COMPETITION COMMISSION OF INDIA

Case No. 76 of 2012

In Re:

Shri Nirmal Kumar Manshani — **Informant**

And

1. **M/s Ruchi Soya Industries Ltd.** — **Opposite Party No. 1**
2. **M/s Betul Oils Ltd.** — **Opposite Party No. 2**
3. **M/s Ganganagar Commodity Ltd.** — **Opposite Party No. 3**

CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Dr. M. S. Sahoo
Member

Mr. Justice G. P. Mittal
Member

Appearances: Shri Sharad Gupta and Shri Ved Jain, Advocates for the Informant.

Shri A. N. Haksar, Senior Advocate with Shri R. Sudhinder, Shri Ujjal Banerjee and Siladitya Chatterjee, Advocates for OP-1 and Shri Dinesh Shahra, MD of OP-1.

Shri Ramji Srinivasan, Senior Advocate with Ms. Khushboo Jain, Advocate for OP-2 and Shri Shreans Daga, Director of OP-2.

Shri Jatin Kumar and Shri Ashish Sharma, Advocates for OP-3.

ORDER

1. The present information has been filed under section 19(1) (a) of the Competition Act, 2002 ('the Act') by Shri Nirmal Kumar Manshani ('the Informant') against M/s Ruchi Soya Industries Ltd. ('the Opposite Party No. 1'/ OP-1), M/s Betul Oils Ltd. ('the Opposite Party No. 2'/ OP-2) and M/s Ganganagar Commodity Ltd. ('the Opposite Party No. 3'/ OP-3) (collectively, 'the Opposite Parties'/ 'OPs') alleging *inter alia* contravention of the provisions of sections 3 and 4 of the Act.

Facts

2. Facts, as stated in the information, may be briefly noticed.

3. As per the information, the Opposite Parties are involved in futures trading of agricultural commodities in India, besides other business activities. The Informant has stated that the conduct of the Opposite Parties appears to be that of a cartel with regard to trading of Guar Seeds and Guar Gum in various commodity exchanges in India.

4. The Informant has alleged that the OPs have inflated the prices of Guar Seeds and Guar Gum by artificially increasing the demand through self-trading, circular trading *etc*. which caused huge loss to traders, hedgers and farmers.

5. It has been stated in the information that trading in Guar Seed and Guar Gum has been fair and transparent since 2004 till 2010. During this period, the prices of both the commodities were discovered as per sowing, harvesting, supply and demand scenario and were well within the range of Rs. 20 to Rs. 30 per Kg for Guar Seed and Rs. 50 to 60 per Kg for Guar Gum.

6. The Informant has alleged that the OPs have formed a cartel in the year 2011 which artificially made the prices of Guar Gum and Guar Seed to rise against all economic norms of trading. Even if the trading volume went down and open interest was negligible, still the prices of Guar Gum and Guar Seed increased during April 2011 to March 2012. The prices of Guar Seed have increased by almost 10 times from Rs 27 in April, 2011 to Rs. 299 in March 2012. Similarly, the prices of Guar Gum have gone up by 12 times from Rs. 78 to Rs. 959 per Kg. during the same period.

7. The Informant has stated that the volume of trading of Guar Seed went down from an average trading of 2,00,000 tons per day for April 2011 to an absurd level of 2,500 tons per day for April, 2012. It has also been stated that while there was hardly any trading and scanty open interest, the prices of Guar Gum and Guar Seed went up by almost 4% every trading day which is abnormal in the commodity futures market.

8. It has been alleged that OPs have left their cartel after making huge profit from it; which caused the prices of Guar Seed and Guar Gum to fall by almost 800 % within a period of 6 months *i.e*. from April, 2012 to September, 2012. The said conduct of OPs again caused irreparable financial losses to thousands of traders, hedgers, exporters and farmers

all over the country.

9. It has been stated by the Informant that OP-1 and its 21 subsidiary companies and OP-2 and its 7 subsidiary companies had "buy position" of several lakhs tons of Guar Gum and Guar Seed and that they were involved in self-trading, circular trading and collusive bidding amongst their subsidiary companies. The total traded quantity between the subsidiary companies of OP-1 and OP-2 was to the tune of 3, 40, 000 tons for Guar Seed and 63, 000 tons for Guar Gum.

10. It has been alleged that the cartel led by OP-1 acted in concert and cohesive manner as a group to manipulate and influence the prices of Guar Gum and Guar Seed for their personal gain by keeping substantial stocks of Guar Gum and Guar Seed.

11. The Informant has also stated that OP-1 with its 21 subsidiary companies had almost 22% of the total position of the Guar Gum and Guar Seed; OP-2 and its 7 subsidiary companies had more than 10% position; and OP-3 with its 7 entities held about 9% of the total market share of Guar Gum and Guar Seeds. Thus, the said cartel had more than 42% of the total trade being conducted for Guar Gum and Guar Seeds. It has been stated that these entities/groups were in a dominant position in this trade and abusing their dominant position.

12. Based on the above averments and allegations, the Informant filed the instant information seeking an inquiry into the matter.

Directions to the DG

13. The Commission after considering the entire material available on record and hearing the Informant *vide* its order dated 21.03.2013 passed under section 26(1) of the Act, directed the DG to cause an investigation to be

made into the matter and submit a report. The DG, after receiving the directions from the Commission, investigated the matter and after seeking extensions submitted the investigation report on 05.06.2015.

14. It was observed by the Commission in its *prima facie* order that from 2004 to March, 2011, the prices of Guar Gum and Guar Seed were quite stable and fluctuated normally as per demand and supply gap in the spot market as well as in futures market. But, from October 2011 to March 2012 prices of Guar Seed increased abnormally from Rs. 42/- per Kg to Rs. 299/- per Kg and prices of Guar Gum increased from Rs. 130/- per Kg to Rs. 950/- per Kg. These price fluctuations cannot be attributed to usual market behaviour/ trend. Thus, the Commission *prima facie* noted that the Opposite Parties played a role in manipulating the prices by creating artificial demand through self-trading, circular trading *etc*. The stocks of Guar Gum and Guar Seeds held by Opposite Parties and the trading volume among them were also found to raise suspicion that they might have indulged in circular trading in a concerted manner to artificially raise the prices of Guar Gum and Guar Seeds. Accordingly, the Commission noted that these facts required further investigation.

15. However, so far as the allegations relating to contravention of the provisions of section 4 of the Act were concerned, the Commission did not find any contravention. In this regard, it was noted by the Commission that the relevant market in the present case appeared to be "the market for trading of Guar Seeds and Guar Gum in futures market in India". As per the information provided by the Informant, none of the Opposite Parties *prima facie* appeared to be in a dominant position in the relevant market as defined above. It was stated that OP-1 alongwith its subsidiaries have 22% market share of Guar Gum and Guar Seeds whereas OP-2 alongwith its subsidiaries have 10% market share and OP-3 alongwith its subsidiaries have 9% market share of Guar Gum and Guar Seeds in India. Hence, *prima facie*, none of the OPs individually

seemed to be in a dominant position in the relevant market. It was also noted that the Act does not contain any provision on collective dominance and as such; the question of abuse of dominance by the Opposite Parties collectively as alleged by the Informant did not arise.

16. It was also ordered that in case the DG finds the Opposite Parties companies in violation of the provisions of the Act, it shall also investigate the role of the persons who at the time of such contraventions were in-charge of and responsible for the conduct of the business of the Opposite Parties so as to fix responsibility of such persons under section 48 of the Act. The DG was also directed to give opportunity of hearing to such persons in terms of the provisions of section 48 of the Act.

Investigation by the DG

17. The summary of findings and conclusions drawn by the DG are noted below:

(i) It was revealed that OP-1 and OP-2 had limited and controlled supplies of Guar Seeds & Guar Gum commodities in the markets during the latter part of the FY 2011-12 thereby significantly contributing to the abnormal increase in prices of the said commodities both in the physical markets as well as futures markets through their concerted actions.

(ii) Investigation established that the actions taken by OP-1 and OP-2 were concerted actions under an informal tacit agreement/understanding between them which resulted in the demand supply equilibrium of the market being adversely affected.

(iii) That to achieve the above objective, OP-1 and OP-2 and various other entities being their subsidiary/ group companies and other

directly/ indirectly related entities acting at their behest, accumulated stocks of Guar Seeds and Guar Gum under a concerted plan during the latter part of 2011-12 thereby aggravating the already stressed demand supply scenario prevailing in the markets during the said period.

(iv) OP-1 and OP-2 armed with the foreknowledge of an increasing price trend sustained on the back of their concerted action of accumulating stocks in the physical markets, used this foreknowledge to consistently take long positions in futures markets through their various group companies and other directly/ indirectly related entities for influencing prices in the futures contracts and trading profitably on the commodity exchanges.

(v) The OP-1 and OP-2 after having made significant profits in their various group companies, adopted an identical *modus operandi* of booking bogus losses in the books of these companies through fictitious commodity transactions in identical commodities and thereafter ploughing back the profits as Share Application money in other group companies.

(vi) The above actions taken by the OP-1 and OP-2 of influencing the prices in the spot markets to gain both in the futures market as well as in the spot markets were under a well thought out action plan which is corroborated by a similar *modus operandi* adopted by OP-2 group entities while dealing in the scrip of OP-1 on National Stock Exchange owing to which, SEBI was constrained to debar OP-2 and its various group companies from undertaking any transactions on the stock exchange.

(vii) Both OP-1 and OP-2 in an attempt to camouflage their concerted actions, executed the above informal tacit agreement between them through their various seemingly unrelated group companies having

name lending directors on their Boards as well as through various directly/ indirectly related entities who were provided funds for the said purposes.

(viii) Investigation on the basis of various evidence collected during the course of investigation which included indirect evidence as well direct evidence like calculation sheet depicting distribution of profits, e-mail exchanged between OP-1 and OP-2, evidence of a common employee being entrusted to manage the guar related business activities of both the groups has established meeting of minds between the two groups.

(ix) Based on the various data collected and analyzed in the report, investigation established that the concerted actions of the two groups of (OP-1 and OP-2) collectively holding substantial stocks of Guar Seeds & Guar Gum resulted in limiting and controlling supplies of these commodities in the markets. That due to such limiting and controlling of supplies, the two OPs with the assistance of their various subsidiary group and other entities indirectly determined prices of these commodities in the futures and physical markets.

(x) Investigation, thus, concluded that OP-1 and OP-2 have contravened the provisions of section 3(3)(a) and 3(3)(b) read with section 3(1) of the Act.

(xi) The allegations of the Informant against OP-3 could not be substantiated by facts and evidence gathered during investigation.

(xii) Investigation has also identified the various entities that were involved and found complicit in the above anti-competitive conduct of the two OPs as detailed in the report.

(xiii) Investigation has also identified Shri Dinesh Shahra, MD of OP-1 and Shri Shreans Daga, Director of OP-2 as persons responsible for/complicit in the anti-competitive conduct of OP-1 & OP-2 and their group companies respectively, in terms of section 48 of the Act.

