



COMPETITION COMMISSION OF INDIA

Case No. 61 of 2013

In Re:

Shri Surendra Prasad

Informant

AND

**1. M/s Maharashtra State Power Generation
Co. Ltd.**

Opposite Party No. 1

2. M/s Nair Coal Services Ltd.

Opposite Party No. 2

3. M/s Karam Chand Thapar & Bros.

Opposite Party No. 3

4. M/s Naresh Kumar & Co

Opposite Party No. 4

CORAM

**Mr. Ashok Chawla
Chairperson**

**Dr. Geeta Gouri
Member**

**Mr. Anurag Goel
Member**

**Mr. M. L. Tayal
Member**

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

**Mr. S. L. Bunker
Member**



Order under Section 26(2) of the Competition Act, 2002

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 M/s Maharashtra State Power Generation Co. Ltd. ('the opposite part No 1'/ MAHAGENCO), M/s Nair Coal Services Ltd. (' the opposite party No. 2'), M/s Karam Chand Thapar & Bros. ('the opposite party No. 3') and M/s Naresh Kumar & Co ('the opposite party No. 4') alleging *inter alia* contravention of the provisions of sections 3 and 4 of the Act.

2. The present information has been filed by the informant, who claims to be a practising advocate from the City of Nagpur in Maharashtra with 7 years of standing, in public interest. As per the information, being affected by the sudden rise in electricity charges and also having come across the final order and judgment of the Hon'ble Supreme Court of India in *M/s B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. & Ors.*, (2006) 11 SCC 548, the informant realized that in violation of the Supreme Court judgment and in complete disregard to the interest of the general public and the nation's economy, the opposite parties have continued to violate provisions of the Act.

3. The opposite party No. 1 (MAHAGENCO) is a company created by the Government of Maharashtra for the purpose of generation of power for supply in the State of Maharashtra. For the purposes of running its seven Thermal Power Stations, it obtains raw coal from the subsidiaries of M/s Coal India Limited *viz.* M/s Western Coalfields Limited, M/s South-Eastern Coalfields Limited, M/s Mahanadi Coalfields Limited and M/s Singareni Coal Company Limited. In order to procure quality coal and to make proper supervision of the said supply through rail and other modes of transportation excluding road transportation, MAHAGENCO engages the services of liasioning agents for supply of coal, which is used as a primary fuel for generation of coal in the Thermal Power Stations by the opposite party No. 1.



4. The informant further avers that sometime in March 2005, the opposite party No. 1 invited tenders for coal liasioning, quality and quantity supervision to supply coal to its Thermal Power Stations. Four companies submitted their bids in the said tender process *i.e.* one M/s B.S.N. Joshi & Sons Ltd. and the opposite parties No. 2 to 4. The rate quoted by M/s B.S.N. Joshi & Sons Ltd was the lowest. However, the said company was not awarded the work in spite of being the L-1 bidder. This led to a prolonged litigation before the Nagpur Bench of the Hon'ble Bombay High court in Writ Petition Nos. 2444/4514 of 2005 and thereafter before the Hon'ble Supreme Court in Civil Appeal No. 4613 of 2006.

5. It is further stated in the information that the Hon'ble Supreme Court *vide* its judgment dated 31.10.2006 categorically held that the opposite party Nos. 2 to 4 herein had formed a cartel for successfully obtaining the contract. Therefore, the contract was awarded in favour of the M/s B S N Joshi & Sons Ltd. The informant submits that the Hon'ble Supreme Court has also observed that M/s B S N Joshi & Sons Ltd. was making profits in spite of quoting such a low bid. Thus, owing to the fact that there are few contract agents in this business, the opposite parties have colluded to geographically distribute the market amongst them in order to defeat the benefits of healthy competition. In this process, with connivance of the opposite party No. 1, the contractors such as the opposite parties have been able to successfully foreclose the market to any other enterprise that may be interested in taking part in the tender.

6. As per the informant, in spite of the order passed by the Hon'ble Supreme Court on 31.10.2006 the work of liasioning of coal supply was not awarded to M/s B S N Joshi & Sons Ltd. by the opposite party No. 1, due to which a Contempt Petition No. 245 of 2007 was filed before the Hon'ble Supreme Court. On 19.12.2008, the Hon'ble Supreme Court disposed of the contempt petition by its judgment in favour of M/s B S N Joshi & Sons Ltd. and it was categorically held that the opposite party No. 1 (MAHAGENCO) was aware of the fact that the opposite parties No. 2 to 4 had formed a cartel



for the work of liasioning of coal and yet, the contract continued in the hands of the opposite parties. It was thereafter once again ordered by the Hon'ble Supreme Court to hand over the work of coal liasioning contract in favour of M/s B.S.N. Joshi & Sons Ltd.

