



COMPETITION COMMISSION OF INDIA

Case Nos. 72 & 76 of 2015

Case No. 72 of 2015

In Re:

**M/s DB Power Limited
3rd Floor, Naman Corporate Link
Opp. Dena Bank, C - 31, G - Block
Bandra Kurla Complex, Bandra (E)
Mumbai – 400051**

Informant

And

**1. M/s Coal India Limited
10, Netaji Subhash Road
Kolkata, West Bengal-700001**

Opposite Party No. 1

**2. M/s Northern Coalfields Limited
P.O. Singrauli Colliery
District- Singrauli
Madhya Pradesh-486889**

Opposite Party No. 2

WITH

C. No. 76 of 2015

In re:

Shri Bijay Poddar

**At:
9, Old China Bazaar Street
Room Nos. 79, 99 & 100
5 & 6th Floor
Kolkata-700001**

Informant



And

M/s Coal India Ltd. & its Subsidiaries

At:

Coal Bhawan

Premise No. - 04 MAR

Plot No. - AF-III Action Area 1A

New Town, Rajarhat

Kolkata-700156

Opposite Party

CORAM

**Mr. Ashok Chawla
Chairperson**

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

**Mr. Sudhir Mital
Member**

**Mr. Augustine Peter
Member**

**Mr. U. C. Nahta
Member**

**Mr. M. S. Sahoo
Member**

**Mr. Justice (Retd.) G. P. Mittal
Member**

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

1. This common order shall dispose of these informations as the grievances in both the cases emanate out of Spot e-Auction Scheme, 2007 framed by Coal India Limited.



Facts

2. Facts, in brief, may be noticed from the respective cases.

Case No. 72 of 2015

3. The information in this case has been filed by M/s DB Power Limited ('the Informant') under section 19(1)(a) of the Competition Act, 2002 ('the Act') against M/s Coal India Limited ('the Opposite Party No. 1' / OP-1/ CIL) and M/s Northern Coalfields Limited ('the Opposite Party No. 2' / OP-2/ NCL) alleging *inter alia* contravention of the provisions of section 4 of the Act.
4. The Informant is stated to be a company incorporated under the provisions of the Companies Act, 1956 and is engaged in generation and sale of electricity. It has set-up a 1200 MW (2 × 600) coal based thermal power plant at village Badadarha in District Champa, Chhattisgarh.
5. The Opposite Party No. 1 is a Government of India undertaking and produces coal through mechanised open cast mines through its various subsidiaries. The Opposite Party No. 2 is one of the subsidiaries of CIL and is empowered by CIL to control the mining activities and operations of Singrauli coalfields, District- Singrauli, Madhya Pradesh.
6. It is averred in the information that CIL framed a Spot e-auction Scheme, 2007 for conducting e-auction of coal. Further, it is stated that in terms of the said scheme, an e-auction of coal by road and rail mode was notified by NCL *vide* notification dated 07.10.2014 incorporating by reference all the terms and conditions of the Spot e-Auction Scheme.
7. The Informant is stated to have been selected as a successful bidder pursuant to the e-auction of coal by road conducted by NCL under the said notification in respect of Jhingurda Colliery for 1000 MT coal @ Rs. 2,662/- per MT *vide* email dated 16.10.2014 (Sale Intimation Letter) and



thereafter an allotment letter dated 30.10.2014 was issued by NCL in favour of the Informant. The grade of coal specified in the Sale Notification, the Sale Intimation Letter as well as the allotment letter is described as G-10, the Gross Calorific Value (GCV) of coal is 4301-4600 and the size is crushed Run- of- Mine (ROM).

8. The Informant avers that the Opposite Parties are dominant in the relevant market of sale of non-coking coal to the thermal power generators in India as held by the Commission *vide* its order dated 09.12.2013 in Case Nos. 03, 11 and 59 of 2012 filed against CIL and its subsidiaries. The Informant also points out that in view of provisions of the Coal Mines (Nationalization) Act, 1973, production, distribution and sale of coal is in the hands of the Central Government and the Government discharges the said functions through CIL and its subsidiary companies, which are majorly owned and controlled by the Central Government. Thus, it is averred that these companies have, by operation of law, been vested with monopolistic power for production, distribution and sale of coal in India.
9. The Informant has challenged the various terms and conditions of Spot e-Auction Scheme as also the Sale Notification issued pursuant thereto besides the conduct of the Opposite Parties as arbitrary and unfair being in contravention of the provisions of section 4 of the Act.
10. It is stated in the information that under Sale Notification, the reserve price of coal offered to be sold by e-auction is fixed on the basis of the grade, GCV and the size of the coal. Based on this, it is contended that the Opposite Parties are obligated to supply to the successful bidder/ buyer, the exact grade, GCV and size of coal which is specified in the Sale Notification and based on which the bidders participate in the e-auction.



