COMPETITION COMMISSION OF INDIA

***Suo Moto* Case No. 01 of 2013**

In Re:

Cartelisation in Sale of Sugar Mills by the Uttar Pradesh State Sugar Corporation Limited (UPSSCL) and the Uttar Pradesh Rajya Chini Evam Ganna Vikas Nigam Limited (UPRCGVNL)

CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Mr. G. P. Mittal
Member

Appearances:

For *M/s Wave Industries Private Limited*	Shri R.K. Raizada, Senior Advocate Shri Surjeet Singh, Advocate Ms. Rekha Rani Day, Advocate Shri Satish Chand Gupta, Vice President (Finance)
For *M/s PBS Foods Private Limited*	Shri T. Srinivasa Murthy, Advocate Ms. Shruti Iyer, Advocate

For *M/s Nilgiri Foods Products Private Limited*	Shri G. C. Srivastava, Advocate Shri P. K. Tandon, C.A.
For *M/s Trikal Foods & Agro Products Private Limited*	Shri Divy Pratap, Advocate
For *M/s Giriasho Company Private Limited*	Shri Neeraj Jain, Advocate Shri Anupam Mishra, Advocate
For *M/s Namrata Marketing Private Limited*	Shri Neeraj Jain, Advocate Shri Anupam Mishra, Advocate
For *M/s S.R. Buildcon Private Limited*	Shri Alok Aggarwal, Advocate Shri Gaurav Tanwar, Advocate

FINAL ORDER

1. Introduction

1.1 This case was taken up *suo moto* by the Commission based on the finding in the 'Performance Audit Report of the Comptroller and Auditor General of India on Sale of Sugar Mills of Uttar Pradesh State Sugar Corporation Limited for the year ended 31 March 2011' (hereinafter, the 'CAG report') which indicated cartelization / concerted bid by a group of related companies in the sale of sugar mills by the Uttar Pradesh State Sugar Corporation Limited (hereinafter, 'UPSSCL') and its subsidiary M/s Uttar Pradesh Rajya Chini Evam Ganna Vikas Nigam Limited (hereinafter, 'UPRCGVNL').

1.2 The CAG report stated that there was lack of competition in the bidding process of these sugar mills which affected the realization of fair value of sugar mills. It outlined several indicators of cartelisation by the participating companies namely, M/s Wave Industries Private Limited ('Wave'), M/s PBS Foods Private Limited ('PBS Foods'), M/s Indian Potash Limited ('IPL'), M/s Nilgiri Food Product Private Limited ('Nilgiri'), M/s Trikal Food and Agro Private Limited ('Trikal'), M/s Giriasho Company Private Limited ('Giriasho'), M/s Namrata Marketing Private Limited ('Namrata'), M/s SR Buildcon Private Limited ('SR Buildcon') in contravention of the provisions of Section 3(3)(d) read with Section 3(1) of the Competition Act, 2002 ('the Act').

2. Facts

2.1 As per the CAG report, the Government of Uttar Pradesh ('GoUP') under a policy of privatization/ disinvestment of Public Sector Undertakings ('PSUs') decided to privatise/ sell sugar mills of UPSSCL in June 2007. In execution of this decision, ten operational mills of UPSSCL and eleven closed mills of UPRCGVNL were sold during July 2010 - October 2010 and January 2011 - March 2011, respectively.

2.2 According to the report UPSSCL sold ten operational sugar mills located at Amroha, Bijnore, Bulandshahr, Chandpur, Jarwal Road, Khadda, Rohankalan, Saharanpur, Sakoti Tanda and Siswa Bazar. During the bidding process, ten applicants responded to the Expression of Interest-cum-Request for Qualification ('EOI-cum-RFQ') invited by UPSSCL in June 2009. However, only three of these applicants submitted financial bid in response to Request for Proposal ('RFP') offered to them in July 2009. Of which, two *i.e.* Wave and PBS Foods

submitted bids in respect of seven mills. The CAG report observed that these two companies had common directors or shareholders. Only other bidder who submitted bids was IPL.

2.3 The CAG report noted that Wave and PBS Foods were the only two bidders for the four mills at Amroha, Bijnore, Bulandshahr and Saharanpur. For the three mills at Khadda, Rohankalan and Sakoti Tanda IPL was the only bidder. IPL and Wave were competitive bidders for Jarwal Road and Siswa Bazar mills. All three bidders *i.e.* Wave, PBS foods and IPL, submitted bids for Chandpur mill.

2.4 In terms of the conditions applicable to the bidding process, six mills were taken to the 'Swiss Challenge Method' ('SCM') as the financial bids received for three mills were below the Expected Price of the Government but above 50 per cent of the Expected Price (for Bijnore, Bulandshahar, Saharanpur) and as single bid was received for other three mills (Khadda, Rohankalan, Sakoti Tanda), however, none of the competitors made competitive bids against each other in the SCM round. Eventually, out of ten mills, five were sold to IPL, four to Wave and one *i.e.* Chandpur mill to PBS foods. In respect of the Chandpur mill, the CAG report noted that an unreasonably low bid being 1/10th of the expected price was made by Wave and the highest bidder, IPL withdrew its bid for unknown reasons.

2.5 With respect to the sale of closed sugar mills, the CAG report observed that UPRCGVNL sold eleven mills located at Baitalpur, Bareilly, Bhatni, Deoria, Ghughli, Shahganj, Barabanki, Chittauni, Ramkola, Lakhmiganj and Hardoi. Nine applicants submitted response to EOI-cum-RFQ for these mills. Of these, only three submitted financial bids in response to offer for submission of RFP by UPRCGVNL. The CAG

report noted that only one financial bid was received for each of the eleven mills divided amongst the three bidders *i.e.* Wave, Nilgiri and Trikal and that there was no competition amongst them for any of the mills. The bid price of the three bidders was just above 50 per cent of Expected Price except the bid price of Trikal in respect of Chittauni mill which was 64 per cent of the Expected Price.

2.6 In respect of all the eleven mills of UPRCGVNL, challenge bids were invited under SCM. The bids were received for all the eleven mills from five challengers. As in case of original bidding, there was single bid for each of the mills in bidding in SCM round also. All the original bidders were informed about the SCM challenge bids and asked to match the bids received. The CAG report noted that, initially, all the original bidders accepted the challenge bids. However, later they withdrew their consent in respect of eight mills in favour of Giriasho, Namrata and SR Buildcon and allowed their bid security ranging from Rs. 1 crore to Rs. 2.75 crore to be forfeited instead of matching the challengers' bids which were just above the original bid amount ranging from Rs. 12 lakh to Rs. 60 lakh.

2.7 The CAG report observed that the similarity in the bid/ expected price ratio of these bidders and the unusual withdrawals of the bids allowing the forfeiture of the substantial security deposits without any apparent reason reflected some prior arrangement/ understanding amongst the bidders in the original as well as in the SCM round.

2.8 In addition, the CAG report outlined other incidences that indicated possibility of meeting of mind amongst the bidders. These included common directors in Wave and Nilgiri as well as in Wave and Trikal; and common directors in the SPVs formed by the three original bidders

for the closed mills *i.e.* Wave, Nilgiri and Trikal. Further, in the SCM round, with respect to Namrata and Giriasho which together won bids for 7 mills out of total 11 mills, it was found that Giriasho was the holding company of Namrata and they had common correspondence address, email address and contact number.

2.9 Also, there were common directors in the SPVs of Namrata, Giriasho and S R Buildcon as well as in the SPVs formed by Wave, Trikal, Nilgiri and S R Buildcon. There was also indication of sub-contracting as the Board Resolution dated 04.02.2011 of Trikal, authorized Sri Israrul Hasan Zaidi, the authorized signatory of Namrata to take possession of Bhatni mill purchased by it.

2.10 The demand drafts submitted by the original bidders for purchasing the EOI-cum-RFQ as well as submission of bid security amount had consecutive numbers and were issued by the same bank on the same date. Further, the address as well as the contact number mentioned on the letterhead of Nilgiri was that of PBS Foods which was found to be a related company of Wave.

2.11 On consideration of the above findings of the CAG report, the Commission was of the view that *prima facie* there appeared to be a case of tacit agreement/ understanding/ arrangement amongst the bidders for the sugar mills sold by UPSSCL and UPRCGVNL in violation of the provisions of Section 3(3)(a) and 3(3)(d) of the Act. Accordingly, the matter was referred to the Director General ('DG') for investigation *vide* order dated 10.01.2013 passed under Section 26(1) of the Act. The DG submitted investigation report on 22.01.2015.