7. It is further stated by the informant that upon enquiries it was found that on 03.01.2009 a work order was issued in favour of M/s B.S.N. Joshi & Sons Ltd. for carrying out the liaison work of coal supply. The contract continued till 12.09.2009 on which date it was illegally terminated. The issue of termination is stated to be a subject matter of pending arbitral proceedings under the Arbitration and Conciliation Act, 1996.

8. The informant has submitted that since termination of its contract with M/s B.S.N. Joshi & Sons Ltd. as the liasion agent of the opposite party No. 1, the opposite party No. 1 has been consistently and regularly awarding the contracts by issuing work orders in favour of the opposite party Nos. 2 to 4 in the geographically distributed market, as agreed between them. Thus, it is clear that being in a dominant position in the market of power generation within the State of Maharashtra, in spite of the fact that the Hon'ble Supreme Court has declared that the three contractors had formed a cartel for bid-rigging and also geographic distribution of areas of contract in the State of Maharashtra, the opposite party No. 1 is continuing to award work orders in favour of opposite parties Nos. 2 to 4 on short term basis as a stop gap arrangement.

9. The informant has submitted that the opposite parties Nos. 2 to 4 being in collusion with the opposite party No. 1 have conveniently divided amongst themselves the seven Thermal Power Stations for doing liasion works by effectively thwarting any newcomer or any other existing company from either participating in the tender process or working for the opposite party No. 1.



10. The informant on the basis of the detailed chart highlighting the name of companies, area awarded and cumulative contract period submitted that the effect of the cartel formed earlier as found by the Hon'ble Supreme Court is continuing till date which could not have taken place if MAHAGENCO had taken necessary steps to reform its practices in accordance with the new law.

11. It is submitted by the informant that on four occasions the opposite party No. 1 sought to issue tenders inviting bids for liaison work for supply of coal to their Thermal Power Stations. However, on all these occasions for various reasons the tender process was subsequently cancelled.

12. The informant has submitted that the opposite party No. 1 is very comfortable with the opposite parties Nos. 2 to 4 and is giving impetus to them on one hand and effectively making sure that no newcomer enters the field. They have, therefore, effectively driven out competition in the market by foreclosing it misusing their dominant position.

13. It is also submitted by the informant that the opposite party No. 1 in its subsequent actions seems to be favouring formation of cartel and particularly between the three named contractors herein as is clear from the fact that since September 2009 till date the opposite party No. 1 floated four tenders for granting work of supervision and monitoring of loading of size coal into wagons to its permissible carrying capacity upto free extent to its Thermal Power Stations by rail mode from M/s Western Coalfields Ltd, M/s South-Eastern Coalfields Ltd, M/s Mahanadi Coalfields Ltd. and M/s Singareni Coal Company Ltd. However, the said tenders were cancelled for various reasons.

14. The informant has submitted that the cancellation of the tenders mentioned hereinabove by the opposite party No. 1 resulted in the opposite parties Nos. 2 to 4 becoming beneficiaries of a stop-gap arrangement being continued by them. In so far the three contractors, who were found to have formed a cartel by the Hon'ble Supreme Court, have indulged in similar acts



of bidding in collusion (or bid-rigging) while bidding for liaisoning work for the opposite party No. 1.

15. As per the informant, the situation with regard to grant of liaison contract for coal supply to Thermal Power Stations of various power generation companies throughout the country is in one way or the other controlled by such collusive bidding by a handful of companies such as the three mentioned contractors herein. The informant also submits that the collusion cannot be said to be even tacit collusion in nature as the bidders are forbidden to even disclose their bids to each other. It is with connivance of the opposite party No. 1 which is a government company that contractors such as the opposite party contractors herein are able to chalk, browbeat or keep at bay any new entrant in the field.

16. The informant has further submitted that on a number of occasions when an outsider other than the three mentioned contractors dared to bid in a tender process by quoting the lowest figures and became L-1, one of the three contractor companies promptly questioned the credibility and qualification of such a new entrant and made the entire process sub-judice. During this interregnum, one of the three companies who have divided the Thermal Power Stations amongst themselves on geographical consideration continues to work on stop gap basis/temporary basis. The opposite party contractors successfully make sure that nobody other than these three enters into the business of coal liaison. In the entire process, the opposite party No. 1 either remains a mute spectator or tacitly helps the contractors in forming a cartel. All this is done at the costs of the tax payer, who is none else than a common man.