Consideration of the DG report by the Commission

18. The Commission in its ordinary meeting held on 02.09.2015 considered the investigation report submitted by the DG and decided to forward electronic copies thereof to the parties for filing their respective replies/ objections thereto. The Commission also decided to forward an electronic copy of the investigation report to the persons identified by the DG for the purposes of section 48 of the Act *i.e.*, Shri Dinesh Shahra, MD of OP-1 and Shri Shreans Daga, Director of OP-2 for filing their respective replies/ objections thereto. The Commission further directed such parties to appear for oral hearing and the matter was finally heard on 23.02.2016 and 25.02.2016 whereupon the Commission reserved its order and decided to pass appropriate order in due course. The Commission also directed the parties to file their written submissions by 07.03.2016. The Informant filed the written submission on 07.03.2016 and OP-1 filed the same on 15.03.2016. The Commission has condoned the delay in filing the written submissions on behalf of OP-1 and the same were taken on record. No written submissions, however, were filed on behalf of OP-2 and OP-3.

Replies/ Objections/ Submissions of the Parties

19. On being noticed, the parties filed their respective replies/ objections/ submissions to the report of the DG besides making oral submissions.

Replies/ objections/ submissions of OP-1

20. OP-1 filed its preliminary reply on 11.01.2016 and additional submissions on 22.02.2016. Further, written submissions were also filed post-hearing of the matter on 15.03.2016.

21. OP-1 in its reply dated 11.01.2016 denied all the allegations and submissions made by the DG. It was averred that the investigation was initiated on a motivated complaint of an individual *i.e.* Shri Nirmal Kumar Manshani who has also filed complaints even before NCDEX, FMC, Income Tax and other departments. It was submitted that NCDEX, FMC and Income Tax Department could not find anything against OP-1 and that no action was taken. Thus, the Informant has not come with clean hands before the Commission and the proceedings ought to be dropped.

22. It was further contended that the Commission has no jurisdiction in this matter since the future contracts - which are types of the forward contracts - are in the nature of actionable claims and they are expressly excluded from the definition of "goods" under the Sale of Goods Act and therefore outside the purview of the Competition Act as well. Reference was made to the provisions of Section 3 of the Competition Act to contend that the same deals with the anti-competitive practices in respect of "goods" and "services". Therefore, the trading on the Commodity Exchanges by way of future contracts are not "goods". Further, the transactions on the commodities exchange are in respect of future goods as the transactions are merely agreements to sell and there is no sale or purchase.

23. It was also submitted that even assuming, without in any manner admitting to the same that there has been some contravention of the provisions of Section 3(1) and 3(3) of the Competition Act by OP-1, it would still be exempted as per the provisions of Section 3(5)(ii) of the

Competition Act as the commodity in question is being exported out of India to the extent of 95% of its production. In any event, there is no appreciable adverse effect on competition in India. OP-1 also contended that that buyer-seller transactions fall under agreements in the vertical chain covered under Section 3(4) of the Competition Act and not in the horizontal chain. It was submitted that all allegations made *qua* the Opposite Parties are not in nature of seller-seller agreements or buyer-buyer arrangements/agreements so as to be covered under horizontal agreements falling within the ambit of Section 3(3) of the Competition Act. Further, OP-1 reiterated that any party dealing on the commodity exchange deals only with the Exchange as the counter party of any trade and there cannot be any trade between two parties in the commodity exchange as alleged in the instant case by the DG.

24. OP-1 also alleged violation of principles of natural justice. It was submitted that the DG while conducting the investigation has relied on the replies of number of third parties, Exchanges *etc.* without even giving an opportunity to OP-1 to rebut the same before arriving at the conclusion.

25. On merits, OP-1 argued that the related entities of OP-1 have been trading in a number of commodities in NCDEX apart from Guar Gum and Guar Seeds for a number of years now. It was pointed out that no allegations have ever been levelled against OP-1 in respect of any other commodity. Further, the trading volume of the related entities in Guar Gum and Guar Seeds was miniscule in comparison to the total volume of (all) commodities traded in NCDEX. As such, it was only reasonable to assume that the related entities have also acted in a fair and transparent manner while trading in Guar Gum and Guar Seeds.

26. It was submitted that the prices of Guar seeds in the spot market and the future market on the NCDEX platform were moving in close tandem

signifying similar trends of price rise in both the markets *i.e*. spot and futures. OP-1 enclosed tables showing date-wise spot prices and future prices on NCDEX of Guar Seeds and Guar Gum for the period January 2011 to March 2012 and the graphs showing the spot and future prices of Guar Gum and Guar Seeds for the above period to prove that the sharp rise in prices of Guar Gum and Guar Seeds during the relevant period was not due to any alleged actions on the part of Opposite Parties but primarily due to the fundamental economic considerations of demand and supply. Furthermore, it was submitted that at every given point of time, there are millions of users logged in to the Commodity Exchange and, as such, it is not possible for a few players to control the price movement in the market.

27. It was stated that there are stringent penalties provided for in the Futures Contracts itself, which make it very difficult for any trader to try and influence or manipulate the prices. To elaborate further, OP-1 explained that Spot Prices are determined in the most transparent manner after duly taking into account a number of factors including the prices prevalent in the physical market. OP-1 also submitted that it has an absolutely negligible market share in the physical market and is in fact not involved in regular trading in the physical market. As such, it is in no position to determine or in any manner affect the spot prices. Further, it was stated that in relation to all those entities which were alleged to be acting in concert, FMC had issued revised guidelines on clubbing of positions on 10.01.2012. Thereafter, the positions of those entities were clubbed group-wise to a Single Client Level Limit w.e.f. 18.01.2012/21.01.2012 thereby seriously curtailing their ability to participate in the futures market. OP-1further elaborated with few more highlights like daily price fluctuation limit as 3%, expiry date as per contract being the 20th day of the delivery of the month, penalties on delivery default, traders trading only with the exchange and not with the Opposite parties, the person buying the commodity would not know who the seller is, *etc*. In view of

the above, OP-1 submitted that it was evident that all members have to adhere to these stringent norms, guidelines, regulations when they trade in the commodity futures market. That apart from this, the market regulator *i.e.* FMC also takes stringent regulatory measures from time to time in order to curb any price volatility.

28. OP-1 further argued that there was no concept of *per se* rule in India and presumption under Section 3(3) of the Competition Act was rebuttable on account of various grounds mentioned under Section 19(3) of the Competition Act. OP-1 submitted that no AAEC has been caused as it does not create any entry barrier for new players. It was stated that the new members were admitted in, controlled and monitored by the Exchange itself and no member/trader was in a position to control the entry/exit of any prospective member/trader or in any manner create any entry barrier whatsoever. It was further submitted that from the data available on the volume of trade in Guar Gum and Guar Seeds carried out in the NCDEX by the related entities from April 2011 till February 2012, the same was negligible and insignificant to cause any impact in the market so as to drive the existing competitors out. It was reiterated that the futures commodity market is regulated by FMC and national commodity exchanges such as MCX, NCDEX and NMCE. As such, OP -1 or the related entities can not cause any impediment to the entry of a new member in the market.

29. It was stated that OP-1 and the related entities were involved only in normal trading and not in any collusive trading as alleged by the Informant. It was stated that OP-1 and its related entities were involved in miniscule trading during the period from April 2011 to March 2012, which could not possibly result in any price manipulation as alleged.

30. OP-1 concluded by stating that the DG's approach to the matter has been incorrect and devoid of any merits or consideration of relevant economic

aspects. The inferences drawn by the DG were not based on valid considerations of law and the same were based on incomplete and wrongful assessment of laws in India.

31. In its additional submissions dated 10.02.2016, OP-1 argued that the FMC has already opined that that the sudden price rise in 2011-2012 was predominantly due to the sudden rise in the demand for Guar Gum for exports and not because of any manipulation in the commodity exchanges. In respect of future prices, FMC has also observed that the during the period from December 2011 to March 27, 2012, the futures trading on the Exchange has predominantly followed the Spot prices of the product *viz.* Guar Gum and Guar Seed. Similar view was observed by NCDEX in its report. Therefore, it was submitted that the sharp rise in prices of Guar Gum and Guar Seeds during the relevant period was not due to any alleged actions on the part of Opposite Parties but primarily due to the fundamental economic considerations of demand and supply.

    It was further submitted that the prices continued to rise even after the trading on Commodity Exchanges stopped in April 2012 which clearly showed that the price rise had no nexus with any alleged cartelization. That the DG in an erroneous manner has selectively taken the data for the period December 2011 to March 2012 even though it was fully aware of the continued increase in prices up till July 2012.

32. OP-1 further submitted that the issue before the Income Tax Authorities has no relevance with the competition issue and the issue was regarding some profits which were allegedly offset against some losses incurred in some of the group entities and has nothing to do with the trading of Guar Gum and Guar Seeds. It was an intra group transaction and not inter group transaction and therefore has no nexus with the alleged cartelization.

33. It was also argued that Bharat Foods, Neer Ocean & Skyline Agro cannot be considered as OP-1 entities. OP-1 stated that Bharat Foods Cooperative Limited is an independent cooperative company with whom OP-1 has business relations only. Further, merely because Bharat Foods and Skyline Agro were registered through the same members of NCDEX, it cannot be a reason for them to be related entities. A member may be having thousands of clients with him. With regard to Neer Ocean, it was submitted that there was no other definitive evidence to support the contention that it was a related entity of OP-1.

34. It was submitted that the DG has rightly concluded that the transaction with Ganganagar Group was all for business purposes but failed to draw the same analogy to the transactions between OP-1 and OP-2's entities even though the transactions were similar. To further explain its business relationship with OP-2, OP-1 stated that there was a sudden surge in demand of Soybean Meal in the Middle East especially in Iran, therefore, OP-1 started purchasing Soybean Meal from OP-2 and its entities. This was done as OP-1's manufacturing plant could not sufficiently cater to the huge export demand. Further, owing to the fact that Vision Millennium Exports Pvt. Ltd. (Vision) was also an associate company of OP-2, OP-1 did not find any difficulty in entering into a business relationship with Vision for the purchase of soyabean meal. Further, it was stated that OP-1's relations with Shri Nakul Sanghvi and Shri Jayanti Lal Sanghvi - the persons identified by the DG to have been funded by Ruchi Group Companies - were also purely for sale-purchase of various Agri commodities at arm's length basis. To substantiate the same, OP-1 submitted that it has been dealing with Shri Jayanti Lal Sanghvi from the year 2010-11 for trading in Soya Oil & Soya DOC on National Board of Trade (NBOT) Commodity Exchange. In the year 2011-12, he had offered OP-1 to sell some Guar Seed as he had found some opportunity to procure Guar Seeds from the market and the same was accepted by OP-1. That payments were made for the said business.

35. It was also stated that there was litigation between OP-1 and OP-2 on non-delivery of soyabean meal much prior to the submission of the investigation report by the DG. That had there been any meeting of minds between OP-1 and OP-2 or any action in concert by the Opposite Parties as alleged in the report, the Opposite Parties certainly would not have had a pending litigation against each other. Further, with regard to the DG's analysis of various group entities' bank statements and the conclusion drawn therefrom, OP-1 submitted that the allegations do not in any manner establish that the funds of OP-1 group were used by Vision to procure Guar Seeds/ Gum from Edelweiss Trading and Holdings Ltd. (Edelweiss) – a commodity broker. On the contrary, it was asserted that the figures taken by the DG showed that Vision and Edelweiss had an ongoing business relationship and was not dependent upon and funds advanced by OP-1 group. OP-1 also explained in detail with regard to other group entities of OP-1 and OP-2 transactions and stated that there was no collusion and all the transactions were done for business purposes.