3. DG's Investigation:

3.1 The DG during the investigation collected and examined information regarding the policy of the GoUP for the sale of sugar mills to private parties; circulars/ notices/ notifications issued by the GoUP and UPSSCL/ UPRCGVNL; bidding method and process of sale of sugar mills as adopted by the UPSSCL and UPRCGVNL; the advertisement, terms and conditions for the bidders, tender documents, technical and financial bids; the composition of bidders and their shareholding patterns; the memorandum and articles of association, ownership, financial strength, areas of operation of various companies that participated in the bidding process; information from companies who submitted EOI-cum-RFQ but did not participate in the final bidding process, *etc.*

DG's Findings: Sale of operational mills by UPSSCL

3.2 With respect to the sale of operational mills by UPSSCL, the DG noted that EOI-cum-RFQ was invited for eleven sugar mills, out of which sale of ten mills was finalized, in slump sale of assets through competitive bidding process by issuing advertisement on 29.06.2009. The advertisement was issued in different newspapers including The Times of India, The Economic Times, Business Standard, The Financial Express, The Hindu and The Telegraph.

3.3 The terms and conditions for the sale of operational sugar mills were outlined by UPSSCL in its bid document. Under the terms, each applicant was entitled to submit one EOI-cum-RFQ individually by himself and could be a party to more than one application as a member of the consortium which intended to bid for separate mills. Further,

while submitting financial bids each applicant was entitled to submit only one bid per mill and could not be a party to more than one bid for the same mill. It was also stipulated that the applicant shall meet the criteria of net worth of not less than Rs. 20 crores as per the last audited accounts not ended before 31.03.2008 and in case the applicant was awarded bid for more than one mill, then the applicant had to satisfy the cumulative net worth of two units *i.e.* Rs. 40 crores. Similarly, the average turnover was also stipulated which was Rs. 50 crores as per the last three annual audited accounts.

3.4 The DG observed that at the EOI-cum-RFQ stage, ten companies showed interest but only three *i.e.* Wave, PBS Foods and IPL submitted financial bid at the RFP stage. On examination of bids of Wave and PBS Foods, it was observed that both had submitted bids close to 50 percent of the expected price; they did not participate against each other in SCM round and out of five mills in which both submitted bids, PBS Foods always submitted a bid lower than that of Wave except for Chandpur mill where Wave quoted only 1/10th of the expected price showing that it was not a serious contender for this mill.

3.5 The DG also examined the financial statements and other documents submitted by Wave and PBS with the Registrar of Companies ('ROC') for the year 2009-2010. It was observed that these companies had common directors or shareholders. Shri Trilochan Singh designated as director of Wave and its group companies was also a director and shareholder in PBS Foods. Further, Shri Bhupender Singh, Shri Junaid Ahmad and Shri Shishir Rawat who were directors in different Wave group companies were also directors in PBS Foods. Shri Bhupender Singh, Shri Junaid Ahmad and Shri Manmeet Singh (Additional Director in a Wave group company) were also shareholders of PBS

Foods. Examination of the documents filed by Wave before the ROC, Kanpur revealed that Wave had declared PBS Foods as an enterprise where its key management personnel were able to exercise significant influence.

3.6 Apart from above, the DG found documentary evidences as well which established collusion amongst Wave and PBS foods. It was noted that the demand drafts submitted by Wave and PBS for purchasing EOI-cum-RFQ had consecutive serial numbers and were drawn on the same date by debiting the bank account of Wave. Further, the bank guarantees submitted by Wave and PBS were also issued on the same date by the same bank and the covering letter of the bank guarantee had consecutive serial number. Additionally, the address of Wave was noted in the endorsement of the sale of stamp paper needed for the Power of Attorney submitted by both Wave and PBS Foods and also the stamp papers submitted by both the Companies for Performance Guarantee contained the same address.

3.7 Based on above, the DG concluded that both the parties were acting together during the bidding process and had violated the provisions of Section 3(3)(a) and 3(3)(d) of the Act by acting in collusion in the bidding process of sale of operational sugar mills by UPSSCL.

3.8 As regards the third bidder *i.e*. IPL, the DG noted that it had submitted bid for six sugar mills and acquired five of them *i.e.* the mills at Sakoti Tanda, Rohankalan, Siswa Bazar, Jarwal Road and Khadda. All the five mills were purchased at a price above the Expected Price. However, IPL withdrew its bid for the Chandpur mill even though it was the highest bidder. IPL explained that the mill had the highest bid value on account of prime location in urban area; since its interest was

not in infrastructure, it had withdrawn the bid. The DG found no indication of involvement of IPL with other two companies during the bidding process.

3.9 Further, the DG noted that IPL, a company registered under Section 617 of the Companies Act, 1956 had a unique corporate structure/ shareholding pattern. The shareholding of this company comprised of Corporate sector (70.22%), Public sector (20.84%) and Private sector (9.24%) and the composition of its Board comprised 3 members who were permanent by seats *i.e.* Chairman, a nominee of National Cooperative Development Corporation; a nominee of Department of Fertilizers; and Managing Director, a company employee. Other 13 seats were distributed amongst Cooperative Sector (9 seats), Public Sector (3 seats) and Private Sector (1 seat).

3.10 Keeping in view the foregoing shareholding pattern and the composition of management of IPL, the DG observed that no private individual interest was involved in this company as it was a cooperative societies based company. In absence of any evidence against IPL, the DG concluded that IPL had not contravened the provision of Section 3(3)(d) of the Act.

3.11 During the course of investigation, the DG also examined the reasons for non-participation at RFP stage by the seven companies *i.e.* DCM Shriram Industries Ltd., Dwarikesh Sugar Industries Ltd., Laxmipati Balaji Sugar and Distilleries Private Limited, Patel Engineering Ltd, Triveni Engineering and Industries Ltd., SBEC Bioenergy Ltd. and Tikaula Sugar Mills Limited who had shown initial interest but did not submit financial bid. The reasons given by these companies included their decision not to pursue the matter, high reserve price, difficulty in garnering and mobilizing financial resources and pending court cases

in relation to sugar mills. The DG noted that no adverse inference could be drawn from these reasons against the seven companies. Thus, these parties were not found to be in contravention of the provisions of Section 3(3)(d) of the Act.

DG's Findings: Sale of eleven closed mills of UPRCGVNL

3.12 The DG found that in June 2010 UPRCGVNL had invited EOI-cum-RFQ for fourteen closed mills (thirteen mills of UPRCGVNL and one mill of Chhata Sugar Company Ltd.) *via* 'Slump Sale of Assets' on 'as is where is basis'. Subsequently, EOI-cum-RFQ for Rampur mill was also invited in August 2010. As per the conditions in EOI-cum-RFQ, UPRCGVNL was to transfer all the assets and certain liabilities of the mill as per the balance sheet of the mill to the successful bidder who was expected to purchase the mill. Each applicant was entitled to submit one EOI-cum-RFQ by itself or through consortium. Otherwise the applicant/ the consortium(s) of which it was a member was liable to be disqualified. As per the final eligibility criteria approved by Core Group of Secretaries on Disinvestment ('CGD') on 31.08.2010, the applicant was required to have a minimum net worth of Rs. 2 crore and could submit bids for maximum five mills. They had to fulfil cumulative eligibility criteria in case of purchase of more than one mill. 10 percent of Expected Price subject to minimum of Rs. 1 crore per mill and Rs. 1.5 crore for Hardoi mill, Rs. 4 crore for Chatta mill and Rs. 10 crore for Rampur mill was to be submitted as bid security. UPRCGVNL received EOI-cum-RFQ for fifteen closed mills.

3.13 Although fifteen closed mills were put for sale through bid, but later on in November 2011 the sale process for the four mills *i.e.* Burdwal, Nawabganj, Rampur and Chhata mills, was cancelled by the

Government. For the purchase of the rest eleven closed mills, nine applicants had submitted EOI-cum-RFQ. All the nine applicants were short listed and RFP were issued to them for submission of their financial bid. However, only three of them *i.e.* Wave, Nilgiri and Trikal submitted financial bid.