17. Referring to the contraventions of the Act, the informant states that the opposite parties Nos. 2 to 4 have entered into an anti-competitive agreement between themselves to divide the market area in Maharashtra and thereby have made exorbitant quotation for their bids, depriving the Indian economy of huge funds to the tune of at least Rs. 52 crores in each contract. The success of



such a contracts has to be attributed to the methods adopted by opposite party No. 1 *i.e.* MAHAGENCO which has been facilitating this arrangement between the parties.

18. It is also submitted by the informant that the opposite parties No. 2 to 4 have violated clause (d) of sub-section (3) of section 3 of the Act as they had 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. The informant further reiterates that the opposite parties No. 2 to 4 have formed a cartel for collusive bidding and thereby have distributed the market between themselves and have continued to bid in collusive manner even after the Supreme Court judgment in *M/s B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. & Ors.*, as quoted earlier.

19. Lastly, it has been submitted by the informant 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 together colluded to deny others access to the market and thereby are preventing new players, if any, from participating in the bidding process. Hence, it is alleged that there is a clear violation of section 4 by the opposite party No. 1 along with opposite party Nos. 2 to 4.

20. Based on these allegations and averments, the informant made the following prayers to the Commission:

- i) To initiate an inquiry under section 26 of the Act against the opposite parties and, if necessary, against other State power generation companies also;
- ii) To impose penalty on the opposite parties Nos. 1 to 4; and



iii) To pass such orders or issue such directions as may be deemed fit in the facts and circumstances of the case.

21. The Commission has very carefully perused the information and the material available on record. The Commission has also heard the counsel for the informant at length. Despite grant of opportunity to file additional submissions, the informant did not file such submissions and, as such, the Commission decided to proceed further on the basis of the material available on record.

22. The informant appears to be aggrieved by the alleged cartel formed by the opposite party Nos. 2 to 4 (who are liaison work contractor in coal industry) in collusion with the opposite party No. 1 in the matter of provision of liaison work for the thermal power stations of the opposite party No. 1.

23. The basic thrust of the grievance of the informant centres around the fact that MAHAGENCO floats tenders for coal liasoning and subsequently cancels them for various assigned reasons and thereupon as a stop gap arrangements, work orders are issued to the opposite party contractors. Further, it is alleged that the opposite party contractors have distributed the markets inter se and make exorbitant quotations for their bids. It is the case of the informant that whenever new entrants seek to enter the market, unnecessary disputes qua qualification of such competitors are raised by the entrenched contractors, all in collusion with the procurer.

24. To begin with, the allegations against the opposite party Nos. 2 to 4 with reference to the provisions of section 3 of the Act may be examined. The informant has annexed a chart containing quotes of the opposite party Nos. 2 to 4 for the year 2010 at page 370 onwards in the paper book. On perusal thereof, it appears that the quotes made by these parties were in a narrow band, yet the same cannot be described as identical or similar. Absent any other evidence or circumstance, it is difficult to infer any anti-competitive



agreement solely on the basis of the chart noted above. Hence, it may be observed that the informant has not been able to substantiate its allegations of bid rigging by and between the opposite party Nos. 2 to 4. Resultantly, no case of contravention of the provisions of section 3 of the Act is made out against the opposite party Nos. 2 to 4.

25. The next grievance of the informant relates to alleged facilitation by the opposite party No. 1 to the bid rigging allegedly entered into by the opposite party Nos. 2 to 4. This can be summarily dealt with. The opposite party No. 1 is a government company and examination of any allegation of corruption or favouritism *per se* on its part or on the part of its officers is beyond the purview of the jurisdiction of the Commission.

26. For the same reasons, the allegations of the informant based on the same grounds against MAHAGENCO and the three named contractors relating to contravention of the provisions of section 4 of the Act are also misconceived. In the present case, the informant has alleged contravention of the provisions of section 4 of the Act by MAHAGENCO alongwith the three named contractors. As MAHAGENCO and its contractors do not fall within the definition of 'group', the allegations do not stand. Even at a disaggregated level, assuming MAHAGENCO to be dominant in the market of procurement of liaison work relating to coal in the State of Maharashtra, the allegations made by the informant against MAHAGENCO of favouritism and corruption cannot be said to fall within the purview of section 4 of the Act.

27. Looked at from any angle, the Commission is of opinion that no case of contravention of the provisions of sections 3 or 4 of the Act is made out against the opposite parties.