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11. It is further pointed out that as per the terms and conditions of Spot e-auction Scheme, the coal is supplied by NCL after receiving the entire coal value from the buyer/ successful bidder by way of demand draft/ pay order. It is further alleged to be stipulated therein that even if the coal supplied is not suitable or is of sub-standard quality, the buyer has no right or option to refuse. It was alleged that 994.99 MT of coal supplied by NCL to the Informant under the Notification for Sale dated 07.10.2014 is still lying at the plant of the Informant as the Informant has not been able to utilize the same on account of its sub-standard and inferior quality. Objection was also taken to the condition in Spot e-auction Scheme and incorporated in Notification for Sale of coal to the effect that no third party/ joint sampling facilities to be provided to the buyers. Reference was also made to the stipulation whereby and whereunder CIL/ NCL have reserved onto themselves the rights to amend/ modify/ revise unilaterally the terms and conditions contained in the Spot e-auction Scheme and the Sale Notification issued thereunder without any right whatsoever to the buyers to raise any claim in that regard.
12. Coming to the specific conduct, it is alleged in the information that there was a huge variation in the quality of coal offered for sale and actually sold to the Informant. It was pointed out that the grade of coal allotted to and paid for by the Informant was G-10 whereas the grade of coal supplied, on analysis was found to be of G-15 grade. Grievance was made that there is no mechanism in place to ascertain that the coal of contracted grade and quality is available in the mine from which the coal is contracted to be supplied.
13. A passing reference was also made to the fact that Earnest Money Deposit (EMD) was revised to Rs. 400/- per tonne for coal having GCV of 4300 KCal/Kg and below and Rs.500/- per tonne for coal having GCV more than 4300 KCal/Kg, from the present EMD amount of Rs. 200 per tonne.



Case No. 76 of 2015

14. The information in this case has been filed by Shri Bijay Poddar ('the Informant') under section 19(1)(a) of the Competition Act, 2002 ('the Act') against M/s Coal India Ltd. and its subsidiaries ('the Opposite Party'/ CIL) alleging *inter alia* contravention of the provisions of section 4 of the Act.
15. The Informant has filed the instant information against CIL and its subsidiaries challenging clause 4.4 of the Spot E-auction Scheme, 2007 ('the Scheme') which states as under:

"The Buyers while bidding shall quote their "Bid price" per tonne in Indian Rupee as base coal price on FOR/ FOB colliery basis, exclusive of other Charges like statutory levies, surface transportation Charges, Sizing/ Beneficiation Charges, Taxes, Cess, Royalty, SED, & any other charges as will be applicable at the time of delivery. These charges as well as freight etc. shall be on the Buyers' account."

16. It is alleged by the Informant that CIL and its subsidiaries are not only abusing their dominant position by misconstruing and circumventing clause 4.4 of the Scheme but are also forcing hundreds and thousands of industries including other buyers of coal under the Scheme to pay for what is not payable. It is alleged that they are collecting Surface Transportation Charges when they are selling coal on the terms Free on Rail (FOR)/ Free on Board (FOB) Colliery basis. They are also collecting Beneficiation and Sizing Charges and selective loading charges without the process of Beneficiation and Sizing of Coal as there is no such plant. It is also alleged that they are also collecting statutory levies in excess of what is payable to Government of India and retaining the same with them which runs in thousands of crores.