3.14 The DG examined reasons for non-submission of financial bids given by six entities who had submitted their EOI-cum-RFQ for the closed mills of UPRCGVNL *i.e.* Anand Triplex Board Limited, Meerut; Gautam Realtors Private Limited, Varanasi; Shree Siddharth Ispat Private Limited, Noida; SR Buildcon Private Limited, Delhi; Kapil Kumar Tyagi, Greater Noida and Shree Radhey Industries Private Limited, Delhi. While some entities cited reasons such as inability to qualify for the bids, inability to arrange funds for submission of financial bids, *etc*., others either gave no reason for not submitting the bid or gave no reply at all.

3.15 On examination of bids received the DG observed that one bid was received for each of the eleven mills divided among the three bidders. Since only one bidder had bid for each mill, all these mills were put to SCM. The DG noted that in SCM round also one bid was received for each of the mills. The original bidders initially accepted challenge bids for almost all mills but later withdrew in all except three mills. Each original bidder accepted challenge bid for one mill each as follows - Nilgiri accepted for Baitalpur mill for which challenge bid was made by IB Trading Pvt. Ltd.; Trikal accepted for Bhatni mill for which challenge bid was made by Shree Radhey Intermediaries and Wave accepted for Shahganj mill for which challenge bid was made by IB Commercial. Out of remaining eight mills, three mills were sold to Giriasho, four to Namrata and one to SR Buildcon which were the bidders for these mills in the SCM round.

3.16 With respect to withdrawal of bids, it was observed that Nilgiri had applied for four mills *i.e.* Baitalpur, Deoria, Barabanki and Hardoi; but except Baitalpur it withdrew from other mills as they were not considered up to the mark and allowed UPRCGVNL to forfeit the security deposits for these mills. The DG found that Baitalpur mill was purchased by 100% subsidiary of Nilgiri *i.e.* Dynamic Sugar Pvt. Ltd. which had taken non-interest bearing unsecured loan from V.K. Healthsolutions Pvt. Ltd. ('V.K. Healthsolutions') for financing the purchase of Baitalpur mill. Subsequently, entire equity was sold by Nilgiri to Canyon Financial Services Ltd. ('Canyon') at the end of March, 2011.

3.17 Similarly, it was seen that Trikal purchased Bhatni mill. However, it had withdrawn from the other two tenders for Chittauni and Ghughli mills as it considered that the contingent liability against court cases in case of these mills in future would be more than bid security. Therefore, it allowed the bid security amount to be forfeited by UPRCGVNL. Since in terms of the RFP, the bidder company was allowed to create a Special Purpose Vehicle ('SPV'), Trikal created Honeywell Sugar Pvt. Ltd., a 100% subsidiary as an SPV which also executed the slump sale agreement. It was found that the bid price for the Bhatni mill including registry charges were financed through an unsecured loan from V.K. Healthsolutions and later on, in March, 2011, 100% equity shares of the SPV were sold to Canyon.

3.18 The DG found that initially Wave had submitted bid for seven closed mills *i.e.* Bareilly, Shahganj, Ramkola, Laxmiganj, Nawabganj, Rampur and Chhata mills. Later on, when the process for sale of four sugar mills was closed the bid security amount paid by Wave was

refunded in respect of those mills. Wave withdrew the bids for Bareilly and Ramkola mills as these were not considered profitable by its management and, as such, the bid security was forfeited by the UPRCGVNL. The Shahganj mill was purchased by Wave through its SPV - Mallow Infratech Pvt. Ltd., a 100% subsidiary company of Wave. The entire SCM bid price for purchase of mill was paid through unsecured loan from V.K. Healthsolutions. Subsequently, 100% equity shares of this subsidiary were sold in March, 2011 to Canyon.

3.19 In addition to the fact that Wave, Nilgiri and Trikal had each taken loan from the same company *i.e.* V.K. Healthsolutions and also sold the 100% shares of their respective SPVs to the same company *i.e.* Canyon, the DG found linkages amongst the three original bidding companies in terms of their management and shareholding. It was observed that there was a common shareholder/ director in Wave and Nilgiri *i.e.* Shri Avej Ahmad and also a common director in Wave and Trikal *i.e.* Shri Lalit Kailash Kapoor. It was also found that the demand drafts for the initial EOI-cum-RFQ submitted by Wave, Nilgiri and Trikal bore consecutive numbers and were taken from bank account of Wave. Same was the case with the demand drafts submitted for bid security by these companies.

3.20 Apart from linkage amongst original bidder companies, the DG also found relationship amongst the challenger companies based on their shareholding pattern and list of directors. The DG noted that though every bidder was required to submit its shareholding pattern as per the terms and conditions of the EOI-cum-RFQ, however, this requirement was not fulfilled by Namrata and Giriasho. The office of DG, therefore, collected this information from the ROC, Delhi and found that as per the annual return filed by Namrata for the year 2010,

Giriasho and Canyon held 86.42% and 13.58% shareholding respectively in Namrata. Thus, Namrata was found to be a fully controlled subsidiary of Giriasho. Further, on perusal of the bid documents and correspondence, it was found that Giriasho and Namrata had common address, phone numbers and email accounts.

3.21 Furthermore, the DG found that the annual return filed by Giriasho in 2009 and the documents furnished by Canyon in ROC for the period 2008-09 showed that Shri Mohd. Wazid Ali who was a shareholder in Giriasho was appointed as director of Canyon. With respect to Canyon, the DG found that it had vested interest in Giriasho as well as in Namrata through holding of more than 5% equity shares. The DG also gathered that the three companies *i.e.* Giriasho, Namrata and Canyon had common registered office in Sarita Vihar. It was also found that VK Healthsolutions from which loan had been obtained and Canyon to which subsequently the SPVs were sold by Nilgiri, Trikal and Wave were a group company of Giriasho and Namrata against whom the acceptance of bids were withdrawn by Nilgiri, Trikal and Wave.

3.22 The DG further observed that Shri Israrul Hassan Zaidi who was an authorised signatory of Namrata, was also the person authorized by Trikal *vide* board resolution dated 04.02.2011 to receive the possession of Bhatni mill from UPRGCVNL which was purchased by it in SCM round.

3.23 As per the DG report, bidding companies as well as the SPVs formed by the bidding companies had several common directors. It was observed that Shri Laique Ahmad Khan who was a director in various group companies of Giriasho was a director in various SPVs that were used as a conduit to acquire the mills purchased by various group

companies of Giriasho. The SPVs included Mallow Infratech P Ltd. of Wave (Shahganj), Dynamic Sugar P. Ltd. of Nilgiri (Baitalpur), Honeywell Sugar P Ltd. of Trikal (Bhatni), Adarsh Sugar Solutions P Ltd. of Namrata (Bareilly), Eikon Sugar Mills P Ltd. of Namrata (Deoria), Agile Sugar P Ltd. of Namrata (Hardoi) and Ablaze Sugar Mills P Ltd. of Namrata (Laxmiganj). Shri Laique Ahmad Khan was also a director in Canyon, a group company which acquired Bhatni, Shahganj and Baitalpur sugar mills by way of transfer of equity shares of SPVs from the original purchasers. He was later on appointed as a director in these SPVs.

3.24 The DG further observed that Shri Rajinder Singh was the common director in all the SPVs that were acquired by Canyon namely, Dynamic Sugar P. Ltd. of Nilgiri (Baitalpur), Honeywell Sugar Pvt. Ltd. of Trikal (Bhatni) and Mallow Infratech P Ltd. of Wave (Shahganj). Further, Ms. Shashi Sharma, Ms.Sujata Khandelia and Shri Pawan Kumar Pawan were common directors in various SPVs through which the sugar mills were acquired by Giriasho on its own or through its group entities.

3.25 Based on above, the DG observed that clearly there were linkages between the original bidders *i.e.* Nilgiri, Trikal and Wave and the challenger bidders *i.e.* Giriasho and Namrata. Further, SR Buildcon was also found to be acting in concert with the companies of Wave group and Giriasho Group. The DG observed that the documents obtained during investigation from the Ministry of Corporate Affairs showed that there was a common Director (Ms. Shashi Sharma) in the SPV formed by SR Buildcon *i.e.* Zircon Sugar Solution Private Limited and SPVs formed by Giriasho group. From bidding pattern, it was observed that Trikal was the original bidder for Ghughli mill with

the bid amount of Rs. 3.51 crores. In SCM round, SR Buildcon was the only challenger with the bid amount of Rs. 3.71 crores. The DG observed that this amount was just Rs. 20 lakhs above the original bid price but Trikal did not match the amount and allowed the mill to go to SR Buildcon; this clearly established some understanding between SR Buildcon with Wave Group and Giriasho Group.