28. In the result, the information is misconceived and deserves to be closed forthwith in terms of the provisions contained in section 26(2) of the Act.



29. It is ordered accordingly.
30. The Secretary is directed to inform the parties accordingly.

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

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

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

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

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

New Delhi

Date: 11/12/2013

Order under Section 26(1) of the Competition Act, 2002 (Minority)

The information in the present case has been filed by the Informant against the Opposite Parties under section 19(1)(a) of the Competition Act, 2002 (“**Act**”) alleging *inter alia* contravention of the provisions of sections 3 and 4 of



the Act by forming a cartel engaged in collusive bidding for contract of liaison work for movement of coal.

2. The Informant, a practicing advocate, being affected by the sudden rise in electricity charges and having come across the final order and judgment in *M/s B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. & Ors.* (reported in (2006) 11 SCC 548) dated 31.10.2006, filed this information. The above case before the Supreme Court was an appeal from the decision of the High Court of Bombay given in a writ petition filed by OP2 challenging the disqualification of M/s B.S.N. Joshi & Sons Ltd. (“**B.S.N. Joshi**”) for award of tender by OP1 despite B.S.N. Joshi being the lowest bidder.

3. OP1 is a company created by the Government of Maharashtra for the purpose of generation of power for supply in the State of Maharashtra. In order to procure quality coal and make proper supervision of supply of raw coal through rail to OP1’s seven thermal power stations, OP1 engages services of liaisoning agents. The Informant averred that in March 2005, OP1 invited tenders for coal liaisoning, quality and quantity supervision for coal supply to its thermal power stations. Four companies submitted their bids in the said tender process *i.e.* B.S.N. Joshi and OPs 2 to 4. Despite being the lowest rate quoted in the tender, B.S.N. Joshi was not awarded the work which led to a prolonged litigation. The Supreme Court vide the abovementioned judgment observed that OPs 2 to 4 had formed a cartel for successfully obtaining the contract. In spite of the order of the Supreme Court, the tender was not awarded to B.S.N. Joshi, therefore a contempt petition was filed before the Supreme Court. On 19.12.2008 the Supreme Court ruled in favour of B. S. N. Joshi and held that OP1 was aware of the fact that OPs 2 to 4 had formed a cartel for the work of liaisoning of coal and yet, the contract



continued in the hands of the OPs 2 to 4. The Supreme Court ordered that the contract for coal liaisoning be handed over to B.S.N. Joshi.

4. The Informant submitted that he came to know that on 03.01.2009 a work order was issued by OP1 in favour of B.S.N. Joshi for carrying out the liaison work of coal supply. The contract continued till 12.09.2009 when it was terminated. The dispute of termination of contract wrongfully was the subject matter of an arbitral proceeding under the Arbitration and Conciliation Act, 1996.

5. The Informant submitted that after termination of contract of B.S.N. Joshi, OP1 had been regularly awarding the contracts by issuing work orders in favour of OPs 2 to 4, on short term basis as a stop gap arrangement in the geographically distributed market, as agreed between them. The Informant stated that since September 2009, on four occasions OP1 sought to issue tenders inviting bids but the tender process was subsequently cancelled giving some or the other reason. The Informant further stated that on a number of occasions, whenever a bidder other than OPs 2 to 4 dared to bid in the tender process and quoted the lowest figures, one of the OPs 2 to 4 promptly questioned the credibility and qualification of such a new entrant and made the entire process *sub-judice*. The Informant submitted that the cartel formed earlier as found by the Supreme Court was continuing till date with the help of OP1, and this cartel would not have succeeded only if OP1 had taken necessary steps to reform its practices.

6. Based on the above allegations the Informant contended that OPs 2 to 4 have violated clauses (c) and (d) of sub-section (3) of section 3 of the Act as they had engaged in collusive bidding for projects with OP1 thereby scuttling any competition among themselves. The Informant further claimed that OPs 2 to



4 have entered into an anti-competitive agreement among themselves to divide the market area in Maharashtra and thereby have made exorbitant quotation for their bids.

7. The Informant submitted that in spite of the Supreme Court's judgment observing that the three contractors (OPs 2 to 4) had formed a cartel for bid-rigging and despite continuous geographic distribution of areas of contract by OPs 2 to 4 in the State of Maharashtra, OP1 being in a dominant position in the market of power generation within the State of Maharashtra, was continuing to award work orders in favour of OPs 2 to 4 without following the tender process and thus violating clause (c) of sub-section (2) of section 4 of the Act by limiting the market access to only three players in the market of coal liaison/ quality/ supervision work, denying access to other players in the market and preventing new and other existing players from participating in the bidding process thereby driving out competition.