17. It is further averred that CIL and its subsidiaries misuse the power and authority by levying new charges under the garb of the condition of clause 4.4 of the Scheme which enables them to levy any other charges at the time of delivery. It is alleged that the Opposite Party goes on adding on the strength of this and also on the strength of clause 15 of Price Notification dated 26.02.2011 which reads “*Any other charges as are being presently levied by the subsidiary coal companies over and above those being notified by CIL shall continue to be levied*”. It has been pointed out that this clause did not exist in earlier Price Notifications.
18. The Informant in Case No. 72 of 2015 is essentially aggrieved of the various terms and conditions stipulated in the Spot e-auction Scheme 2007 framed by CIL and as further incorporated in the Notification for Sale of coal issued by NCL (*i.e.* one of the subsidiaries of CIL) dated 07.10.2014.
19. In particular, the Informant is aggrieved of the terms and conditions whereby buyers are restrained from refusing to accept the coal on account of non-suitability or sub-standard quality. Further, absence of joint and third party sampling facility is also objected to. Furthermore, the clause enabling coal company to amend/ modify and revise the terms and conditions of the Scheme at any point of time without any right to the buyers to raise any claim, is also impugned.
20. At the outset, it may be pointed out that the Spot e-Auction Scheme, 2007 also came up for consideration before the Commission in the case of *Shri Bijay Poddar v. M/s Coal India Limited & Ors.*, Case No. 59 of 2013 (which was also instituted by the Informant in one of the present cases *viz.* Case No. 76 of 2015) wherein the Commission *vide* its order dated 27.10.2014 *inter alia* ordered the terms and conditions of the Spot e-Auction Scheme 2007 as specified therein to be modified in light of the findings recorded in the said order. An appeal against the order of the



Commission is pending before the Hon'ble Competition Appellate Tribunal.

21. It may be mentioned that in the said case, “*sale of non-coking coal to the bidders under Spot e-auction in India*” was determined as the relevant market wherein the Opposite Parties (CIL and its subsidiaries) were found to be dominant. In that case, the abusive instance primarily related to the alleged one sided penalty in the form of forfeiture of EMD for non-performance by the successful bidder under clause 9.2 of the Scheme whereby a buyer is saddled with penalty by way of forfeiture of EMD for non-lifting of coal after successful participation in the e-Auction, no corresponding penalty was provided thereunder, if despite acceptance of the bid the opposite parties failed to deliver the coal. Such stipulation in the Scheme was noted by the Commission as resulting from market power exercised by the opposite parties and held as falling foul of the provisions of section 4(2)(a)(i) of the Act being *ex facie* unfair. It was also noted that there was clearly lack of mutuality and reciprocity in the contractual obligations which are due to market power of the opposite parties in the relevant market.
22. As the Informant in the present case has also impugned the various terms and conditions of the Spot e-auction Scheme and accordingly, the relevant market in the present case may also be taken as “*sale of non- coking coal to the bidders under Spot e-Auction Scheme in India*”.
23. In this relevant market, CIL and its subsidiaries are dominant as held by the Commission in Case No. 59 of 2013.
24. So far as the abusive instances are concerned, it may be noted that the Informant has principally raised the following issues: the terms and conditions of the Spot e-auction Scheme whereby buyers are restrained



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from refusing to accept the coal on account of non-suitability or sub-standard quality; absence of joint and third party sampling facility; and the clause enabling coal company to amend/ modify and revise the terms and conditions of the Scheme at any point of time without any right to the buyers to raise any claim.

25. On a careful consideration of the impugned terms and conditions, the Commission is of opinion that the challenge mounted in the present cases, does not appear to be well founded. It is evident from the Spot e-Auction Scheme itself that before participating in e-Auction, bidders are to satisfy themselves with the quality of coal being offered from a source as per clause 4.2 thereof. In view of such clear stipulation in the Scheme, the grievances made by the Informant are not tenable. The Commission notes that before participating in the e-auctions, it is the duty of the potential bidders to satisfy themselves about the quality of coal being offered from a source. In such a scenario, the allegation regarding absence of joint and third party sampling facility does not stand. Where a particular clause of the Scheme has been challenged, the Commission has to appreciate the entire Scheme in a holistic manner and it is not possible or plausible to scrutinize certain specific clauses in a piecemeal manner. Thus, no infirmity can be found in the Scheme on the basis of the challenge made by the Informant in the present case.

26. In this regard, it is also pertinent to mention that the Commission in its order passed under section 26(1) of the Act in Case No. 59 of 2013 repelled an analogous challenge to the Scheme by holding as under:

The other allegation made by informant is in respect of bidder getting satisfied about the quality of coal through source. We think those who bid for these auctions normally keep themselves informed about the quality of coal being dug out from these mines and they have their sources who keep them



informed about the quality of available coal. This allegation does not raise any competition issue.

