

COMPETITION COMMISSION OF INDIA
[Suo-moto Case No. 02/2011]

Dated: 23.04.2012

In Re:- Aluminium Phosphide Tablets Manufacturers

As per R. Prasad (Supplementary Order)

I am in agreement with this order but I have different reasons for arriving at the conclusion. The reasons are given as follows.

2. In this case the facts are that at the time of bidding since 2002, the four OPs while applying to the tenders floated by FCI for the supply of chemicals for the storage were submitting an identical price in each tender. From the year 2007, one of the four OPs stopped bidding for the tenders. Thus only three OPs remained in the field of supply. Incidentally before some other authorities also, at the time of bidding the three OPs were quoting identical price for the chemicals. In economic terms it could be stated that the three OPs were indulging in price parallelism. No distinction can be made between price parallelism and identical pricing. The issue of price parallelism had come up before the Supreme Court in the case of Hindustan Development Corporation 1993(3) SCC 499 and the Supreme Court after relying on various decisions of the U.S. Supreme Court had come to a conclusion that price parallelism by itself does not lead to a conclusion of the existence of a cartel. On the other hand the U.S. and the European Courts had held that in addition to the price parallelism there should be some plus factors. But the Competition Law in India is different from the laws in the U.S. and Europe. **Section 3(3)** of the Competition Act reads as under-



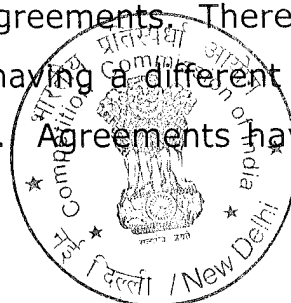
Any agreement entered into between enterprises or associations of enterprises or persons or association of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar 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:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

This section is a provision in which agreements, decisions taken by an association and practices are all deemed to be an agreement. This is also clear from a reading of Section 27 wherein all the three items have been treated as anticompetitive agreements. Therefore by the virtue of the Act all the three items though having a different meaning are deemed to be anticompetitive agreements. Agreements have been defined in **Section 2(b)** of the Act as under:-

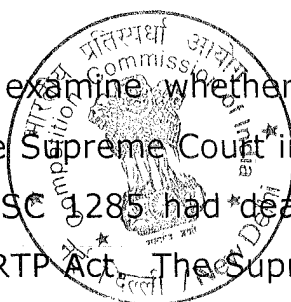


Agreement includes any arrangement or understanding or action in concert-

- (i) Whether or not, such arrangement, understanding or action is formal or in writing or,*
- (ii) Whether or not, such arrangement, understanding or action is intended to be enforceable by legal proceedings.*

A perusal of the Section shows that the definition is an inclusive definition and therefore a wide meaning has to be given to agreement. The three elements to be considered in an agreement are (i) arrangement (ii) understanding and (iii) action in concert. Therefore in order to invoke the agreement in Section 3(3) it is necessary to establish that an agreement exists. In the absence of agreement Section 3(3) of the Act cannot be invoked though for a decision taken or a practice carried out Section 3(3) of the Act it can still be invoked. Action in concert or concerted action over a period of time is established in this case because the behaviour pattern of the four OPs shows an arrangement and an understanding which has led to the concerted action of submitting identical prices for the supply of chemicals in the different tenders. This is clear from the fact that all of them have acted in similar manner at different times. If one has boycotted a tender the other three have also boycotted the tender. Further in nearly all the tenders all the four OPs have quoted identical prices. This clearly shows an arrangement as well as an understanding. Therefore though there is no direct evidence, on the basis of the behaviour an agreement can be deduced. We have also to examine the probability of all the four OPs quoting the identical price in different tenders for the supply of chemicals.

3. Alternatively we have to examine whether these four OPs were following the same practice. The Supreme Court in the case of Hindustan Lever Ltd. vs. MRTP AIR 1977 SC 1285 had dealt with the word trade practice as defined under the MRTP Act. The Supreme Court was dealing



with restrictive trade practices. Under the MRTP Act trade practice has been defined as under:-

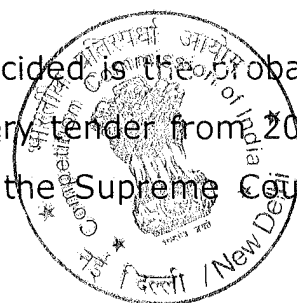
(u) 'trade practice' means any practice relating to the carrying on of any trade, and includes (i) anything done by any person which controls or affects the price charged by or the method of trading of, any trader or any class of traders. (ii) a single or isolated action of any person in relation to any trade.

Practice has been defined under Section 2 of the Competition Act as follows:-

"practice" includes any practice relating to the carrying on of any trade by a person or an enterprise.