3.26 Thus, based on the foregoing, the DG concluded that there was an understanding among the bidders for all the sugar mills put for sale by UPRCGVNL and they acted in a collusive manner to grab all the sugar mills at much lower price without any real competition. There was found to be a clear violation of Section 3(3)(a) and 3(3)(d) of the Competition Act, 2002 by Wave, Nilgiri, Trikal, Giriasho, Namrata and SR Buildcon as during the process of sale the prices of the mills were found to be directly/indirectly decided amongst the bidders by not bidding against each other which resulted in a collusive bidding.

4. Consideration of the investigation report of the DG:

4.1 The Commission considered the investigation report of the DG on 10.02.2015. It was observed that during the investigation, PBS Foods had filed Writ Petition (Civil) No. 3134/2013 before the Hon'ble High Court of Delhi against the order of the Commission passed under Section 26(1) of the Act wherein the Hon'ble High Court in its interim order dated 14.05.2013 had directed that "*it is made clear that while the petitioner may give information, as called upon the DG, no final orders will be passed*". It was noted that the said order was still in operation as on that date.

4.2 Subsequently, the Commission considered matter again on 12.05.2015 and decided to forward the investigation report of the DG to Wave, PBS Foods, Nilgiri, Trikal, Giriasho, Namrata and SR Buildcon for filing their objections/ suggestions and also to furnish their financial statements for the last three financial years and appear for hearing. All the parties were heard on 28.07.2015. However, the Commission decided to pass an appropriate order in due course as and when the writ petition was decided or the interim orders were modified/ vacated by the Hon'ble High Court of Delhi.

4.3 An order was passed by the Hon'ble High Court of Delhi on 23.02.2016 in three civil writ petitions pertaining to the matter *i.e.* WP(C) 3134/2013 (*PBS Foods Private Limited & Anr. v CCI & Anr.*), WP(C) 161/2014 (*Giriasho Company Ltd. v CCI & Anr.*) and WP(C)7080/2015 & CM Appl. 13002/2015 (*S.R. Buildcon Pvt. Ltd. v CCI & Anr.*). The Commission considered the order in its ordinary meeting held on 16.03.2016.

4.4 It was noted that the Hon'ble High Court of Delhi in its order had *inter* alia directed as follows:

> "*.... petitioners are given liberty to file additional affidavits within six weeks raising all factual contentions as well as legal submissions including the plea of jurisdiction. The matter is directed to be listed before the Commission for directions on 18.04.2016.*"

4.5 Accordingly, the matter was considered on 16.03.2016 and PBS Foods, Wave, Nilgiri, Trikal, Giriasho, Namrata and SR Buildcon were given liberty to file additional affidavits, if any, and appear before the Commission on 18.04.2016. All parties filed their additional affidavits

by 18.04.2016. The Commission considered the matter on 18.04.2016 and allowed the request for further time made by some of the parties. The parties were heard afresh on two consecutive days *i.e.* 26.05.2016 and 27.05.2016.

4.6 The objections/ suggestions by PBS Foods, Wave, Nilgiri, Trikal, Giriasho, Namrata and SR Buildcon to the investigation report of the DG and their legal submissions including those on the issue of jurisdiction are summarised below.

5. Objections/ suggestions to the investigation report of the DG:

I. Submissions of Wave

5.1 Wave filed submissions with respect to legal issues as well as findings of the DG regarding the bidding processes for both - the sale of operating sugar mills by UPSSCL and sale of closed sugar mills by UPRCGVNL.

Submissions on the issue of Jurisdiction:

5.2 On the issue of jurisdiction, Wave has pointed out that the sale of operating sugar mills by UPSSCL was on a 'slump sale' and 'going concern' basis as per the slump sale agreement in respect of each unit. The consideration amount was the lumpsum consideration for slump sale of the unit as a whole on 'as is where is basis' and no separate valuations were ascribed to individual assets comprised in the units. Similarly, in case of sale of closed mills by UPRCGVNL also there was slump sale of mills on the basis of 'sale of entire assets' on 'as is where is' basis with all rights and liabilities.

5.3 Wave has referred to provisions in Section 3(3) of the Act read with the definition of 'Goods' under Section 2(i) of the Act and has contended that the power to inquire into the allegations of bid rigging under Section 3 of the Act is confined to the 'Goods' and that the purchase of operational and closed sugar mills on 'as is where basis' through a 'Slump Sale Agreement' is not a sale or purchase of 'Goods' as defined under the Sale of Goods Act, 1930. It is also not 'sale of any movable property or property severed from the land of closed mills' so as to attract Section 3 of the Act. Further, the term 'cartel' in Section 2(c) of the Act is also used in relation to the market of goods and services only. Thus, the whole bidding process is alleged to be beyond the purview of Section 3 of the Act and, *ex-facie*, beyond the statutory mandate or jurisdiction of the Commission.

5.4 In order to substantiate the above contention that slump sale of unit/ mill is not sale of 'goods' under the Act, Wave has relied on the following judgements - *Coromandel Fertilizers Limited v. State of A.P* [112 STC 1]; *Deputy Commissioner (C.T) v. K. Behanan Thomas* (1977[39] STC Madras; *The Deputy Commissioner of Sales v. Dat Pathe* (1985 [59] STC 374 Kerala, wherein the courts *inter alia* held that where there is sale of entire business undertaking or a branch of the business undertaking as a going concern the sale of movables involved in such a transaction cannot be regarded as sale in the course of business nor can we treat the seller as having been engaged in any business activity in disposing of the entire undertaking including movable, immovable and all other properties. The sale proceeds of such a transaction cannot be said to constitute turnover for the sale of goods in course of business.

5.5 Another argument by Wave is that the purchase of 'operating sugar mills' or 'closed sugar mills' amounts to 'acquisition of assets' as per

Section 2(a) of the Act which cannot be classified as sale of goods or movable property. Further, the acquisition of assets that meet the parameters provided in Section 5 of the Act can be subject matter of inquiry only under Section 6 read with Section 20 of the Act. In this case, even that is not possible as the entire acquisition of sugar mills by Wave was completed prior to 31.05.2011 *i.e.* before the relevant provisions of the Act were enforced. Moreover, the proviso to Section 20(1) of the Act prohibits initiation of inquiry after the expiry of one year from the date on which the combination has taken effect.

5.6 In addition, Wave has submitted that Section 3(3) of the Act requires that for bid rigging there must be an agreement between enterprises or persons who are engaged in identical or similar production or trading of goods or provision of services. Whereas in this case, the requirement is not fulfilled. The Memorandum of Association of the bidders clearly shows that the bidders who submitted RFP for operating sugar mills and closed sugar mills were not engaged in production or trading of identical or similar goods or provision of services. Thus, *a priori* the jurisdictional facts to invoke Section 3(3)(a) and 3(3)(d) of the Act are absent in the present case and the allegation of bid rigging by cartelisation is not maintainable under the Act.

5.7 Further, Wave has also contended the Commission did not direct nor could have directed investigation into the issue whether the cartelisation in the 'market of sugar mills' was aimed to effect *inter alia* the 'production, supply, distribution, storage, acquisition or control of goods' or 'trade of goods' in the upstream market of cane or downstream market of sugar. It is argued that the 'market of sugar mills' is a clustered market as a sugar mill produces not only sugar but also other products such as molasses, bagasse etc. The 'market of sugar

mills' is not divisible from the consumer's point of view and a clustered market is not covered under Section 3 of the Act.

Submissions regarding finding of bid rigging:

5.8 In response to the findings of the DG, Wave has submitted that the allegation of agreement or arrangement amongst bidders has to be examined in light of the bid process. It is averred that prior to the submission of bid, Expected Price was disclosed to the prospective bidders and a bid less than 50 percent of the Expected Price was not admissible. Since SCM was introduced, the process of bidding consisted of two rounds. Under the SCM method, the highest financial bid in the first round was publicly disclosed by UPSSCL and UPRCGVNL after issuing a public notice inviting challenge in the nature of fresh bid. Wave has argued that since other competitors knew the information of highest financial bid, therefore, they could have easily adapted their conduct to the existing conduct of the highest bidder of the first round. Thus, the allegation of bid rigging stands refuted.