36. Arguing further on the DG's finding that the relationship between OP-1 and OP-2 were not at arm's length, OP-1 referred to the working sheet mentioned by the DG in the report which was seized by Income Tax Authorities during the survey proceedings undertaken on 31.01.2013 at Ruchi House, Royal Palm Estate, Goregaon West, Mumbai depicting detailed working of distribution of Guar Gum/ Guar Seed profits between the two groups .It was pointed out that the DG has not shown any connect between the said sheet with the books of accounts of OP -1. That it was a fundamental principle of law that the statement made by a person must be considered in totality and not in parts. As such, it was submitted that the alleged working sheet was unworthy of any reliance and cannot be given any credence. Further, in any event, it does not show any cartelization between OP -1 and OP- 2.

37. OP-1 pointed out that heavy reliance was placed by the DG on the e-mail dated 14.12.2012 from Shri Raj Kumar Goyal of OP-1 to Shri Ravi Daga of OP-2 to establish meeting of minds between the two groups to show a cartel. The said e-mail was a proposal of adjustment of advances given by various OP-1 group companies to OP-2 and its group company viz. Vision Millennium Exports Pvt Ltd. As per the e-mail sent, transfer of certain stocks of Guar Seeds held by OP-2 (through funding of a commodity broker) by sale of the same at a given price to OP-1 group companies so as to adjust their advances and to settle their accounts had been proposed. The communication also spoke about the need to look into and decide about the further action to be taken with respect to the profits that would be generated in the books of OP-2 for which a joint meeting had also been proposed.

38. OP-1 explained that the advances given by it referred to in the e-mail pertained to soya bean meal extraction contracts which was never delivered to OP-1. Furthermore, OP-1 submitted that the reliance of the DG on an order dated 15.02.2013 passed by SEBI was unfounded as the SEBI *vide* order dated 06.12.2013 revoked the earlier directions issued on 15.02.2013 and as such, the reliance on the said order dated 15.02.2013 was baseless and untenable in law. It also added that all the allegations in the order above pertained to OP-2 and its group companies and there was no involvement of OP-1at any stage.

39. It was argued that the DG made a sweeping statement that the two groups were acting in unison and not at arm's length basis based on the statement of Shri Shreans Daga, Director of OP-2 that Shri Jigar Shah looked into the Guar Gum and Guar Seeds business activities of both the OPs. OP-1 argued that nowhere NCDEX has mentioned in its report that Shri Jigar Shah placed even a single order on behalf of OP-1 on the Exchange nor there was a statement to the effect that any of the common persons of the two OPs placed orders on NCDEX. It was also stated that

that Shri Jigar Shah was never entrusted with the task of trading on NCDEX by OP-1 or any of its entity even when he was employed by OP-1 for a short period of 20 days in the year 2010 or even anytime thereafter. Thus, the DG completely erred in reaching the conclusion that both the groups entrusted Shri Jigar Shah with the activities related to Guar/ Guar Gum and therefore they were acting in unison.

40. On the issue of entity wise trading volume, OP-1 agreed with the DG's finding that the volumes of OP-1 and OP-2, even if combined, were too negligible to have any effect on the competition. Based upon a detailed analysis on Guar Gum and Guar Seed trading volume, it was stated that the same showed that there were no unusual trading pattern during the full year and particularly during the relevant period *i.e.* October 11 to March 12.

41. With regard to the allegation of self-trading and circular trading, OP-1 stated that it was in agreement with the DG's view that the allegations were not substantiated. However, it has pointed out that the DG failed to check the volume of other groups as identified by NCDEX which were not entities of OP-1 and OP-2. On circuit trade analysis, it was stated that out of the quantity of 7,47,893 MT trade at upper circuit price in Guar Seed during the period, these group entities bought only 4902 MT i.e. just 0.7% of the total. Further, it was stated that in Guar Gum also, out of the total quantity of 82,253 MT traded at upper circuit price in Guar Gum during the period, these group entities have bought only 1757 MT *i.e.* just around 2% of the total. Thus, the DG ought to have found out who were the other entities who were responsible for doing 99.3% of the trading at upper circuit price in Guar Seeds and 98% of the trading at upper circuit price in Guar Gum. As such, it was submitted that the DG acted with undue haste to prove that OP-1 was guilty and neglected this crucial issue without even considering those details.

42. It was argued that the DG did not even look at OP-1's Open Interest (OI) positions for the entire relevant period under consideration. That it failed to see that OP-1 never increased its OI positions during those period but only maintained a consistent OI positions even during the limited period considered by the DG. In fact, OP-1's OIs were considerably reduced during this period. It was also stated that due to various regulatory measures like no fresh positions, square up mode of positions, increase in margin money to around 70%, most of the traders reduced their OI positions due to which OP-1's OI position seemed quite high during the particular period when seen as a percentage of total market OIs. Referring to its OI positions during the period from April 2011 to March 2012, OP-1 submitted that it had maintained its OI positions in most of the months but price of Guar Gum and Guar Seeds did not show an increase in the earlier months. In fact, in the case of Guar Gum, OP-1 had much higher long OIs during the earlier months of May to September than in the relevant period under consideration. That the DG has completely ignored OP-1's high short OIs during the two months of October & November in the case of Guar Seeds and failed to ascertain the reasons for the price hike in those two month. OP-1 therefore, submitted that the fundamentals of demand and supply were the only reason behind the price rise.

43. It was pointed out that the DG has wrongly calculated the stock position of OP-1 entities of both Guar Seeds and Guar Gum. That the DG has not given individual stocks of OP-1 & OP-2 in DEMAT form and preferred to club them and then present in the report for the reasons best known to him. Further, the DG has erroneously considered stocks lying on NCDEX accredited warehouses, DEMAT Stocks and physical stock holdings as 3 separate stocks of OP-1 entities. It was averred there was overlapping of those 3 categories of stocks as certain quantities of stocks lying in NCDEX accredited warehouses and physical stocks of OP-1 entities could have been the same. Further, DEMAT stocks as shown by

NSDL and CDSL could also have been lying physically in NCDEX accredited warehouses. It was further averred that the DG considered much higher stock positions of OP-1 and its entities as on 31st March 2012. That the conclusion drawn by the DG that OP-1 accumulated the stocks of Guar Seeds and Guar Gum, thereby aggravating the already stressed supply scenario prevailing in the market did not hold water at all.

44. OP-1 explained that the reason for holding 23402 MT of Guar Seeds as on 31.03.2012 was the upcoming plant of Guar Gum processing and trial runs were expected to start around second quarter of the year 2012-13 *i.e.* during July-September 2012 which got delayed and could start only in the third quarter *i.e.* during October-December 2012. The new crop of Guar Seeds come only from October of every year and it was only prudent for a company to keep raw materials available with them for the trial runs which were expected to start during July-September 2012 particularly, in view of the very low arrivals of seeds in the Mandis during crop year, 2011 and uncertainties of monsoon.

45. It was argued that withholding of Guar Seed produce at the end of farmers or increased procurement by millers/ processors leading to a stressed supply situation in the Mandis cannot be considered to be a concerted action on the part of producers (farmers) or on the part of millers/ processors. Those entities being spread far and wide, it was not only improbable that all these entities were acting in tandem under any agreement or understanding but there was also no evidence to suggest the same. It was submitted that no attempt was made by the DG to ascertain from the farmers the reasons for bringing lower quantities of the Guar Seeds in Mandis or to contact any miller/ processors to find out how much higher procurement was being made by them in that season and what was the reason for the increase in the price of guar seeds.

46. It was also stated that the DG's method of calculating the stocks by converting Guar Gum stocks into Guar Seeds by multiplying gum stocks by 3 is absurd, as seeds and gum are two completely different commodities.

47. On the reliance upon US Supreme Court judgment in *United States* v. *Socony- Vacuum Oil Co. Inc. 310 U.S. 150 (1940)* by the DG, OP-1 submitted that every purchase or sell order/contract raises, lowers or stabilizes price, the impact could however vary depending on various factors. The above *ratio* in the case-law faults even the orders or trades which stabilize prices. If this was construed as direct interfering with the free play of market forces, every trade would be considered as direct interference with the free play of market forces. Therefore, the DG has seriously erred in basing its conclusion on such an untenable *ratio*.

48. With regard to the issue of higher export earnings, OP-2 submitted that the DG has wrongly concluded that export quantities and per ton export realization could not be sustained in the subsequent periods of the relevant period even though the data and explanation provided conclusively proved otherwise.

49. Lastly, it was stated that OP-1 and its entities were neither producers of Guar Seeds nor manufacturers or suppliers of Guar Gum during the period under investigation. That OP-1 or its related entities have not even bought, sold or otherwise dealt with even a single kilogram of Guar Gum/ Seeds in the Mandis. As such, it was submitted that OP-1 being evidently absent in the manufacture or first point of sale in Mandis can in no capacity possibly affect a change in the prices or control the supply of Guar Seeds /Gum as alleged by the DG.

50. Detailed submissions were also made to assert that no appreciable adverse effect on competition was caused in the market.

51. In view of the above, it was submitted that OP-1 did not indulge in any market manipulation or any collusive conduct as alleged by the DG.

52. OP-1 has also filed written submissions dated 14.03.2016 after the hearing was concluded and the same have also been taken on record.

53. Shri Dinesh Shahra, MD of OP-1 also filed a separate reply on 11.01.2016 adopting the reply filed on behalf of OP-1. It was submitted that it was not humanly possible for Managing Director of company to be involved in the day to day activities of a particular division of the company especially when the company is huge and is involved in the business of a number of agricultural commodities. Thus, it was concluded that the Managing Director, being not involved in the division carrying out the daily business activities involving Guar Gum and Guar Seed for OP-1, cannot be made liable under Section 48 of the Act.

54. It was stated that OP-1 is a multi-product organization with various business verticals. The business vertical operates as a separate profit centre or Strategic Business Unit (SBU). The SBU head plays a crucial role and is fully empowered and has complete independence to operate and run the SBU based on the business plan and targets for the SBU for the year. The SBU head is responsible for the day to day affairs and accountable for the profitability of the SBU. Each SBU has its own team of professionals who look after the critical functions of Export, Manufacturing, Trading, Marketing etc. That OP-1 has several SBUs for different divisions. He further submitted that even assuming for a moment without in any manner admitting to the same, that some person is responsible for the alleged contravention of the Act; for the purpose of identification of the persons responsible in terms of the Section 48 of the Competition Act the overall in charge of all the affairs of the Guar Business of the Company is the SBU head of the Guar division of Ruchi Soya Industries Limited. He stated that the person responsible as the SBU head of the Plantation Division (Palm, Guar, Castor) during the

relevant period under consideration was Mr. Narendra Kumar Arora.

