turnover" *i.e*. relating to the product/ service in question?

146. After referring to the statutory scheme as engrafted in Section 27 of the Act and analysing the case laws at length, the Hon'ble Supreme Court opined that adopting the criteria of 'relevant turnover' for the purpose of imposition of penalty will be more in tune with the ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties. While reaching this conclusion, the Hon'ble Supreme Court recorded the following reasons:

> *"When* the *agreement leading to contravention of Section 3 involves one product, there seems to be no justification for including other products of an enterprise for the purpose of imposing penalty. This is also clear from the opening words of Section 27 read with Section 3 which relate to one or more specified products. It also defies common sense that though penalty would be imposed in respect of the infringing product, the 'maximum penalty' imposed in all cases be prescribed on the basis*

of 'all the products' and the 'total turnover' of the enterprise. It would be more so when total turnover of an enterprise may involve activities besides production and sale of products, like rendering of services etc. It, therefore, leads to the conclusion that the turnover has to be of the infringing products and when that is the proper yardstick, it brings home the concept of 'relevant turnover'."

147. Having considered the various mitigating factors pleaded by these OPs as enumerated earlier and other pleas urged by them on relevant turnover, the Commission is of opinion that the contention of the parties that only the revenue generated from the impugned tender alone would constitute relevant turnover, is not tenable. In *Excel Crop Care Limited* v. *Competition Commission of India & Ors.*, Appeal No. 79 of 2012, the Hon'ble Appellate Tribunal *vide* its order dated 29.10.2013 (in para 67) categorically observed that turnover cannot be restricted to supply made only to the concerned procurer whose tenders were rigged. The Hon'ble Supreme Court *vide* its order dated 08.05.2017 dismissed the appeal filed against the aforesaid order and upheld the order passed by the Hon'ble Appellate Tribunal. Similarly, the Commission is of the opinion that it is the total revenue generated from all coal liasoning services that is relevant for the present purposes and the contention of the parties that business of coal liasoning in respect of washed coal is not akin to the contracts under consideration, is both flawed and misconceived. It makes no difference as to coal liasoning services are provided for washed coal or raw coal. Furthermore, the Commission is of opinion that the present case falls in the category of hard core cartels as OPs reached an agreement to submit collusive tenders and to divide the markets. Thus, the case deserves to be dealt with utmost severity. Accordingly, the Commission notes that it is a fit case for invoking the proviso to Section 27 of the Act and decides to impose a penalty on OP-2, OP-3 and OP-4 at the rate of 2 times of their total profits earned from provision of coal liasoning services to all power generators, and not limited to the profits

generated from MAHAGENCO alone, for continuance of the cartel for 2010-11 to 2012-13 years only based on the financial statements filed by them. Details of the quantum of penalty imposed on these OPs are set out below:

(INR In crore)

Name	Profit 2010-11	2 Times of Profit for 2010-11	Profit 2011-12	2 Times of Profit for 2011-12	Profit 2012-13	2 Times of Profit for 2012-13	Total
NCSL	1.03	2.06	1.29	2.58	1.26	2.52	7.16
KCT	20.67	41.34	19.39	38.78	15.74	31.48	111.60
NKC	1.52	3.04	2.07	4.14	4.87	9.74	16.92

148. Accordingly, a penalty of INR 7.16 crore (Seven crore and sixteen lakh) is imposed on NCSL; a penalty of INR 111.60 crore (One Hundred Eleven crore and Sixty lakh) is imposed on KCT and a penalty of INR 16.92 crore (Sixteen crore and Ninety Two lakh) is imposed on NKC respectively.

149. The Commission directs the above OPs to deposit the penalty amount within 60 days of the receipt of this order.

150. Lastly, the Commission notes that the learned counsel appearing for OP-2 (Shri Chetan S. Dhore) had moved an application in his individual capacity seeking expunging of certain remarks made against him in the DG Report stating, *inter alia*, that the inferences drawn by the DG in the report *qua* him are in violation of the principles of natural justice as no opportunity was accorded to him to explain his side. On a careful perusal of the application and after hearing Shri Dhore, the Commission, *vide* its order dated 05.10.2016, had decided to take up the application for consideration during the final hearing of the case.

151. The Commission has perused the remarks of the DG as noted at pp. 230-231 against Shri Dhore. The Commission is of the considered opinion that the adverse remarks made by the DG against Shri Dhore were not warranted as no opportunity was given by the DG to seek explanation of Shri Dhore. Such remarks against a professional who was only assisting a party were not relevant for the purposes of present investigation. The Commission has perused the relevant remarks and is satisfied that the same ought to be erased from the records.

152. Before parting with this case, the Commission is constrained to note that though the Informant cannot be non-suited on the ground of *locus standi* to pursue the present case particularly in the light of the observations of the Appellate Tribunal, the Commission deprecates the conduct of the Informant in breaching the confidentiality and sanctity of the inquiry by circulating copies of the investigation report to BSN- a rival of the OPs – who, in turn, forwarded copies thereof to various authorities. The Commission has also considered an application filed on behalf of OP-2 wherein it is, *inter alia*, averred that during the proceedings for cross-examination held on 20.02.2017, the learned counsel appearing on behalf of the Informant had made allegations against the Commission in reference to the order allowing cross-examination of the witnesses. It was stated in the application that the learned counsel appearing on behalf of the Informant alleged during the said proceedings that the Commission had already made up its mind to allow cross-examination of the witnesses even before the application for the same was filed. The Commission, *vide* its order dated 07.03.2017, decided to examine the allegations during the final hearing in the matter. However, the said application was not pressed or argued by OP-2 during final hearing and, as such, the Commission does not want to hold any further inquiry in this regard and the same stands disposed of as not pressed.

153. The Secretary is directed to communicate to the concerned parties accordingly.

Sd/-
(Devender Kumar Sikri)
Chairperson

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

Sd/-
(Justice G. P. Mittal)
Member

New Delhi
Date: 10/01/2018