5.9 In addition, explaining the reason for quoting near to 50 percent of the Expected Price, Wave has submitted that the Hon'ble High Court of Allahabad in the judgement dated 01.04.2010 in Civil Misc. Writ Petition No. 39850 of 2009 (*Chini Mill Karmchari Sangh v. State of U.P. and others*) had effectively stopped the purchasers from closing the sugar mills and changing the use of land. Further, in the interim order passed on 28.5.2010 in Special Leave Petition (Civil) No.16362 of 2010, which was preferred against the aforesaid order before the Hon'ble Supreme Court by Shri Rajiv Kumar Mishra, the very transfer of title of assets of sugar mills by UPSSCL to the purchaser was made subject to the final adjudication of the appeal. Thus, from the point of

view of the prospective purchaser, such a condition was very onerous amounting to a distress sale of litigious property. Thus, in respect of most of the units, Wave decided to bid only near to 50% of the Expected Price.

5.10 Wave has contended that there is no probative evidence to suggest that the conduct of Wave had the effect of creation of barriers to new entrants in the market or driving existing competitors out of market or foreclosure of competition by hindering entry into the market or exclusionary behavior. This is further strengthened by the Affidavit by the Chief Secretary GoUP before the Hon'ble High Court of Allahabad which states that no complaint had been received from any company stating that it had been prevented from participation in bidding process.

Submissions regarding bid rigging in purchase of operational mills

5.11 With respect to sale of operational mills by UPSSCL, Wave has submitted that in the first pre-bid meeting held on 10.07.2009 for operating mills, at least 60 participants had attended the meeting and 10 of them submitted EOI-cum-RFQ, though ultimately only Wave, PBS Foods and IPL participated in the bid. While IPL has been exonerated from the charge of being part of the cartel, the DG has made a finding of contravention against Wave and PBS foods. However, there is no evidence on record to suggest that Wave had any knowledge about the bid submitted by PBS Foods and other competitors. Moreover, if there is no allegation of collusion amongst Wave and IPL in case of Jarwal and Siswa Bazar mills where IPL was the H-1 bidder and Wave was H-2 bidder (and Wave bid just above 50% of the Expected Price), then how the other bids (where also Wave bid similarly) can be considered as rigged bids.

5.12 Also, Wave has submitted that a perusal of the prices quoted by Wave and PBS Foods shows that this is not a case of identical or similar pricing. There was a huge difference in the bids ranging from Rs. 30 lakhs to Rs. 81 crores made by the two companies with respect to these five units. The figures quoted by them are not in consonance with the allegation of cartelisation or concert amongst them. Further, the bids submitted by PBS Foods for Bulandshahr, Bijnor and Saharanpur mills being below 50 percent of the Expected Price amount to invalid/ no bids and cannot be treated as cover/ courtesy bids. In this regard, Wave has cited *MDD Medical Systems Indian Private limited v. CCI & ors.* (2013 COMPAT 30) where two out of six bidders had submitted technically deficient bids and the Hon'ble Competition Appellate Tribunal had observed that where there are other eligible competitors, submission of technically deficient bids does not amount to evidence in favour of cartelization.

5.13 With respect to the finding that Wave and PBS Foods did not participate against each other in SCM, Wave has submitted that the DG while making this finding has ignored the fact that the net-worth of PBS Foods was much less than Rs. 40 crores and it had already been declared successful bidder in respect of one of the costliest mill *i.e.* Chandpur, after IPL chose to withdraw. Moreover, the business decision of the companies not to participate in the SCM is irrelevant because the bid price of Wave was in public domain and it was open to challenge by other competitors provided they qualified in terms of eligibility and other applicable conditions. Thus, the conduct of PBS Foods not to participate or challenge the highest financial bid under SCM was not anti-competitive.

5.14 In view of the above, Wave has submitted that the allegations of collusion between Wave and PBS Foods during the bidding of operational unit are false, baseless and misconceived.

5.15 With respect to the consecutive serial numbers on demand drafts of Wave and PBS foods, Wave has explained that PBS Foods was a customer of Wave and that it had purchased one demand draft for PBS Foods on request. However, Rs. 50,000/- was subsequently realized from PBS. It is submitted that this was a mere innocuous action of a clerk of PBS Foods and cannot lead to inference of sharing of information. Further, it is highlighted that there was a gap of almost one year between the purchase of demand draft (July 2009) and invitation of financial bids (June 2010) and during this time certain developments took place which had the effect on the valuation of the property. Given these facts, it is argued that the impugned evidence is neither relevant nor has any consequence under law.

5.16 On the issue of consecutive serial numbers on covering letters of Performance Bank Guarantee ('PBG'), Wave has submitted that the last date for submission of PBG was 28.08.2010 and Wave and PBS approached the same bank but independently. Wave has stated that, on inquiry from its bank, it found that only two PBGs were issued by the bank on the day it got its PBG issued, one in its favour and the other in favour of PBS Foods and hence the consecutive numbers. It is pointed out that PBG of only Wave was issued from its bank account.

5.17 In relation to the fact that same address was mentioned on the stamp paper of Wave and PBS Foods for PBGs and power of attorney, Wave has submitted that clerks of both the companies had gone to one stamp vendor and the address furnished by Wave's clerk was inadvertently written by the vendor on the stamp paper of PBS Foods also.

5.18 Referring to the allegation of common directors and shareholders in Wave and PBS Foods, Wave has stated that the promoters of these companies are different and there was no shareholding of directors of PBS Foods in Wave or in any of the companies identified by DG as Group Companies or by the directors of Wave in PBS Foods. Also, there was no cross-shareholding between these companies. Shri Bhupender Singh, Shri Junaid Ahmad and Shri Shishir Rawat, who were directors of PBS Foods (out of 11 members of the Board), held directorship in companies identified by DG as Group companies of Wave but had no statutory right or obligation to sit in the board meetings of Wave. Further, in absence of any shareholding in Wave or any related company they could not participate in Annual General Meeting of Wave by virtue of merely being directors in related companies.

5.19 As regards Shri Trilochan Singh who was found to be a common director in both the companies with shareholding in PBS foods but not in Wave, it has been submitted that the minutes of the board meetings of Wave show that Shri Trilochan Singh was not involved in the process of fixation of bid by Wave. Further, the issue of common directorship is irrelevant and of no consequence since all issues concerning the bid process of eleven operating mills were delegated to high level officers *vide* Board Resolution dated 07.07.2009 and no discussion regarding the bid price took place in board meetings. Therefore, there was no question of sharing of information related to pricing with Shri Trilochan Singh or with any other director.

5.20 Further, as regards the reliance placed by the DG upon the submission of Wave in note appended to the balance sheet filed with the ROC which stipulates 'significant influence of wave over PBS', Wave has

submitted that the DG has erroneously relied upon the same. The DG did not consider that the stipulation pertained to the financial year 2009-2010 ending on 31.03.2010 and that the pre-bid meeting was held in the month of June 2010. Thus, the note is irrelevant for drawing any inference on the issue of meeting of minds or exchange of information between Wave and PBS Foods on bid rigging. Further, the note was factually incorrect and was prepared on mistaken assumption of facts.

Submissions regarding bid rigging in purchase of closed mills

5.21 With respect to sale of closed mills by UPSSCL, Wave has submitted that EOI-cum-RFQs were invited for the sale of 12 closed sugar mills of UPRCGVNL through a public notice in the national newspapers. Nine applicants submitted EOI-cum-RFQ for the closed mills although ultimately only Wave, Trikal, Nilgiri and Shri Radhey submitted the financial bid. Shree Radhey infact submitted the financial bid for Burdwal unit and also participated in SCM round. However, no finding was made by the DG against Shree Radhey. Wave has submitted that the finding of bid rigging by the DG against Wave, Trikal and Nilgiri in absence of finding against Shree Radhey is untenable.

5.22 With respect to consecutive numbers of demand drafts submitted by Wave, Trikal and Nilgiri, Wave has submitted that Trikal and Nilgiri were both established customers of Wave and both requested Wave to receive tenders for the closed sugar mills. Therefore, an official of Wave simply arranged the demand drafts from the accounts of Wave for the two customers, the amount for which was refunded by them in due course of business transaction. It has been argued that the fair acquaintance of Wave with the two enterprises does not mean sharing of information between them. Further, the demand drafts bearing nos.

19002, 19003 and 19063 were not prepared from accounts of Wave and DG has wrongly reported so in the report.

5.23 As regards the issue of unusual withdrawal of bids pointed out in the DG report, Wave has submitted that a close analysis of the last paragraph of the SCM process would show that if H1 bidder of the first round matched the bid of challenger, the bid of challenger would not survive and at any subsequent date, refusal/ withdrawal by such H1 bidder would entail forfeiture of his bid security. There was no provision in the SCM that in such circumstances the bid of challenger would stand revived. Therefore, if UPRCGVNL decided to approach such challenger, then the sale did not constitute sale through the bidding process and H1 bidder was not part of such sale.