Replies/ objections/ submissions of OP-2

55. A joint reply dated 18.01.2016 was filed on behalf of OP-2 and Shri Shreans Daga, Director of OP-2.

56. OP-2 denied all the allegations in the instant case and also questioned the motive of the Informant behind filing the case against it. Apart from these, OP-2 has explained in detail the dynamics of Guar Gums in the market including the pricing, economics of price increase, the export trends and its impact, Governments schemes, depreciation in rupees, gap in arrival of Guar Seeds at Mandis and the production, capacity expansion, commission agents and physical traders, *etc*. OP-2 has also cited the same reasons as that of OP-1 for challenging the jurisdiction of the Commission. It was stated that the forward contract transactions are in the nature of actionable claims and as such are not sale/ purchase of goods and therefore, the order of the Commission under section 26(1) and the DG's investigation are *void ab initio*.

57. On merits, OP-2 began with the contention that the DG's reliance on the definition of the term 'Group' from the 'Explanation to section 5' of the Act was not applicable to section 3 and that the decision to club various entities as part of OP-2 was *void ab initio*. It was further contended that the DG has not been able to rely upon any law to substantiate his conclusion that the entities listed therein were part of common group having a common unwritten memorandum of understanding. OP-2 submitted that all entities listed as part of OP-2 are separate legal entities and not a group of entities which could be clubbed under the Act. As such, it was argued that OP-2 did not have any control over such persons/ entities and their business dealings. Any fund transactions with these entities were in the course of regular business transactions. To

substantiate further, OP-2 cited the FMC Report wherein only eight entities were identified as being part of OP-2.

58. It was pointed out that the DG has come across transactions between OP-1 and entities named as 'Ganganagar Group' which were in no manner different than the ones carried out between OP-1 and OP-2 group companies. It was maintained by Ganganagar group that the stocks held by it directly as well as through M/s Edelweiss Financial Services Ltd. were part of their own business operations and not on behalf of any third party. As regard funds transfer from/ to OP-1, it was further pointed out that Ganganagar group has stated that the amounts remitted by OP-1 group companies were mostly towards purchase of Guar commodities. It was also submitted that the amount of stocks held by Ganganagar group and in similar manner by hundreds of other traders/trading groups as appearing in the data provided by warehouses and depositories (NSDL and CDSL) highlight the fact that the inventories of Guar Seeds and gum were held in widespread manner in the market at-large during the impugned period. Therefore, it would not be justified to blame OP-2 of adversely affecting demand-supply equilibrium of the markets.

59. OP-2 denied that there was any explicit/tacit agreement with OP-1 and that the stocks held by OP-2 or its group companies through commodity broker, Edelweiss were as a part of their own business operations and were not held on behalf of any third party. That it was further confirmed by Edelweiss itself that OP-2's fund transactions with it pertained not only to Guar Seed and Gum but also other agricultural commodities like red chilies. It was argued that in the analysis of transactions between OP-1 and OP-2 group companies as carried out by the DG, there was no one-to-one match between the transaction among OP-1 and OP-2 and those between OP-2 and Edelweiss. Furthermore, the running account of Vision given in the DG's report showed that there were credit entries with no corresponding transactions between any OP-1 group company

and Vision. Therefore, OP-2 submitted that any document allegedly found in premises other the premises of OP-2 cannot be a basis to link the documents with OP-2 when the DG has never put up the said documents to OP-2 and sought its explanation.

60. With regard to the income tax matter, OP-2 submitted that the statement given before Income-tax authorities was subsequently retraced by Shri Shreans Daga.

61. It was denied that the long open interest position held by OP-2 had significantly contributed to the price rise in future contracts. That the monthly Open Position held by OP-2 during 2011-2012 did not show any material change from month to month. It was stated that the data and the table as given in the report are for the period 06-11-2011 to 17-01-2012 for which no reasoning or explanation was given by the DG. OP-2 pointed out that it was a fact that the price consistently increased from October 2011 to May 2012. Referring to the monthly Open Interest of OP-2, it was argued that there was no correlation between the Open Interest position of OP-2 and the price. It was further stated that there was no economic theory which suggested that higher the Open Interest, higher the price. It was therefore, submitted that the Open Interest position belied the allegation that OP-2 'consistently' took long position. The Open Interest position of OP-2 in the month of October 2011 being negative also belied the contention that there was any 'foreknowledge of an increasing price trend' any sharp price increase. If there was any foreknowledge, OP-2 would not have sold the Guar.

62. With regard to the issue of price manipulation, it was stated that there were several checks and balances on NCDEXZ trading platform like daily price limits, member and client level position limits, maximum lot size and special/additional margins which make it difficult to manipulate the market even in the slightest of manner. Further, NCDEX polls spot prices of the commodities few times a day and carries out bootstrapping

to arrive at the most representative prices of the trade. Hence, if futures market prices deviated from the spot prices, it can immediately take corrective measures.

63. It was further submitted that series of regulatory measures and interventions had resulted only in reduced trading volumes and Open interest on NCDEX and had hardly any impact on price movement. Thus, it was sought to be canvassed that despite various harsh regulatory measures, prices kept on increasing as they were driven by fundamental factors.

64. OP-2 submitted that Commodity Exchange by its small size cannot influence price. In stock exchange the supplies and stock of equity are limited and fixed but in commodity exchange the supplies of stock of commodity are unlimited. It was stated that the delivery of guar through NCDEX during 2011-12 was only 7% of the domestic production. The balance 93% of guar quantity which was delivered through physical market fetched a price higher than the price prevailing in the NCDEX. Given the miniscule quantity of guar delivered through NCDEX, OP-2 submitted that NCDEX could not have not influenced the price of guar.

65. It was also submitted that the conclusion of the DG that farmer/miller/processor's role in withholding stock will have no impact was perverse being not backed by any investigation. It was pointed out that roughly only 37% of the production arrived in Mandi and 63% of the production was held by farmers or millers/processors who might have purchased directly from the farmers.

66. It was averred that the DG has committed an error by double counting the figure. It was stated that the DG has taken the report of stock held through NCDEX and added with the report received from warehouse about the holder of the stock. This has resulted in double counting. It was further stated that even upon taking the data provided in DG's report

at face value, it was clearly evident that stocks held by OP-2 in 2011-12 were miniscule compared to the overall market size. It was pointed out that the combined figure of stock of guar held by OP-1 is not separated from the combined figure of stock held by OP-2.

67. OP-2 stated that on a year - to - year basis, the rate per unit of guar consistently increased from 2010-11 to 2011-12 and again from 2011-12 to 2012-13. Even though the unit price declined in the month of Jan 2013 to March 2013 period compared to previous month of the year, the export price in the month of January 2013 to March 2013 period was more than double the rate prevailing in September 2011. That the price rise was beneficial to all, the country, its farmers, traders, milers and exporters.

68. It was denied that OP-2 had formed any cartel from the "beginning of second quarter of FY, 2011-12" and limited supplies of Guar Seed and Guar Gum in the physical market thereby disturbing demand-supply equilibrium and increased price as concluded by the DG. OP-2 submitted that the second quarter of 2011-12 was covered within the period of investigation. It was further submitted that the quantities held by OP-2 being 0.09% of domestic production cannot be substantial by any economic standard which may cause price increase.

69. It was pointed out that the allegations by the informant that the act of the Opposite Parties has caused substantial harm to consumers/ farmers/ processing unit was not at all referred in the "Investigation" and there was no reference to it as no findings is recorded in this regard. The DG report did not specify any stakeholder in India who is adversely affected by the price rise. Hence, OP-2 submitted that the price rise has not caused any harm or substantial harm to any section of the society or the business community.

70. OP-2 argued that the DG has relied solely on the statement given by Shri Shreans Daga before Income Tax authorities on 29-01-2013 while making this observation with respect of OP-2. However, subsequently on 13-01-2015, six group companies have filed income tax settlement applications before Income Tax Settlement Commission. In these applications, the group companies have claimed that the declaration made by Shri Shreans Daga, in respect of group as a whole was not based on facts of the case and there were no fictitious losses booked by the applicants and therefore by filing the applicants, the group had retracted the earlier income declared U/s 132(4) in the hands of respective applicants. Further the group companies have maintained that all transactions in respect of profit/loss in commodity derivatives were genuine, carried out through FMC registered members on recognized exchanges, duly supported by contract notes and payments/receipts through banking channels. During the hearings of those settlement applicants, the group companies have maintained that as regards the share application money, all the investor companies are genuine shareholders and their transactions were genuine. The Income Tax Settlement Commission has concluded that the applications filed by the group companies could not be held as invalid and allowed the same to be proceeded further. Now the matter is pending before the Settlement Commission. OP-2 contended that that disputed statements cannot form a basis for any allegations.

71. It was further submitted that the stock market and commodity futures are two completely different and unrelated markets and dealings in one market cannot be deemed to have any bearing on the other. OP-2 stated that the findings of DG was factually incorrect. The order of SEBI which the DG had referred was later stayed by the SEBI. It was contended that while the DG in its report relies upon the *ad interim ex-parte* order of SEBI dated 15-02-2013 when stating the SEBI was constrained to debar OP-2 and its various group companies from undertaking any transactions

on the stock exchange, it has conveniently overlooked SEBI's order dated 06-12-2013 issued long time before the presentation of the DG's report wherein it had revoked the directions issued *vide* the earlier *ad-interim* order. That SEBI while passing the order has clarified that the directions issued vide ad interim order were interim in nature.

72. It was further submitted that Shri Jigar Shah was employed in OP-1 on probation basis which could not be confirmed. He thereafter joined Vision. In any case, employing a person per se does not establish 'meeting of minds' with his previous employer. Moreover, if there was really a close nexus between the two OPs there wouldn't have been any need for the concerned employee to leave one company and join another.

73. In view of the above, it was submitted that OP-2 has not violated any of the provisions of the Act.

Replies/ objections/ submissions of OP-3

74. OP-3 filed a brief reply pointing out the paras in the DG report wherein it was observed by the DG that the allegations of the Informant against OP-3 could not be sustained by facts and evidences gathered by investigation.

Replies/ objections/ submissions of the Informant

75. The Informant filed the written submissions on 07.03.2016 supporting the findings of the DG and the same shall be referred to while analyzing the issues arising in the present case.

Analysis

76. The Commission has heard the learned counsels appearing for the parties besides perusing the material available on record.

Cross-examination

77. On 23.02.2016 when the hearing began in the matter, Shri Haksar, the learned senior counsel appearing on behalf of OP-1 pressed an application which was filed on 22.02.2016 seeking cross-examination of the Informant *i.e*. Shri Nirmal Kumar Manshani primarily on the ground that he has filed motivated complaint/ information and has made certain statements which are seriously prejudicial to the interest of OP-1.

78. Before adverting to the merits of the instant application, it would be appropriate to note the statutory scheme on the issue of cross-examination as envisaged under the framework of the Act and the Regulations framed thereunder.

79. In this regard, reference may be made to the provisions contained in Regulation 41 of the Competition Commission of India (General) Regulations, 2009 ('the General Regulations') which deals with the procedure for taking evidence including cross-examination of the persons giving evidence. The same is quoted below.