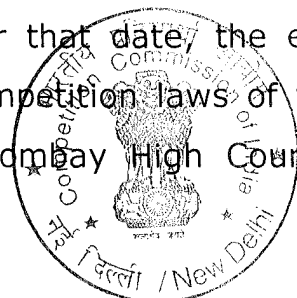
The definition under the MRTP Act is an exhaustive definition whereas the definition under the Competition Act is an inclusive definition. Thus for the purpose of the Competition Act one can adopt the definition of trade practices under the MRTP Act. Further in the case of Hindustan Lever Ltd. (Supra), the Supreme Court has held that a clause in an agreement is a practice for the purpose of the examination of anticompetitive practice. The Supreme Court has also held that an agreement is a restraint on trade and it is through a rule of reason and the provision of law that anticompetitive behaviour has to be determined. The Supreme Court has also held in the case of Hindustan Lever that 'per se' application of the Act is an American concept and has no application under the Indian conditions. Therefore according to the Supreme Court one has to look at the provisions of the Indian laws and rule of reason and come to a conclusion. In this particular case over the large number of years, in the different tenders the four parties were submitting identical prices and as this system was followed in the different years, it has to be regarded as a practice for the purpose of Section 3(3) of the Act.

4. The next issue to be decided is the probability of the four bidders quoting the same price in every tender from 2002. The issue of human probability was examined by the Supreme Court in the case of Sumati



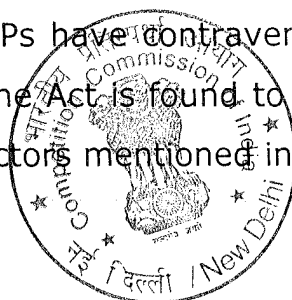
Dayal 80 Taxman 89 (SC). The OPs arguments are that each of them in the bids submitted independently the same price. The question to be decided is whether the explanation is the real explanation. Apparently, the OPs consulted each other and submitted the bids of identical prices. The probability of submitting identical prices by each of the four OPs in each of the 4-5 tenders is zero. Under the provisions of section 3(3) of the Act the onus was on the four OPs to establish by bringing material on record to establish that the tenders of identical prices were submitted independently. This has not been done and therefore the onus cost on the parties under Section 3(3) has not been discharged. Under the circumstances on the basis of probability it has to be held that the OPs consulted each other and submitted tenders showing identical prices.

5. The next issue to be decided is the issue of jurisdiction. Most of the tenders in which identical bids were submitted were in a period prior to 20.05.2009. The provisions of Section 3 and 4 were brought in force w.e.f 20.05.2009. Competition Law has prospective operation and therefore the tenders prior to 20.05.2009 cannot be considered in this analysis for the purpose of contravention of the Act. But the behaviour pattern prior to 20.05.2009 is necessary for the purpose of behaviour after that date. The last tender under consideration was opened on 08.05.2009, the price bid was opened on 01.06.2009 and rate negotiation was completed on 17.06.2009 and the tender was awarded to three of the opposite parties on 17.07.2009. The supplies were made after that date. The supplies were made after the award of the tender. Even though the tenders were called for prior to 20.05.2009, as the effect of the tender continued after that date, the entire transaction has to be looked into under the Competition laws of the country. This view has been confirmed by the Bombay High Court in the case of Kingfisher Airlines.



6. Section 3(3) of the Competition Act is attracted in a case when any of the clauses (a) to clauses (d) mentioned in the said section is attracted. Other conditions are presence of an agreement, decision taken or practice carried out by an association of enterprises or persons engaged in identical business or a trade in similar goods. In this particular case, the three OPs were engaged in a similar trade and they had an agreement and followed the same practices. The 3 OPs i.e. M/s United Phosphorous Ltd., M/s Sandhya Organic Chemicals Ltd. and M/s Excel Crop Case Ltd. had fixed the prices of goods to be supplied by them as they had an identical price in the bids. Thus clause (a) of Section 3(3) is attracted. As far as clause (d) of Section 3(3) is concerned, it would be attracted if the agreement had the effect of eliminating or reducing competition for bids or adversely affected or manipulated the process of bidding. In this particular case, when the tender was issued, the only applicants were the three OPs and there is no material to hold that an agreement was entered to eliminate or reduce competition. Therefore the first portion of clause (d) of Section 3(3) is not attracted. But by fixing prices i.e. by submitting identical bid price, the OPs had defeated the very process of bidding. Thus the clauses (a) and (d) of Section 3(3) are attracted but there is no case of the applicability of clause (b) of Section 3(3) of the Act.

7. Considering these facts, there is material to hold that an anticompetitive agreement existed between the three opposite parties in this case. There is also an existence of plus factors as the three OPs have boycotted bids together. The three OPs in the bids before the F.C.I. were submitting exactly the same price in their bids. The three OPs were following anticompetitive practices as mentioned in Section 3(3) of the Act. Therefore the three OPs have contravened Section 3(3) of the Act. Whenever Section 3(3) of the Act is found to be contravened, there is no necessity to examine the factors mentioned in Section 19(3) of the Act.



8. As far as the penalties under Section 27 is concerned, I am in agreement with the majority on the quantum or other directions.

sd/
(R. Prasad)
Member, CCI

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