5.24 Wave has submitted that in respect of the Bareilly mill (for which acceptance was subsequently withdrawn by Wave), Namrata was the highest bidder. The highest bid made by Namrata was matched by Wave. Wave has argued that if there had been cartel or meeting of minds between the two, it would not have matched the bid and unit would have seamlessly gone to Namrata. In fact, the act of matching the highest bid by Wave revealed that there was no collusion between the two companies.

5.25 Further, Wave has stated that since Namrata, Giriasho, VK Healthsolutions and Canyon were found to be related to each other by way of their shareholding, the competitive bidding by Wave against Namrata also shows that there was no meeting of mind between these companies on one hand and Wave on the other hand. Therefore, with respect to transactions scrutinized in SPV mode transfer by the DG, no transaction was related to bid process and was at best a business transaction between two traders after completion of process of bidding.

5.26 In respect of Shahganj Unit, for which Wave did not withdraw its bid, Wave has stated that the subsequent funding of the unit from VK Healthsolutions had nothing to do with the bid process as there was positive evidence of no meeting of mind between Wave and Namrata *etc.* on the date of submission of bid as stated above.

5.27 Further, Wave has submitted that the issue of who was inducted subsequently as director in the SPV was irrelevant for the issue of bid rigging or collusive bidding. It is explained that in December 2010 Wave purchased all shares of Mallow Infratech Pvt. Ltd., which was formed as SPV of Wave, from Agarwals who had formed the company in June 2010. At the time of introduction of this company as SPV to UPRCGVNL, Shri Laique Ahmad Khan was not a director. It was only at the time of transfer of the SPV to VK Healthsolutions on 26.03.2011 that he was inducted as Director. Therefore, his name in the SPV had nothing to do with bidding and matching of bid by Wave. The induction of Rajendra Singh in Mallow Infratech Pvt. Ltd. was also in the exact similar manner.

II. **Submissions of PBS Foods**

Submission on the issue of Jurisdiction

5.28 At the outset, PBS Foods has argued that the present inquiry is beyond the scope of Section 3 of the Act. It is pointed out that under Section 3(3) of the Act, the jurisdiction of CCI is limited to agreements for production, supply, distribution, storage, acquisition or control of 'goods' or provisions of services. Whereas the underlying transaction in the present case involves the acquisition of a sugar mill as a going

concern by the selected bidder on a slump sale basis along with land, buildings, plant and machinery and other immovable, movable and intangible assets of the mill. The sale consideration is also a lumpsum consideration for the unit as a whole and no separate valuation has been ascribed to the individual assets comprised in the unit/ mill. It is submitted that in view of characterization of the unit/ mill as a going concern, the sale of unit/ mill cannot be construed to be sale of goods. Further, it cannot be contended that the State of Uttar Pradesh or its instrumentality were providing any service while auctioning off its sugar mills. The scope of inquiry in the instant case is, therefore, limited to agreement in respect of rigging bids for acquisition of sugar mills. In terms of the provisions of the Act, the object of bid rigging agreement must be 'good'; if it is not good then the remedy may lie elsewhere but not under the Act.

5.29 Additionally, PBS Foods has contended that for 'bid rigging' the explanation to Section 3(3) of the Act provides that, there must be an agreement between enterprises or persons who are engaged in identical or similar production or trading of goods or provision of services. However, this requirement is not satisfied in the present case, as the entities that are alleged to have engaged in bid rigging are not engaged in production or trading of identical or similar goods.

5.30 Further, it is submitted that the proceedings in the instant case ought to be terminated on account of laches. In the instant case, the inquiry commenced on 10.01.2013 in respect of a bid held on 03.06.2010. It is submitted that even though no limitation period has been prescribed for Section 3 of the Act, the limitation period of 1 year is provided for inquiry into combinations. Accordingly, the belated inquiries must not be perused.

Submission with respect to allegation of bid rigging – operational mills

5.31 With respect to the finding of common directors/ shareholding of PBS Foods with Wave, it is submitted that the evidence on record shows that there was, in fact, no common shareholding between Wave and PBS Foods. There was only one person who was a director on the board of both Wave and PBS. This person had no shareholding in Wave and negligible shareholding in PBS Foods. Other persons on the board of PBS Foods were, contrary to allegations, not on the Board of Wave but on the board of companies related to Wave. Further, as regards the finding that Wave exercised significant influence on PBS Foods, Wave has already clarified that this submission was made erroneously and a corrigendum was filed with the relevant authorities which has been ignored by the DG.

5.32 As regards other evidence cited by DG as indicators of collusion, PBS Foods has submitted that the coincidence of same stamp vendor (for purchase of stamp papers) and same bank (for issue of demand drafts) being used by Wave and PBS Foods was because the accounts department of PBS had taken help from the accounts department of Wave and its lower level employees for purchase of stamp papers and demand drafts. Further, there were consecutive numbers on letters issuing bank guarantees as both PBS Foods and Wave had accounts in the same nationalised bank at Delhi and the two bank guarantees were issued by the branch on the same day.

5.33 It is further submitted that it was not possible for PBS Foods to rig the bid in the present case unless it conspired with the GoUP, eight other pre-qualified bidders including IPL and other companies who would have seen the advertisement, including the 60 entities who participated

in the pre-bid conference. However, all these entities have been given clean chit. Thus, any alleged cartel or bid rigging agreement or even its attempt was impossible to achieve by Wave and PBS Foods amongst themselves where there were so many other participants. Further, the use of SCM by the GoUP made it impossible and futile to rig or attempt to rig the bid.

5.34 It is argued that under SCM, the highest original bidder was precluded from participation. Hence, the DG's finding that Wave did not bid in the SCM round is actually a misconstruction of the SCM process. Further, DG has not appreciated the fact that PBS did not proceed with the SCM as, having acquired Chandpur mill, it was ineligible to acquire another mill on account of net worth restriction as stipulated in the transaction document.

5.35 PBS Foods has pointed out that the Chandpur mill was allotted to PBS Foods only because IPL withdrew from the bid. If IPL has been given a clean chit and its reason for withdrawal from bid is accepted as being reasonable and believable, then the award of mill to PBS Foods is legitimate and, therefore, PBS Foods must also be given a clean chit.

5.36 Lastly, even if it is assumed there was any bid rigging in obtaining these mills as alleged, there can be no appreciable adverse effect on competition in the present case as the overall share of the eleven operating sugar mills in terms of production capacity as well as actual production is insignificant and miniscule.

III. Submissions of Nilgiri

5.37 The primary objection raised by Nilgiri is that in the given facts and existing jurisprudence the provisions of Section 3 of the Act would not

be applicable. 'Goods' as defined under the Act cover movable property. So on plain reading, the sale of sugar mills under a 'slump sale' would not be covered within the definition of the term 'Goods'.

5.38 It is submitted that though the term 'slump sale' has not been defined under the Competition Act or the Companies Act, the issue whether slump sale constitutes sale of goods has been considered in various judicial pronouncements in connection with sales tax and courts have held that slump sale does not constitute 'Goods' as defined under Sales of Goods Act, 1930. The cases cited in this connection are *Sri Ram Sahai v Commissioner of Sales Tax (1963)14 STCd 275 (All)*; *Deputy Commissioner (C. T.) Coimbatore v K. Behanan Thomas (1977) 39 STC 325 (Mad)* and *Coromandel Ferilisers Limited v State of A.P. 112 STC 1 (A.P.).*

5.39 In addition, it is argued that even if the entire sugar mill is considered a commodity/ goods then also it is not a marketable commodity as there is no market for the same. In order for there to be an adverse effect on competition in the market, the item has to be a marketable item. Sick units are not an item for which there exists a market. Thus, it is unfair to hold a company in default under Section 3 of the Act under these circumstances.

5.40 Further, it is submitted that the slump sale of closed sugar mill in this case is not a mere sale of assets but also license to establish and run a sugar mill with the condition that the underlying asset *i.e.* the land, which cannot be sold. Thus, in effect the sale of closed sugar mill is sale of 'assets of enterprise' as per Section 2(a)(i) of the Act to which the provisions of Section 5 are applicable. But since the assets and turnover in this case do not meet the threshold limits prescribed in Section 5 of the Act, even that provision cannot be applied.