> *Taking of Evidence*
> *Regulation 4l(1)...*
> *(2)...*
> *(3)...*
> *(4) The Commission or the Director General, as the case may be, may call for the parties to lead evidence by way of affidavit or lead oral evidence in the matter.*
> *(5) if the Commission or the Director General, as the case may be, directs evidence by a party to be led by way of oral submission, the Commission or the Director General, as the case may be, if considered necessary or expedient, grant an opportunity to the other party or parties as the case may be, to cross-examine the person giving the evidence.*

(6)...

(7)...

80. It is, thus, evident that the Commission or the DG has the discretion to take evidence either by way of Affidavit or by directing the parties to lead oral evidence in the matter. However, if the Commission or the DG, as the case may be, directs evidence by a party to be led by way of oral submissions, the Commission or the DG, as the case may be, if considers necessary or expedient, may grant an opportunity to the other party or parties, as the case may be, to cross-examine the person giving the evidence. Thus, it is only when the evidence is directed to be led by way of oral submissions that the Commission or the DG may grant an opportunity to the other party or parties to cross-examine the person giving the evidence, if considered necessary or expedient. Hence, even when the evidence is led by oral submissions, the Commission or the DG retains the discretion to consider the request for grant of opportunity to the other party or parties to cross-examine the person giving the evidence if the same is considered necessary or expedient. Thus, the only issue which needs to be examined is when it would be necessary and expedient to grant an opportunity to the other party or parties to cross-examine the person giving evidence by way of oral submissions. Whether an opportunity of cross-examination is to be given or not depends upon the circumstances of each case. The issue of necessity or expediency depends upon the factual matrix of each case. As a general rule, when the information supplied by a party is based on personal knowledge, the other party may be granted the right to cross-examine the party giving evidence. When the information provided by a party is documentary or based on documents, the other party need not be granted the opportunity to cross-examine the party giving the evidence.

81. Coming to the instant application seeking cross-examination, the Commission notes that the DG has not recorded any statement of the

Informant. As such, the plea to seek cross-examination of the Informant does not appear to be well founded. Even otherwise, the Informant has a very limited role of providing information to the Commission and the motivations which propel such persons in filing the informations before the Commission are not relevant for the inquiry to be conducted by the Commission. It is only when a statement is recorded by the DG, the question of allowing cross-examination may have some relevance particularly when such deposition is adverse to the interest of the Opposite Party and requires to be tested through cross-examination in an appropriate case. In the result, the Commission finds no merit in the application moved on behalf of OP-1 seeking cross-examination of the Informant and the same is rejected. For the same reasons, the Commission finds no merit in the plea made on behalf of OP-2 seeking cross-examination which was made in passing in the pleadings and during the course of the arguments without in any manner making out a case whatsoever much less specifying any witness.

82. Having disposed of the pleas seeking cross-examination, the Commission now proceeds to examine the following issues which arise for consideration in the present case:

Issues

a) Whether the Commission has the jurisdiction to inquire into the present matter?

b) Whether there is any contravention of the provisions of Section 3 of the Act?

(a) Whether the Commission has the jurisdiction to inquire into the present matter?

83. The learned senior counsel appearing on behalf of OP-1 and OP-2 challenged the jurisdiction of the Commission to the present proceedings

by contending that the Commission has no jurisdiction to inquire into any allegation *qua* the futures market.

84. To support the plea, it was argued that the unique feature of futures market is that one does not have to actually hold the commodities in physical form or for that matter take the delivery in physical form. As such, it was stated that the futures contracts are basically forward contracts other than specific delivery contracts. Reference was made to the following observations of the Constitution Bench of the Hon'ble Supreme Court of India in the case of *Bullion and Grain Exchange Limited* v. *State of Punjab*, (1961) 1 SCR 668 while construing the nature of forward contracts under the then Punjab Forward Contracts Tax Act, 1951:

> *When two parties enter into a formal contract for the sale and purchase of goods at a given price, and for their delivery at a given time it may be that they never intended an actual transfer of goods at all, but they intended only to pay or receive the difference according as the market price should vary from the contract price. When such is the intention it has been held that is not a commercial transaction but a wager on the rise or fall of the market, which comes within the connotation of "gambling ". It is the fact that though in form an agreement for sale purports to contemplate delivery of the goods and the payment of the price, neither delivery nor payment of the price is contemplated by the parties and what is contemplated is merely the receipt and payment of the difference between the contract price and the price on a later day that makes the contract a wagering contract…..*

85. Further, reference was made to the definition of 'goods' as given in Section 2(i) of the Competition Act, 2002. For ready reference, the same is quoted below:

Section (i) "goods" means goods as defined in the Sale of Goods Act, 1930 (3 of 1930) and includes-
(A) products manufactured, processed or mined;
(B) debentures, stocks and shares after allotment;
(C) in relation to goods supplied, distributed or controlled in India, goods imported into India;

86. It was stated that the said definition clearly indicates that it is an exhaustive definition and not illustrative or inclusive. Further, reference was made to the definition of 'goods' as given under the Sale of Goods Act, 1930 and it was pointed out that the same is once again an exhaustive definition. For ready reference, the definition of 'goods' as given under the Sale of Goods Act, 1930 is noted below:

Section 2(7) "Goods" means every kind of movable property ***other than actionable claims and money****; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.*

87. It was stated that the aforesaid definition deals with goods which are in existence and are ascertainable. It does not deal with future goods and unascertained goods. The commodity exchange deals with future contracts and therefore does not deal with "goods". The Sale of Goods Act, 1930 defines 'future goods' under a separate provision, which also establishes that the Parliament in its wisdom has given distinct and different meaning to the expressions "goods" and "future goods". The trading on the commodities exchange is not in respect of any ascertained goods. It only enables price discovery. Many times, the entire crop of a particular commodity in a particular year is traded on a single day, which clearly shows that transactions on the Commodity Exchanges in respect of future contracts are not in respect of any ascertained and/ or existing

goods. The future contracts are in the nature of 'actionable claims' and they are expressly excluded from the definition of 'goods' under the Sale of Goods Act, 1930 and hence also fall outside the purview of the definition of 'goods' as defined in the Act.

88. Thus, in sum, it was contended on behalf of OP-1 that future contracts - which are a specie of the forward contracts - are in the nature of 'actionable claim' and they are expressly excluded from the definition of 'goods' under the Sale of Goods Act, 1930 and, hence, also outside the definition of 'goods' are defined in the Act; the Commission has no jurisdiction to inquire any alleged cartelization in the matter of future contracts traded on the commodity exchanges as they are not in respect of 'goods'; the goods traded on the commodity exchange are not 'goods' under the Act, the Sale of Goods Act, 1930 or even the Sales Tax Act which deals with levy of sale tax on the sale and purchase of goods - the forward contracts are not assessable under sales tax, solely because the goods covered under the said contracts are not 'goods' as defined under the Sale of Goods Act, 1930 or under the respective sales tax legislation. Reference was also made to a decision of the Constitution Bench of the Hon'ble Supreme Court of India in the case of *Sales Tax Officer, Pilibhit* v. *Budh Prakash Jai Prakash*, (1955) 1 SCR 243 to contend that forward contracts cannot be included in the definition of sale.

89. Attention was also invited to an affidavit filed by market regulator *i.e.* Forward Market Commission in the case of *Meera Bhayandar Jagruti Sanstha & Anr.* v. *National Multi-commodity Exchange of India Limited & Ors.*, PIL No. 50 of 2010 before the Bombay High Court wherein it was stated as under:

> *"... Commodity futures market is a financial or derivative market where standardized contact are traded for the purposes of price discovery and price risk management; and*

sale or purchase of actual goods is not the objective. Market participants can buy and sale these contracts on the exchange platform and can square them of in the course of the life of the contract running into multiple months, by payment of cash difference. Since no physical goods are involved in these transaction, no sales tax is payable in respect of such transaction that take place on the various commodity exchanges in India…"

90. On a careful perusal of the submissions advanced by the learned senior counsel appearing for OP-1 and OP-2, the Commission is of considered opinion that the same are thoroughly misconceived and deserve to be rejected.

91. To appreciate the issue, it is necessary to first advert to the allegations laid in the information. It has been alleged by the Informant in the information dated 17.12.2012 filed before the Commission as follows:

"30. It is further to be noted that the cartel led by Ruchi Soya Limited and its subsidiary companies were holding Guar Gum stocks of over 16,500 tons and Guar Seed stock of 26,500 tons. These were perhaps the largest stocks held by one group for Guar Gum and Guar Seed. With such large stocks, doing self-trading and circular trading, the dominant players and did price rigging and made huge illegal profits and gave immense losses to over 12,000 small traders and hedgers."

92. Further, in the additional information dated 11.02.2013, it is categorically alleged as under:

5.1 It is submitted that the opposite parties are traders of Guar Seed and Guar Gum in the physical (spot) market as well as the commodity futures market.

5.2 It is submitted that opposite parties have acted in collusion to manipulate/ fix the prices of Guar Gum and Guar Seed in both these markets. It is submitted that the opposite parties, at the first instance, managed to hoard a sizeable portion of the physical stocks in the physical (spot) market to create an artificial shortage in the said market. It is pertinent to note that guar/ Guar Gum/ Guar Seeds are not an essential commodity and no stock limits or other restrictions are prescribed in the holding of stocks of guar/ Guar Seeds/ Guar Gum by any State Government. It is submitted that such hoarding was done to create a demand-supply gap in the physical market to raise prices in the spot market thereby creating conditions for manipulating prices in the futures market. It is submitted that the opposite parties were well aware of the fact that a surge in guar futures prices cannot be sustained unless a spot (physical) market prices are influenced.

93. It is, thus, obvious that the fulcrum of the information is the alleged collusion amongst the Opposite Parties in the physical (spot) market in fixing the prices and creating artificial storage of Guar Gum and Guar Seed. Further, as per the Informant, such conduct created conditions for manipulation of prices in the futures market.

94. In view of the above noted averments in the information, it is obvious that the gravamen of the allegations as noted in the information centered on the alleged cartelization by the Opposite Parties in the physical market in respect of Guar Gum and Guar Seed. Not only that the Informant made specific allegation of collusion amongst the Opposite Parties in the physical (spot) market in fixing the prices and creating artificial storage of Guar Gum and Guar Seed, the DG conducted a detailed examination of the conduct of the Opposite Parties in the physical/ spot markets. Both the products namely, Guar Seed and Guar

Gum are squarely covered within the definition of "goods" as given in Section 2(i) of the Act and as such the pleas advanced by the learned senior counsel appearing on behalf of OP-1 and OP-2 are misdirected. Needless to add that the further conduct of the Opposite Parties in manipulating the prices in futures market was incidental and ancillary to the alleged collusion in the physical market and the impugned conduct of the Opposite Parties constituted one single act which essentially and predominantly emanated out of alleged control of supplies in the physical market. As such, both conducts being interlinked and interdependent, the attempt by the learned counsel to divert attention of the Commission only to the futures market alone does not appear to be justified.