27. The Informant in Case No. 76 of 2015 is essentially aggrieved of clause 4.4 of the Spot e-Auction Scheme 2007 framed by CIL. The said clause states that the Buyers while bidding shall quote their “Bid price” per tonne in Indian Rupee as base coal price on FOR/ FOB colliery basis, exclusive of other Charges like statutory levies, surface transportation Charges, Sizing/ Beneficiation Charges, Taxes, Cess, Royalty, SED, & any other charges as will be applicable at the time of delivery. Further, it provides that these charges as well as freight *etc.* shall be on the Buyers’ account.
28. Before advertng any further in the present case, the Commission expresses its displeasure about the piecemeal manner in which the Informant in Case No. 76 of 2015 has laid challenge to the Scheme in a selective and convenient manner.
29. As the Informants in the present case has also impugned the various terms and conditions of the Spot e-Auction Scheme, 2007 and accordingly, the relevant market in the present case may also be defined on the lines delineated in the previous case noted *supra* as “*sale of non- coking coal to the bidders under Spot e-Auction Scheme in India*”.
30. In this relevant market, CIL and its subsidiaries are dominant as held by the Commission in Case No. 59 of 2013.
31. So far as the abusive instances are concerned, it may be noted that the Informant in the present case is essentially aggrieved of clause 4.4 of the Spot e-auction Scheme, 2007 framed by CIL and has highlighted the following issues:



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- (i) Payment of surface transportation charges by the bidders even when the sale of coal is on Free on Rail (FOR)/ Free on Board (FOB) basis where all expenses including cost of transportation upto loading in the ship/ trucks/ rail are borne on account of the seller.
- (ii) Payment of beneficiation/ washery recovery/ breaking charges by the bidders even when CIL and its subsidiaries do not carry out such processes as there are no such plants and facilities.
- (iii) Payment of sizing charges by the bidders even though CIL and its subsidiaries do not have crushing plants.
- (iv) Charging of excess statutory levies/ taxes/ cess/ royalty *etc.* from the bidders without reimbursing the same to the Government.
- (v) Stipulation to charge “any other charges” in the Scheme.

32. On a careful consideration of the issues, the Commission is of opinion that stipulation in the Scheme mandating the bidders to pay surface transportations charges even when the sale of coal is on FOR/ FOB basis cannot be said to be in contravention of the provisions of section 4(2)(a)(i) of the Act. It is not in dispute that the terms mandating such requirement to pay transportation charges by the bidders were clearly incorporated in the Scheme and the price notification issued thereunder. Notwithstanding the manner in which the terms FOR/ FOB are understood in commercial parlance as alleged by the Informant, the Commission is of considered opinion that once the terms of sale were put in plain words in the Scheme and the notification, the agreement has to be construed accordingly and not on the basis of some perceived understanding of the commerce by an individual buyer, unless the same are shown to be unfair or discriminatory in contravention of the provisions of section 4 of the Act.



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33. Further, the challenge to the Scheme on the grounds that the same stipulates payment of beneficiation/ washery recovery/ breaking/ sizing charges by the bidders even when CIL and its subsidiaries do not carry out such processes as there are no such plants and facilities, cannot be sustained in the absence of sufficient material having placed on record. Furthermore, the Commission is of opinion that the stipulation in the Scheme envisaging levy of “any other charges” at the time of delivery may not be unfair *per se* as such terms have to be construed in light of the other levies and accepted norms of interpretation and the same cannot be invoked to charge a totally unrelated levy. So far as the allegation of the Informant relating to charging of excess statutory levies/ taxes/ cess/ royalty *etc.* from the bidders without reimbursing the same to the Government, is concerned, the Commission is of opinion that the same is a taxation issue and not a competition issue.
34. In view of the above, the Commission is of the view that no case is made out against the Opposite Parties in any of the informations for contravention of the provisions of section 4 of the Act and the informations are ordered to be closed forthwith in terms of the provisions contained in section 26 (2) of the Act.
35. Before concluding, the Commission is constrained to note that the e-Auction Scheme has come up in challenge in various cases where buyers have alleged lack of reciprocity and mutuality of obligations in the terms and conditions thereof. Though, in the present cases, the Commission has not recorded any finding of contravention yet it is apparent that the parties are either aggrieved of the terms *per se* or the conduct emanating therefrom. The Commission, therefore, believes that it would be appropriate that CIL examines the entire Scheme afresh after inviting suggestions from the stakeholders. Such participatory and consultative process would not only inspire confidence of the stakeholders but such exercise would also make the Scheme more acceptable besides obviating



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any possible violation of the provisions of the Act and challenge thereto. Let such exercise be completed preferably within a period of 60 days from receipt of this order.

36. The Secretary is directed to inform the parties accordingly. A copy of the order be also forwarded to Secretary, Ministry of Coal.

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

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

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

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

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

**Sd/-
(M. S. Sahoo)
Member**

**Sd/-
[Justice (Retd.) G. P. Mittal]
Member**

New Delhi
Date: 17 / 11 / 2015