5.41 Another contention by Nilgiri is that the applicability of Section 3(3) of the Act is when the enterprises are engaged in identical or similar trade. However, in the present case all the entities are engaged in different trades and, therefore, the provisions of Section 3(3)(a) and 3(3)(d) cannot be applied. While Wave is engaged in the business of sugar and liquor; Nilgiri is in packed food industry, Trikal is in food processing industry, Giriasho is in financial services, Namrata is in trading of goods and SR Buildcon is in building industry.

5.42 Further, Nilgiri has submitted that the allegation that there was an agreement not to compete was baseless. It is submitted that initially a large number of companies who were not inter-related companies had expressed interest but finally the financial bid was made by only five in the first round. Others parties left the process and did not participate in the bid as they found that the mills were not viable from economic point of view. It is argued that from this it cannot be inferred that there was manipulation or bid rigging to avoid competition.

5.43 As regards withdrawal of bids at the stage of SCM round, Nilgiri has submitted that the company withdrew its bid due to the underlying risk and liabilities and suffered a loss of Rs. 6.52 crores of security in order to avoid the greater risk of acquiring the mills at Deoria, Barabanki and Hardoi. The bid for Baitalpur was accepted and first instalment was paid by the company and a SPV named Dynamic Sugar Pvt. Ltd. was established but the same was later sold to Canyon. Contrary to the observation in the DG report, Nilgiri never bid for the Laxmiganj mill and had infact bid for Hardoi mill which is not mentioned.

5.44 With reference to evidence of consecutively numbered demand drafts purchased from the same bank account by Wave, Nilgiri and Trikal, it

is submitted that Wave and Nilgiri had shared information for purposes of purchase of demand draft for buying tender document. However, this fact does not in any way demonstrate that the company had an understanding with other bidders to eliminate competition. Mere sharing of information without reaching any agreement or any concerted action on increasing the prices or limiting production amongst the competitors is not per se illegal.

5.45 Further, Nilgiri has submitted that Shri Laique Ahmad Khan and Shri Rajender Singh were never directors in the SPV formed by Nilgiri and that they may have been introduced by new management after they off-loaded their equity at the end of March 2011. As regards the common address and common directors in Nilgiri and PBS Foods, Nilgiri submitted that this pertained to the period 2008-2009, which was prior to the relevant period of the bids *i.e.* during July 2010 to October 2010.

5.46 In view of the foregoing, Nilgiri has contended that the allegation of meeting of minds, understanding or cartel amongst the bidders is wholly unsubstantiated. It has, therefore, prayed that the proceedings deserve to be dropped.

IV. Submissions of Trikal:

5.47 Like Wave and Nilgiri, Trikal has also submitted that the power of the Commission to make inquiry into the allegations of bid rigging under Section 3 of the Act is confined to cartel in respect of sale of 'Goods' as defined in Section 2(i) of the Act. However, the purchase of sugar mills through a slump sale agreement is not a sale or purchase of 'Goods' as defined under the Sale of Goods act, 1930. It is simply 'acquisition of assets' under Section 2(a) of the Act which cannot be classified as sale of any movable property. It is also pointed out that

the sale consideration was a lump sum consideration for slump sale of the unit as a whole on 'as is where is basis' and no separate valuations were ascribed to the individual assets comprised in the unit.

5.48 In addition, it is submitted that during the relevant period of bidding the Memorandum of Association of the bidders who participated in the bidding process show that they were not engaged in the similar trade of goods and services, therefore, Section 3(3)(a) and 3(3)(d) of the Act are not attracted in the present case. Further, the order passed by the Commission on 10.01.2013 initiating *suo-moto* proceedings under Section 26(1) of the Act is belated and time barred.

5.49 Trikal has stated that while treating the Expected Price fixed by UPRCGVNL as reasonably achievable price, the DG has ignored the fact that the sale of the mills under reference was subject matter of litigation in the High Court and the Supreme Court and that the sale was subject to the outcome of the final orders of the Supreme Court. This had rendered the whole purchase a highly risky business and the Expected Price as determined by UPRCGVNL was simply a non-achievable target in any sense.

5.50 With respect to bidding process, Trikal has submitted that 'EOI cum RFQ' were invited through the process of public notice in the national newspapers for sale of 12 closed sugar mills of UPRCGVNL. Wave, Trikal, Nilgiri, Shri Radhey Industries participated in the financial bid. The participation of Shri Radhey Industries (for Burdwal mill) shows that there were other competitors present in the bidding process and that there was good competition. There is no evidence that Trikal created any barrier to new entrants in the market or its conduct had the effect of driving existing competitors out of the market or creating any foreclosure. Further, since under the SCM, the bids of Trikal were put

in the public domain by UPRCGVNL, the charge of rigging the bid or determining the price of any closed sugar mill stands rebutted.

5.51 Trikal has submitted that being an established customer of Wave, it had requested Wave to receive one tender for closed sugar mills and the official of Wave had simply arranged the demand draft from the accounts of Wave. It is stated that fair acquaintance of Trikal with Wave is not indicative of sharing of information between them. No demand drafts were issued by Wave to Trikal for the bid security amount.

5.52 In respect of the Chittauni mill, Trikal has pointed out that the highest bid of Rs. 3.60 crore was made by Giriasho in the SCM round against a bid of Rs. 3 crore by Trikal in first round. This highest bid was matched by Trikal. It is argued that if there had been meeting of minds or any association or cartel amongst Giriasho and Trikal, Trikal would not have matched the bid and the mill would have seamlessly gone to Giriasho. Like Wave, Trikal has also stated that this conduct is indicative of the fact that there was no meeting of mind between Giriasho, Namrata, Canyon and VK Healthsolutions on one hand and Trikal on the other.

5.53 Trikal has submitted that after reconsideration of the decision to purchase the Ghughli and Chittauni mill, Trikal decided not to purchase the mills and instead suffer the forfeiture of the bid security. The refusal by Trikal to pursue its matching bid was a repudiation of the completed bid. The subsequent action of the State Government or UPRCGVNL to transfer the Ghughli mill to SR Buildcon and Chittauni mill to Giriasho was not part of the bid process initiated on

23.06.2010 and concluded on 17.11.2010. Thus, the issue of bid rigging to facilitate sale of mill to Giriasho does not arise.

5.54 In respect of the Bhatni unit, Trikal has contended that the decision to get the funding for the mill from VK Healthsolutions on 17.01.2011 after matching the challenger bid on 17.11.2010 (SR Buildcon) has nothing to do with the bid process. This was a subsequent business decision and there is no evidence that there was meeting of minds between Trikal and Namrata on the date of bid pricing.

5.55 Further, Trikal has submitted that the issue of who was inducted subsequently as director in the SPV formed by Trikal *i.e.*, Honeywell Sugar Pvt. Ltd. was irrelevant for the issue of bid rigging or collusive bidding. It is stated that at the time of introduction of SPV to UPRCGVNL, Shri Laique Ahmad Khan was not the director as reported by DG. It was only at the time of transfer of the SPV to VK Healthsolutions, that he was inducted as a director. Therefore, his name in the SPV has nothing to do with Trikal bidding and matching the bid. The induction of Rajendra Singh in Honeywell Sugar Pvt. Ltd. was also in the exact similar manner.

V. Submissions of Giriasho and Namrata

5.56 The objections to the investigation report of the DG dated 22.07.2015 and supplementary objections dated 27.07.2015 were filed by each of Giriasho and Namrata separately. Subsequently, an additional affidavit was filed on 04.04.2016 on behalf of Giriasho by Shri Laique Ahmad Khan, Director of Giriasho, alongwith an affidavit by Shri Saurabh Mukund, Director of Namrata. In the affidavit filed on behalf of Namrata it was submitted that the affidavit filed by Giriasho be read as

being filed on behalf of Namrata also and that the contents of that affidavit be read as part and parcel of its affidavit. In view of the foregoing, the contentions on behalf of Giriasho and Namrata are together summarised as below.

5.57 At the outset, Giriasho and Namrata have submitted that the present proceedings are *ex-facie* beyond the provisions of Section 3 of the Act and hence out of the scope of jurisdiction of the Commission. Like other parties, Giriasho and Namrata have submitted that the provisions of Section 3(1) and Section 3(3) of the Act emphasise the necessity of an underlying transaction in 'Goods' or provision of services; however, this is absent in the present case. It is *inter alia* stated that sugar mill when proposed to be auctioned as a whole on slump sale basis, cannot be characterized as movable property or goods within the meaning of Section 2(7) of the Sales of Goods Act, 1930 and hence it would be out of the purview of the Act.