95. Looking at the conduct of the Opposite Parties in both the markets, it is evident that the Commission has the necessary jurisdiction to inquire into the allegations as made by the Informant in the information. As such, the plea advanced by the counsel to the effect that the commodities traded on the commodities exchange, which are in the nature of future contracts, are not 'goods' as defined under the Act is purely academic and is based upon the selective reading of the averments made in the information. Even otherwise, suffice to note that the term "forward contract" has been defined in Section 2(c) of the Forward Contracts (Regulation) Act, 1952 as *a contract for the delivery of "goods" and which is not a ready delivery contract*. The term "goods" has been further defined in Section 2(d) of the Forward Contracts (Regulation) Act, 1952 as every kind of property other than *actionable claims*, money and securities. Thus, a "forward contract" as defined in the Forward Contracts (Regulation) Act, 1952 does not include *actionable claims* within its sweep. Hence, the Commission has full jurisdiction to inquire into the anti-competitive conduct in such markets.

96. The Commission further notes that even otherwise nothing turns upon the submissions advanced by the learned counsel when it was sought to be argued that futures contracts are in the nature of a wager. Once the legislature has allowed and regulated trading in commodities in futures market, the issue of such transactions being in the nature of wager are inconsequential.

97. Be that as it may, for the reasons noted above, the Commission is of considered opinion that the jurisdictional plea raised by the Opposite Parties is bereft of any substance and the same is rejected.

98. Further, the plea to invoke the exemption provided to the export cartels under Section 3(5)(ii) of the Competition Act, is also thoroughly misconceived. It was contended by the Opposite Parties that agreements/ arrangements in the value chain in respect of export goods are exempted under the provisions of Section 3(5)(ii) of the Act as the commodity in question is being exported out of India to the extent of 95% of its production.

99. It may be noted that the Opposite Parties are not the exporters and neither the alleged anti-competitive agreement relates exclusively to the production, supply, distribution or control of goods or provisions of services for any such export as provided under Section 3(5)(ii) of the Act. Merely because the end product is being exported by the millers and the processors would not immunize the anti-competitive agreement entered into by the parties. Acceding to the plea raised by the Opposite Parties would render the entire scheme of the Act redundant in respect of cartels entered into by the parties in respect of any raw or intermediate material where the ultimate product is being exported out of the country. This would not only be an absurd situation but would make the country's exports uncompetitive. Hence, the Commission finds no merit in this plea as well and the same is also rejected.

100. That takes the Commission to the other preliminary objections raised by the Opposite Parties such as violation of the principles of natural justice by the DG. In this connection, the Commission notes that by virtue of the provisions contained in Section 36(1) of the Competition Act, the Commission, in discharge of its functions, is to be guided by the principles of natural justice. No such provision has been made in respect of the investigations conducted by the DG for obvious reasons. The Office of the DG is the investigating arm of the Commission and to demand natural justice during the course of investigation as against the adjudication stage is to render the investigation meaningless. The power of search and seizure, which are part and parcel of investigation stage, by very nature has to be kept secretive and confidential and to insist compliance with natural justice during such stage by way of notice or otherwise would be destructive of the investigative process. Thus, the Commission finds no merit in the contention urged on behalf of the Opposite Parties alleging violation of the principles of natural justice by the DG.

(b) Whether there is any contravention of the provisions of Section 3 of the Act?

101. Now, the Commission proceeds to examine the main issue arising in the present matter *i.e*. whether the Opposite Parties have contravened the provisions of Section 3 of the Act.

102. At the outset, it would be appropriate to note that the definition of '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. The understanding may be tacit and the definition covers situations where the parties act on the basis of a nod or wink. There is rarely a direct evidence

of action in concert and in such situation 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 the light of the definition of the term 'agreement', the Commission has to find sufficiency of evidence on the basis of benchmark of preponderance of probabilities.

103. In view of the above and further considering the fact that since the prohibition on participating in anti-competitive agreements and the penalties the offenders may incur being well known, it is normal that such activities are conducted in a clandestine manner, where the meetings are held in secret and the associated documentation reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful conduct between enterprises such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstruct 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 any other plausible explanation, constitute evidence of the existence of an agreement.

104. Thus, the element of mutual understanding needs to be proved through the investigation as the enterprises will try to avoid leaving any "smoking gun" evidence.

105. In the instant matter, the thrust of the information is the alleged collusion amongst the Opposite Parties in the physical (spot) market in fixing the prices and creating artificial storage of Guar Gum and Guar Seed. Further, as per the Informant, such conduct created conditions for manipulation of prices in the futures market during the period from October 2011 to March 2012 by indulging in self-trading, circular trading and physical hoarding of the products to create artificial demand-supply gap to manipulate prices in the market.

106. Before analyzing the issue, it would be appropriate to notice the brief description of the product as given in the report of the DG.

107. Guar or cluster bean is a drought-tolerant, multi- purpose annual arid legume crop cultivated mainly for extracting gum from seeds and also used to some extent as animal fodder and as green manure. In India, the major guar producing areas are Rajasthan, Gujarat and Haryana which are also important processing areas of guar and its derivatives. Guar crop is cultivated during Kharif season and the crop *viz*. Guar Seed arrives in the markets mainly in the month of October to December whereafter supplies show a declining trend. While part of produce (5-10%) is retained by farmers for seed and animal feed purposes, the rest of the produce is sold in the market. India is the largest producer of guar contributing about 80% of total guar production in the world. Guar Gum which is extracted from processing of Guar Seeds is an export oriented commodity with about 75-80% of total output exported from the country. Guar Gum exported from the country is mainly used by oil and gas exploration companies where Guar Gum finds application as an emulsifying agent in oil and gas exploration operations. In quantitative terms, roughly 3 units of Guar Seeds are required for processing 1 unit of Guar Gum. Guar Seeds & Guar Gum are commodities that are traded both in Commodity Exchanges as well as in Agricultural Produce Market Mandis. The Agriculture Produce Market Committees (APMCs) of Rajasthan, Haryana and Gujarat generally referred to as Mandis are the main markets where Guar is traded in the physical form.

108. To examine the allegations of abnormal price rise of Guar Seeds and Guar Gum, it may be mentioned that the DG sought details of subsidiary/ associate/ group companies from OPs. Pursuant thereto, OP-1 furnished details of 13 subsidiary and associate companies. No details of any group company was furnished by OP-1. OP-2 furnished details of 10 subsidiary and group companies. OP-3 informed that it has no

subsidiary or associate or group company. The DG also sought the details of subsidiary/ associate/ group companies of OPs from commodity exchanges *i.e.* NCDEX, ACE, NMCE and MCX. In response, NCDEX furnished information about certain entities found to be related to OPs who were trading cohesively on its exchange platform. No related entity of OP-3 was identified by NCDEX. Based on these, the DG grouped the entities related to OP-1 and OP-2 as Ruchi Group and Betul Group respectively.

109. After establishing the interrelationships of various entities within the Ruchi and Betul groups and in view of the allegations that OP-1, OP-2 and OP-3 alongwith their respective related entities had colluded to manipulate Guar Gum & Guar Seed prices in the futures markets, investigation proceeded to examine the issue accordingly in order to ascertain if there are evidence that corroborate the allegations of collusion amongst OP-1 and OP-2 groups and OP-3.

110. It was noted by the DG that OP-1 and OP-2 (as well as their related entities so identified) were engaged in trading of agricultural commodities on commodity exchanges as clients of members/ brokers of the exchanges whereas OP-3 was noted as a registered member of NCDEX as well as of some other commodity exchanges executing orders on behalf of its various clients. As per the information furnished by NCDEX, no entity related to OP-1 & OP-2 had traded in Guar Seeds/ Guar Gum contracts on NCDEX during 2011-12 through OP-3. Investigation has also not come across any evidence of any other entity that had traded in Guar contracts on NCDEX during 2011-12 being related to OP-3 except as its clients. Investigation also did not come across any evidence of inter-relationship amongst the clients of OP-3. As such, the allegations of the Informant regarding OP-3 and its group, associates, subsidiary companies having colluded with OP-1 and OP-2 groups were found not to be substantiated by facts and evidence.

111. Further, so far as the OP-1 and OP-2 group entities were concerned, it was informed to the DG during the course of the investigation that the relationship between Ruchi and Betul Groups was purely a business relationship maintained at an arm's length distance basis. It was, however, noted by the DG that very few transactions took place and that too of the amounts which were not substantial between OP-1 group companies and OP-2 group companies since 2009. As such, the past transactions did not reflect a regular ongoing business relationship between the two groups.

112. Furthermore, the following evidence were noted which indicated collusion/ agreement between OP-1 and OP-2:

(i) First time transactions between some OP-1 group companies with an OP-2 group company involving transfer of huge amounts during 2011-12 beginning from August 2011 onwards.

(ii) Transactions were between companies which appeared to be unrelated to OP-1 and OP-2 having dummy/ name lending directors (small time employees) on their Boards to create appearance of unrelated entities.

(iii) One of the company belonging to OP-2 Group (to whom funds were transferred by OP-1 Group) was disowned by OP-2 even though the said company had been admitted by OP-2 as part of its Group before IT Department.

(iv) Funds received from OP-1 group companies further advanced to commodity brokers for procurement of Guar Seeds/ Gum.

(v) No justification of OP-1 companies advancing funds to OP-2 companies for procuring Guar commodities through commodity brokers. No past expertise of OP-2 in guar commodities.

(vi) Funds received from OP-1 companies advanced to brokers through whom OP-2 group companies traded in Guar commodities.

(vii) Many transactions of funds being transferred *inter se* amongst

OP-2 group companies. Remittances made to/ received from commodity brokers by these entities through whom they traded.

(viii) Amount received by OP-2 from a commodity broker against sale of Guar Seeds/ Guar Gum transferred to OP-1 group companies.

(ix) Transactions between OPs do not reveal an arms length business relationship.

(x) Working sheet containing calculations of profit sharing from Guar Seed and Guar Gum business activities.

Figures calculated upto 2 decimal points, remarks like "earlier Gum profit"; "Ruchi has realized more than Betul"; "Sales through Pradeep Singhal";

Futures profit under Column 'JV Books' worked out at Rs. 936.36 cores. Share of each partner from physical market transactions worked out at Rs. 243.20 crores each.

(xi) Email dated 14.02.2012 sent by OP-1 to OP-2

To clear off the advances in this year, I have below proposal, let 30500 ton of seed which betul is holding (thru edelweiss funding) to be sold to us in the company's from where advances come…. this way advances will be wipe off and we will give some funds to release goods from edelweiss that's way your liability will be over plus accounts will shut off.

The biggest point in the below transaction is profit which will be parting in the Betul…. Need to look into it and decide way forward.

Pls think about it…. day after tomorrow, we all will be

sitting to clear this account off.

No satisfactory replies to the queries regarding contents of the e-mail by official of OP-1. Admitted that seeds referred to in the mail are Guar Seeds.

(xii) Identical *modus operandi* of booking bogus losses to wipe off profits through fictitious transactions in Gold & Silver commodities and subsequently ploughing back profits as Share Application money.

Profits from Guar business disclosed to Income Tax Department by OP-1 – Rs. 100 crores, profits disclosed by OP-2- Rs. 61.87 crores (excluding Rs. 31.57 crores, other losses incurred in identical manner).