8. In B.S.N. Joshi's case (*supra*), the Supreme Court quoted a note prepared by Director (Finance) of OP1 dated 19.08.2005 wherein he had stated that OPs 2 to 4 submitted before him that they would not match the lowest rate quoted by B.S.N. Joshi and as per the comparative statement of rates placed, it was seen that OPs 2 to 4 had formed a cartel. The said note was approved by the Managing Director of OP1. The Informant also provided a chart containing quotes of OPs 2 to 4 from year 2006 to 2010 and the quotes showed prices of OPs 2 to 4 in a narrow range which *prima facie* was indicative of concerted action on the part of OPs 2 to 4.

9. Upon terminating the work order issued to B.S.N. Joshi due to alleged poor performance, OP1 sought a consent letter from five liaisoning agents



including OPs 2 to 4 to work on the same rate, terms and conditions as quoted by B.S.N Joshi with additional responsibility of reducing monthly transit loss to less than 0.8%. While OPs 2 to 4 gave consent, the other two agents refused giving consent citing short period of work order. Hence the work order on ad hoc basis was issued to OPs 2 to 4 on the basis of their consent. The tenure of the said work order was only 4 months or till the finalisation of the tender, whichever was earlier. Since then OP1 had been floating tenders and cancelling them for reasons such as high rates received from bidders, failed negotiations, cancellation after pre-bid meeting, etc. It is to be noted that OPs 2 to 4 are bidding in these tenders. On the one hand OP1 is unable to finalise a tender with OPs 2 to 4 as bidders and on the other hand work orders were being renewed in favour of OPs 2 to 4 continuously for over two years at the rates quoted by B.S.N Joshi at the time of initial bid. In the light of the above, it is apparent that OPs were indulging in collusive behaviour and foreclosing competition by hindering entry of other participants in the market. Further, based on the material provided along with information, it is apparent that OPs 2 to 4 have formed a cartel and also geographically distributed market in a manner as agreed between them; the result is that OP2 was continuing to be the agent for Chandrapur and Nasik power stations, OP3 for Koradi, Khaperkheda and Parli power stations and OP4 for Paras and Bhusawal power stations. As such, *prima facie*, the conduct of OPs 2 to 4 was in contravention of section 3(3) of the Act. The conduct of OP1 (procurer) and OPs 2 to 4 (bidders) also *prima facie* appeared to be covered within the ambit of section 3(4) of the Act. In the instant case, the overall conduct of Opposite Parties amounted to a refusal to deal with other players. The repeated ad hoc



renewal of agreement for services was likely to oust certain persons or classes of persons who had offered services at competitive rates.

10. For evaluating the allegations of the Informant regarding section 4 of the Act, the relevant market has to be considered. The relevant product market in the instant case is the market of *liaison services relating to coal for thermal power plants*. It is a unique service for which no substitutes are available. Relevant geographic market would be the geographic area of State of Maharashtra as the conditions of competition for supply of provision of services or demand of services are distinctly homogenous and can be distinguished from the conditions prevailing in other states. As such the relevant market would be *of liaison services relating to coal for thermal power plants in the State of Maharashtra*.

11. According to an information filed by OP1 with the Commission, it has installed capacity of 6800MW for generation of power from coal. It has seven generation stations in the State of Maharashtra. It is the second highest generation company after National Thermal Power Corporation. It procures 45.59 million tonnes of coal per annum. It is therefore a dominant procurer of services of liaison in Maharashtra. In light of the above, *prima facie* OP1 is a dominant player in the relevant market.

12. Cancellation of tenders time and again and ad hoc contract allotment to OPs 2 to 4 and consistent renewal of work orders in favour of OPs 2 to 4 *prima facie* results in driving out competition amongst bidders. The participants other than OPs 2 to 4, who may be able to offer more competitive rates and terms, are unable to participate as 'liaisoning agents for supply of coal' to OP1. Hence from the allegations made in the information, actions of OP1 *prima facie* appear to result in denial of market access to participants other than



OPs 2 to 4 to bid for tenders issued by OP1, thereby resulting in violation of section 4(2)(c) of the Act.

13. In view of the above discussion, I am of the opinion that it was a fit case for thorough investigation by the Director General under section 26(1) of the Act into the allegations made by the Informant, and violations, if any, of the provisions of the Act.

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

New Delhi
Date: 11.12.2013

Sd/-
(Justice (Retd.) S. N. Dhingra)
Member