(xiii) Eight of the nine OP-2 companies debarred by SEBI *vide* order dated 15.02.2013 from transacting on NSE for manipulative trading in the scrip of OP-1.

(xiv) Statement of Shri Daga, Director of OP-2 given during search & seizure proceedings of IT Department-

"*He was earlier working with Ruchi group. When we and Ruchi group decided to coordinate our guar/ Guar Gum business activities, Ruchi people wanted that he should shift to our company and would actively look after this business activity of both the groups*……"

113. In view of the above detailed evidence, the DG was of opinion that relationship of OP-1 and its group entities with OP-2 and its group entities was not a business relation at an arm's length distance. The

evidence indicated an understanding between the two OPs for undertaking and coordinating guar related business activities during 2011-12.

114. Further, the DG examined the reasons for price rise in light of the coordinated conduct of the two groups, as detailed *supra*.

115. In this regard, it was noted in the DG report that based on the traded volume of the various OP's entities in futures contracts on NCDEX (which ranged from 0.68% to 3.98% in the case of Guar Seeds and 0.45% to 6.39% in the case of Guar Gum), the increase in prices on commodity exchanges was not found attributable to the trading volumes of the OP group entities. Furthermore, in this connection, the DG also did not find the allegations of the Informant regarding self-trading and circular trading against OPs as substantiated. This finding was essentially based upon the analysis of self-trading and circular trading done by NCDEX with respect to the entities belonging to these two groups. Analysis done by NCDEX of the transactions of OP's group entities did not reveal any instance of self-trading, circular trading or hitting the circuit continuously by entities belonging to OP groups.

116. The DG also undertook an analysis of Open Interest (OI) position on each of the trading days from 06.12.2011 to 17.01.2012 and noted as follows:

	Long OI of the OP group entities as % of Total Open Interest of NCDEX
Guar Seeds Contracts	**Ranging from 30.45% to 46.62%**
Guar Gum Contracts	**Ranging from 11.99% to 51.91%**

117. It was noted that Open Interest Position reflects market power and any such position above 5% of the Market Open Interest being against norms, is monitored by the exchange as part of its surveillance activity. Based on the analysis of Open Interest positions, it was concluded by the DG that OP-1 and OP-2 groups by virtue of their concerted action of using multiple entities to trade on the exchange platform and enjoying considerable market power through their collective Long Open Interest position had significantly contributed to the price rise in futures contracts till clubbing of their positions in January 2012.

118. Lastly, the DG examined the conduct of OPs in physical markets and noted that as against the estimated Guar Seed production of 22,17,610 MT in the year 2011-12 as per Department of Agriculture & Cooperation, Directorate of Economics & Statistics, Ministry of Agriculture, Government of India; the OPs were holding 1,26,495.26 MT as on March 2012 in physical stock.

119. In this connection, it may be noted that considering that the allegations of price increase pertained to the period from October 2011 to March 2012, as such, on the presumption that export performance during the period from April 2011 to September 2011 reflecting the demand would have an impact on prices in the subsequent periods, the export data for the period April 2011 to September 2011 was analyzed by the DG *vis-a-vis* the corresponding figures of the previous year.

120. As per the DG report, the increase in exports in quantitative terms during the period April 2011 to September 2011 as compared to the corresponding period of the previous year was about 65%. Further, in terms of value, the increase between the two periods was around 336%. It was also observed that during the year 2011-12, the average export realization per Metric Ton of Gum which was about Rs 0.97 lakh per MT during the month of April 2011 increased to Rs 1.63 Lakh per

Metric Ton in September 2011 and the same at the end of the year in March 2012 was 4.65 lakhs per MT.

121. From the above, it was concluded that not only was there an increase in production of Guar Seeds between 2010-11 & 2011-12, there was a substantial increase in exports both in quantitative terms as well as in terms of higher realization per Ton of Gum exported.

122. It was noted by the DG that despite an increase in production of Guar Seeds during 2011-12 by around 2.50 lakh (as compared to the previous year), the arrivals in Mandis between October 2011 to March 2012 were short by about 2.19 lakh MT (compared to the corresponding period of 2010-11) leading to the inference that arrivals in Mandis could have been constricted on account of withholding of Guar Seed produce at the end of farmers (in the expectation of higher price realization in the coming months due to increasing export demand) as well as higher procurement by Millers/ Processors (to meet the increasing export demand).

123. Notwithstanding the significant increase in exports and diminished arrivals in Mandis as reasons for the price rise witnessed during 2011-12, it was observed by the DG that under the already stressed supply situation prevailing in the market which was very conducive for easy manipulation, OPs by their concerted action of consistently accumulating stocks of Guar Seeds & Guar Gum through multiple entities and trading on the commodity exchange in a cohesive manner taking long positions, created an artificial scarcity in the market. OPs who were by the end of March 2012 holding about 2.91 lakh tons of Guar Seeds (after converting Guar Gum stocks to equivalent Guar Seeds) thus not only limited and controlled supplies in the market but also indirectly determined prices of Guar Seeds & Guar Gum both in the physical markets as well as in the futures market.

124. On a careful perusal of the evidence gathered by the DG and the submissions made by the parties, the Commission is of the considered opinion that there appeared to be an agreement indicating collusion or coordination between OP-1 and OP-2 as detailed in the succeeding paras. This, however, is not decisive of the factum of contravention of the provisions of the Competition Act unless such agreement or arrangement determines the prices of the commodity in question or otherwise controls/ limits the supplies thereof *etc*. Moreover, the appreciable adverse effect arising or likely to arise out of such conduct needs to be shown in the markets in India particularly when the parties strenuously rebut the statutory presumption.

125. In this connection, it would be appropriate to note the statement recorded on oath of Shri Shreans Daga, Director of OP-2 before the Income Tax Authorities on 30.01.2013 which was enclosed at p. 2323 (at p.2327) (Vol. 6) of the DG report. In response to Question No. 18, the following reply was given by Shri Daga:

> *"Mr. Jigar shah is an employee in M/s VMEPL and looking after the exchange related trading activities of all the group companies. He was earlier working with Ruchi Group. When we and Ruchi Group* ***decided to coordinate our Guar business activities****. Ruchi people wanted that he should shift to our company and would actively look after this business of both groups, However, he was paid salary from Vision Millennium Exports Pvt. Ltd."*

126. It is clear from the aforesaid reply that OP-1 and OP-2 decided to "coordinate" the activities relating to Guar Gum and Guar Seeds. The response of the Opposite Parties on this aspect has been evasive. It was submitted on behalf of OP-1 that Shri Jigar Shah was never entrusted with the task of trading on NCDEX by OP-1 or any of its entities even

when he was employed by OP-1 for a short period of 20 days in the year 2010 or even anytime thereafter. Further, it was argued on behalf of OP-2 that they appointed Shri Shah after he had left the job from Ruchi Group and it was suggested that normally people change their job in similar lines of business.

127. OP-2 also raised objection to the reliance placed by the DG upon the aforesaid statement given by Shri Daga before Income Tax Authorities. It was submitted that subsequent to the aforesaid statement, 6 group companies on 13.01.2015 filed Income Tax settlement application before Income Tax Settlement Commission. It was stated that in these applications, the group companies have claimed that declaration made by Shri Daga, in respect of group as a whole was not based on the facts of the case and there were no fictitious losses booked by the applicant group companies. It was, thus, sought to be suggested that by filing the applications, the group had retracted the earlier income declared under Section 132(4) in the hands of the respective applicants. It was also argued that the group companies have maintained that all transactions in respect of profit/ loss in commodity derivatives were genuine, carried out through FMC registered members on recognized exchanges, duly supported by contract notes and payments/ receipts through banking channels.

128. The Commission notes that not only the Opposite Parties have failed to respond to this statement but rather have not even denied the truthfulness of the said statement. No objection can be taken to employing an employee of another company engaged in similar trade or business, yet when the trade activities are agreed to be coordinated, the provisions of the Act would squarely apply. Similarly, describing the proceedings before Income Tax Authorities as externalities, the learned senior counsel appearing on behalf of OP-2 only sought to digress the attention of the Commission from the statement given by Shri Shreans Daga who

is Director of OP-2. It is not understood as to how statement given by an individual can be "retracted" by someone else.

129. At this stage, it would be important to note the details as incorporated in the calculation/ working sheet seized by the Income Tax Authorities during the survey proceedings undertaken on 31.01.2013 at Ruchi House, Mumbai. The said document was annexed with the DG report at p. 2663 (Vol. 7). It was found from the drawer of the Office table of Shri Ramesh Chandra Gupta, General Manager (Accounts) of OP-1 detailing the distribution of profits between the two OP groups arising from Guar Gum/ Guar Seed business.

130. A bare perusal of the working sheet reveals the deep nexus developed between OP-1 and OP-2 to further their anti-competitive conduct in the market which is evident from the phrase used therein *i.e.* "Ruchi has realized more than Betul" and the elaborate computation relating to distribution of profit emanating out of guar business between OP-1 and OP-2.

131. Faced with this evidence revealing the strategy adopted by OP-1 and OP-2, who are otherwise competitors, to share the profits, the learned senior counsel, Shri Haksar argued that OP-1 was never confronted with this single page sheet during the course of investigation by the DG nor any questions were put regarding the correctness or otherwise of the said sheet. The Commission notes the plea raised by the learned senior counsel is not only evasive but is even otherwise untenable. During the course of investigation, the DG collects evidence and examines the witnesses. The question of confronting a party with incriminating evidence during the investigation does not arise. Such stage came when the DG report was forwarded to the parties and it was open for it to either rebut or otherwise respond to such document. However, instead of adopting this course, the counsel chose to skirt the plea. Even now, the factum of the sheet having been seized was not disputed and it was only

vaguely suggested that the figures contained therein have not been correlated or linked with the books of accounts maintained by OP-1 or OP-2. Similarly, the counsel appearing for OP-2 argued that the said sheet cannot be a basis to link the document with OP-2 and the DG never put the said document to OP-2 for its explanation. For the reasons already given, this plea is also without merit and the same is rejected.

132. Further, it is relevant to note another document seized by the Income Tax Authorities from the premises of OP-1. This is an email dated 14.02.2012 which was sent by Shri Rajkumar Goyal, DGM, Supply Chain and Business Development of OP-1 to Shri Ravi Daga of OP-2 which was copied to Shri Jigar Shah and Shri Shreans Daga, Director of OP-2. For ready reference, the same is quoted below:

> From: Mr. Raj Kumar Goyal [mailto:rajkumar_goyal@yahoo.com]
>
> Sent: Tuesday, February 14,2012 15.39
>
> To: ravi.daga@betuloil.com; manishgaw@bofl.in
>
> Cc:jigar_a_shah@hotmail.com;sd@bofl.in;sd@betuloil.com
>
> Subject:
>
> Dear Ravi / Manish
>
> Pl find herewith the advances summary company wise given to Vision and Betul.
>
> To clear off the advances in this year, I have below proposal, let 30500 ton of seed which betul is holding (thru edelweiss funding) to be sold to us in the company's from where advances come. This way advances will be wipe off and we will give some funds to release goods from edelweiss that's way your liability will be over plus accounts will shut off.

The biggest point in the below transaction is profit which will be parting in the Betul need to look into it and decide way forward.

Pls think about it day after tomorrow, we all will be sitting to clear this account off.

133. Shri Raj Kumar Goyal while deposing before the DG confirmed that the said mail was sent by him. This e-mail further evidences the collusion between OP-1 and OP-2 as it is not discernible as to how an employee of OP-1 knew the quantity of stock held by OP-2 through Edelweiss funding. Even if it is assumed that OP-1 had given advances to OP-2 for purchasing soyabean meal as contended by OP-1, the question which is looming large is as to how an employee of OP-1 can possibly know the cost, sales value, profit of Guar Seed in the books of OP-2.

134. In the written submissions dated 14.03.2016 of OP-1, it was stated that the DG has not been able to adduce/ produce any evidence worthy of any credence in the form of e-mails, statements, facts *etc*. to show any collusion or concerted action between OP-1 and OP-2 groups except the above noted "*solitary e-mail*". The Commission notes that it is not the quantity but the quality of evidence that matters and particularly in cartel cases such single e-mail would be considered as a sterling evidence where direct evidence is difficult to obtain. In the present case, there are too many such solitary instances to hold the collusive conduct between OP-1 and OP-2. It is the quality and not the quantity of evidence which is required for establishing contravention. In the matter of appreciation of evidence, it is not the number of documents or witnesses but quality of their evidence which is important, as there is no requirement under the law that any particular number of documents is to be exhibited or any particular number of witnesses is to be examined to prove/disprove a fact. It is a time-honoured principle that evidence must be weighed and not counted. The test is whether the evidence is cogent, credible and

trustworthy or otherwise.

135. The afore-noted conduct belies any arm's length relationship between OP-1 and OP-2. Rather, such act is clearly indicative of the fact that OP-1 and OP-2, despite being competitors, coordinated their trade in Guar Gum and Guar Seed in a concerted manner in order to manipulate the markets.

136. The Commission, however, notes that mere collusion or coordination is not enough to hold the Parties in contravention of the provisions of the Competition Act unless such conduct determines the purchase or sale price or otherwise limits/ controls the supply. Besides, when the Parties vehemently contested the factum of causing (or likely to cause) any appreciable adverse effect on competition in the markets, such conduct further needs to be seen to have caused or is likely to cause appreciable adverse effect on competition. In the absence of these factors, mere collusion or coordination *per se* will not be sufficient to reach a finding of contravention of the provisions of Section 3(1) read with Section 3(3) of the Competition Act.

137. With regard to the allegation that the conduct of OP-1 and OP-2 has resulted into directly or indirectly determining the prices, the Commission notes that the DG has observed that the action on the part of OP-1 and OP-2 contributed to the price rise in the market though the major factor was spurt in the export demand of Guar Gum and late arrival of Guar Seeds in Mandis. The learned counsel appearing for OP-1 and OP-2 argued that the conclusion drawn by the DG was fallacious in this regard on two counts. Firstly, the physical stock held by OPs was insignificant to empower them to determine the prices and secondly, the factum of prices continued to rise till next quarter when the OPs are said to have exited the market belies the conclusion completely. The Commission finds substance in the arguments advanced by the counsel

of the Opposite Parties.

138. The learned counsel appearing on behalf of the Informant argued that OP-1 and OP-2 through their collusive and coordinated actions were purchasing and hoarding huge stocks of Guar Gum & Guar Seed to create scarcity in the market and thereby jacking prices. At the same time, they were taking huge long buy Open Interest positions in Futures Market through NCDEX Exchange and subsequently selling the physical stocks and squaring off the long Open Interest in NCDEX at a high price. Further, OP-1 and OP-2 settled the profits by booking bogus commodity transaction losses and fictitious foreign exchange losses as admitted by them before the Income Tax authorities.

139. This proposition was refuted by the learned senior counsel appearing on behalf of OP-1 who contended that the DG did not even look at OP-1's Open Interest positions for the entire relevant period under consideration. It was argued that the DG failed to note that OP-1 never increased its OI positions during those period but only maintained a consistent OI positions even during the limited period considered by the DG. It was also contended that due to various regulatory measures, most of the traders reduced their OI positions due to which OP-1's OI position seemed quite high during the particular period when seen as a percentage of total market OIs.

140. Having heard the learned counsel for the parties, the Commission notes that the trading volumes of OP-1 and OP-2 had been miniscule and they had not indulged in self-trading or circular trading. Besides, it appears that the DG did not examine the Open Interest positions of OP-1 for the entire relevant period under consideration. As contended by the learned counsel, OP-1 did not increase its OI positions during those period but only maintained a consistent OI positions even during the limited period considered by the DG.

141. The Commission notes that 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 subsection (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; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (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; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

142. Thus, in case of agreements as listed in section 3(3) 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; the onus to rebut this presumption would lie upon the opposite parties. The parties may rebut the said presumption in light of the factors enumerated in Section 19(3) of the Act. It may be pointed out by virtue of the provisions contained in Section 19(3) of the Act, the Commission, while determining whether an agreement has an appreciable adverse effect on competition under Section 3, shall have due regard to all or any of the

following factors, namely: (a) creation of barriers to new entrants in the market; (b) driving existing competitors out of the market; (c) foreclosure of competition by hindering entry into the market; (d) accrual of benefits to consumers; (e) improvements in production or distribution of goods or provision of services; (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services. Thus, while clauses (a)-(c) deal with factors which restrict the competitive process in the markets where the agreements operate (negative factors), clauses (d)-(f) deal with factors which enhance the efficiency of the distribution process and contribute to consumer welfare (positive factors). An agreement which creates barriers to entry may also induce improvements in promotion or distribution of goods or *vice-versa*. Hence, whether an agreement restricts the competitive process is always an analysis of balance between the positive and negative factors listed in Section 19(3) of the Act.

143. The learned senior counsel appearing for OP-1 strenuously argued before the Commission that no appreciable adverse effect was caused on competition in the present case. It was submitted that in *Automobiles Dealers Association* v. *Global Automobiles Limited & Ors.*, Case No. 33 of 2011, the Commission had observed that the existence of first three factors under Section 19(3) of the Act would normally indicate appreciable adverse effect on competition while the absence would normally indicate no appreciable adverse effect on competition. The presence of the remaining three factors would normally indicate no appreciable adverse effect on competition as they are in nature of efficiency justifications. The absence of the last three factors alone can neither determine appreciable adverse effect on competition nor establish efficiency justifications. In most cases, therefore, it is more prudent to examine all the above factors together to arrive at a net impact on competition. Drawing inference from the case, OP-1 analyzed the first

three factors under section 19(3) of the Act to argue that no appreciable adverse effect on competition was caused by its conduct in the instant case.

144. Referring to "creation of barriers to new entrants", OP-1 submitted that the very fact that more than 98 entities were trading in large quantities also proved that OP-1 was not creating any barriers to new entrants in the market. It was not in any capacity to cause appreciable adverse effect on competition within the meaning of Section 3 read with Section 19(3) of the Act. It was further submitted that the future commodity market is regulated by the FMC and NCDEX, MCX and NMCE. The new members are admitted in, controlled and monitored by the exchanges themselves. No member or trader is in a position to control the entry/ exit of any prospective member/ trader or in any manner create any entry barrier whatsoever.

145. Adverting to "driving existing competitors out of the market", it was submitted that from the data available on the volume of trade in Guar Gum and Guar Seeds carried out in the NCDEX by the related entities from April 2011 till February 2012, it was evident that the same was quite negligible and insignificant to cause any impact in the market so as to drive out the existing competitors. Moreover, 2-3 transactions in a few days of a month carried on by the related entities cannot result in the competitors moving out of the market.

146. Lastly, a reference was made to "foreclosure of competition by hindering entry into the market" and reiterating the above argument that since future commodity market is regulated by FMC and other National Commodity Exchanges, OP-1 had no role in the entry and exit of any new player in the market. As such OP-1 or its related entities cannot cause any impediment to the entry of new players in the market.

147. Therefore, in the absence of the above three factors, it was stated that no appreciable adverse effect on competition was caused in the market due to any agreement/ action of OP-1.

148. Though OP-2 did not make any specific submissions on appreciable adverse effect on competition, yet during oral hearing, the learned senior counsel appearing for OP-2 vehemently denied causing any appreciable adverse effect on competition by making reference to the factors enumerated in Section 19(3) of the Act.

149. The Commission has carefully perused the material on record besides hearing the submissions made by the learned counsels appearing for the parties and holds that in the present case, OP-1 and OP-2 have effectively rebutted the statutory presumption.

150. It is not in dispute that almost the entire goods *i.e.* Guar Gum which is produced from Guar Seeds is exported and as such any action by the Opposite Parties cannot have any adverse effect on competition in India much less causing or likely to cause any appreciable adverse effect on competition in India. In this connection, the Commission is cognizant of the fact that it has repelled the plea of the Parties to the effect that agreements/ arrangements in the value chain in respect of export of goods are exempted under the provisions of Section 3(5)(ii) of the Act as the commodity in question is being exported out of India to the extent of 95% of its production. It may be noted that the said plea was essentially rejected by holding that the Opposite Parties are not the exporters and neither the alleged anti-competitive agreement relates exclusively to the production, supply, distribution or control of goods or provisions of services for any such export as provided under Section 3(5)(ii) of the Act. This, however, does not preclude the Commission from looking at the substance of the potential effect in the markets (*i.e.* whether in India or abroad) arising out of such arrangements. Admittedly, a major chunk of the commodity is exported and, in these circumstances, the

apprehension of causing any appreciable adverse effect on competition in Indian markets due to such conduct is misconceived. The trading volumes of the Opposite Parties in the futures market as well as physical market were not significant enough to enable those Parties alone to determine the prices of Guar Seeds/ Guar Gum or to otherwise limit or control the supplies thereof. In these circumstances, the arrangement between the Opposite Parties cannot be said to have distorted the competition in the markets to the extent of causing or likely to cause appreciable adverse effect.

151. Further, the Commission notes the points made by the Opposite Parties that the manufacturers and exporters of Guar Gum had hugely benefitted during the relevant period by exporting such higher quantities due to boom in export prices which is established from the export figures and the profits earned by the Parties during that period. In addition, it was also pointed by OP-1 that farmers were hugely benefitted by the unprecedented export demand of Guar Gum from the International market, particularly from USA, during these periods. Various newspaper and other media reports were also cited to demonstrate that Guar became the new gold for farmers.

Conclusion

152. Based on the above discussion, the Commission is of the opinion that notwithstanding the arrangement between OP-1 and OP-2, no case of contravention of the provisions of Section 3(1) read with Section 3(3)(a) and 3(3)(b) of the Act is made out against OP-1 and OP-2 as the impugned concerted act/ conduct did not have the effect of causing appreciable adverse effect on competition in the Indian markets. The allegations of the Informant against OP-3 could not be substantiated even during investigation and as such no contravention of the provisions of the Act is made out against OP-3 as well.

153. The Secretary is directed to communicate to the 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/-
(Dr. M. S. Sahoo)
Member

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

New Delhi
Date: 28/06/2016