5.58 Further, it is submitted that the explanation to Section 3(3) which relates to bid rigging specifically envisages that the agreement in relation to bid rigging must be between enterprises or person who are engaged in identical or similar production or trading of goods or provision of services.

5.59 Relying upon the judgements of the Hon'ble Supreme Court in cases including *Nautam Prakash DGSVC v K.K. Thakker (2006) 5 SCC 330, Unioin of India v. Purushottam (2015) 3 SCC 779, Naresh Kumar Madan v. State of M.P. (2007) 4 SCC 766, Raymond Ltd. v State of Chhattisgarh (2007) 3 SCC 79*, it is contended that the power of the Commission to take *suo-moto* cognizance is confined to the issues within the sphere of the Act and that in this case the essential

jurisdictional facts enabling the Commission to assume jurisdiction in the matter are absent.

5.60 With respect to bidding process, it is submitted that the process of asset sale was done in a transparent manner with the entire sale process being widely publicized both in the newspaper and over the internet repeatedly. There were 10 companies found to be qualified to participate in the bidding process. Wherever it was found that there was a single bid or that the bids quoted were below the Expected Price but above 50 percent of the same, the SCM as contemplated in RFP was used. The SCM was also widely publicised. It is stated that SCM which was designed specifically to overcome collusive tendering and bid rigging with a view to realise best possible price has been approved by the Hon'ble Supreme Court in Ravi Development v. Shree Krishna Pratisthan and other (2009) 7 SCC 462.

5.61 Further, it is stated that the sugar mill was purchased in open competitive auction conducted by the GoUP pursuant to Government Policy based on sustained deliberations and debate by the Cabinet Committee. The pricing, conditions of sale, the sale process to be adopted and also the utilization of the proceeds of the proposed sale was duly decided and ratified by the Legislative Assembly of the State.

5.62 It is submitted that the CAG report on which this case is based is replete with the speculative conjectures and does not substantiate any intention on part of any cartel or body to provide benefit to the companies under consideration. Moreover, CAG report is pending for consideration before the State Legislature and any action pursuant thereto would be premature.

5.63 On merits, it is argued that the report of the DG is a result of premeditation rather than evaluation/ examination of relevant material having bearing on the referred issue. The conclusions drawn are nothing but reproduction of the CAG report and are not based on any evidence. The DG has conveniently accepted or rejected the same material in favour of one party (for instance, IPL) and against the others at whim and pleasure and there is no reasoning to the effect. The DG even did not take into consideration the affidavit filed by Chief Secretary in the Hon'ble High Court of Allahabad wherein it was stated there was no complaint from any company stating that they had been prevented from participation in the bidding process.

5.64 Furthermore, the DG has not been able to find any 'smoking gun' evidence whereby meeting of minds amongst bidders could be concluded. Moreover, it is no offence that two successful bidders happen to be 'Group Companies'. There is no law which prohibits entities of a group to bid or purchase different units simultaneously. This cannot be termed as 'anti-competitive activity.'

5.65 In view of the aforesaid, it has been prayed that the report of the DG be rejected and the proceedings initiated *vide* order dated 10.01.2013 be dropped.

VI. Submissions of SR Buildcon:

5.66 At the outset, SR Buildcon has submitted that the instant proceedings are wholly beyond the jurisdiction conferred upon the Commission by the Act. Under Section 3 of the Act, the jurisdiction of the Commission is confined to agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which

cause or are likely to cause appreciable adverse effect on competition within India.

5.67 It is submitted that the subject matter of the transaction in the present case *i.e.* the sale of 14 closed sugar mills by 'slump sale' on 'as is where is basis' does not involve production, supply, distribution, storage, acquisition or control of goods or provision of services and is, therefore, beyond the purview of Section 3 of the Act.

5.68 It is pointed out that the term 'Goods' in Section 2(i) of the Act is defined to mean goods as defined in the Sale of Goods Act, 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. Further, Section 2(7) of the Sale of Goods Act, 1930 defines 'Goods' to mean 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. Thus, it is evident that a closed sugar mill and land when put to auction on slump sale basis cannot be characterised as movable goods within the meaning of Section 2(7) of the Sale of Goods Act, 1930 and is beyond the purview of the Act.

5.69 With respect to allegation of bid rigging under Section 3(3)(a) and 3(3)(d) of the Act, SR Buildcon has referred to the explanation to Section 3(3) which provides that for bid rigging there must be an agreement between enterprises who are engaged in identical or similar production or trading of goods or provision of services. It is submitted that since there is no production or trading of goods in the underlying transaction, therefore, the provisions of Section 3(3) will not come into play. Further, it cannot be contended that the State of Uttar Pradesh

and its instrumentality is providing any service while auctioning of its sugar mills. In addition, the entities that are alleged to have engaged in bid rigging are not engaged in identical or similar production or trading of goods or provision of services. Hence, *a priori*, the jurisdictional facts necessary to invoke Section 3(3)(d) of the Act are absent in the instant case.

5.70 Further, it is contended that though no period of limitation is prescribed in the Act for initiating any action, it is axiomatic that a statutory authority must take action within a reasonable period in the interest of justice.

5.71 Also, it is contended that *suo moto* action taken by the Commission on the basis of CAG report is contrary to the constitutional provisions and schemes. Since CAG is an adjunct of parliament/ state legislature, all reports have to be laid before them. Therefore, these reports cannot be the basis of *suo moto* action under the Competition Act

5.72 With respect to the bidding process SR Buildcon has stated that it was open to participation by all those who were interested and qualified to participate. No participant has raised any grievance against the process. No one came forward with a higher price than that paid by SR Buildcon. In fact, SR Buildcon participated through SCM where one opportunity was provided to the original bidder to match the bid of the challenger. Also, no participant came forward with the allegation that it was denied effective participation in the process.

5.73 In any event, the process of asset sale was done in a transparent and fair manner by UPRCGVNL with the EOI-cum-RFQ and the entire process including SCM being widely publicized both by advertisements in newspapers and over the internet. Further, even the

Supreme Court in *Ravi Development v. Shree Krishna Pratishthan and ors., (2009) 7 SCC 462* has held that SCM was designed specifically to overcome collusive tendering and bid rigging with a view to realize the best possible price. Hence there is no basis for the allegations of bid rigging.

5.74 Further, it has been submitted that there was no question of bid rigging so far as SR Buildcon was concerned since it was not connected with the other parties and had been in the trade of scrap for a long time. It proceeded only in respect of one mill (Ghughli) because it was geographically more suitable. It did not find Bareilly mill commercially viable and chose to opt out of the same. Also, it was not possible for the company to look after the day to day functioning of the second mill.

5.75 For the Ghughli mill, only one financial bid was received from Trikal. Further, in order to invite RFQ again advertisements in the leading newspapers such as The Economic Times, The Business Standard, The Times of India, The Indian Express, The Telegraph, Dainik Jagran, Aaj and Amar Ujala. were published. Therefore, the findings of the investigation report, that there was linkage between the bidders to bid for only one bid and not to challenge each other, cannot be accepted as the tender was open to public at large and the advertisements inviting the bids were published in the leading newspapers and the websites of the State Government.

5.76 It is submitted that the expected price of the Ghughli unit fixed by the State Government was grossly exorbitant and the Government failed to consider many relevant factors in calculating the actual price of the Ghughli unit. The burden of huge liability on the Ghughli unit was

transferred to SR Buildcon and it has not been able to make profits as expected out of the project.

5.77 Further, since the matter is pending before the Hon'ble Supreme Court and the High Court of Allahabad therefore it is not appropriate for the Commission to intervene in the matter at this stage especially when there is no finding available to act upon and form a *prima facie* opinion.

5.78 Thus, in light of the above SR Buildcon has prayed that its name should be removed from the case and it be discharged from all the allegations.

6. Analysis:

6.1 The Commission has perused the material on record and also heard the counsel for the parties at length. The main issue for consideration in the instant case is (a) whether there was contravention of provisions of Section 3 of the Act by Wave and PBS Foods in the process of bidding for ten operational sugar mills of UPSSCL and (b) whether there was contravention of provisions of Section 3 of the Act by Wave, Nilgiri, Trikal, Giriasho, Namrata and SR Buildcon in the process of bidding for eleven closed sugar mills of UPRCGVNL. The parties have also raised the issue of jurisdiction of the Commission under the Act. This issue would, however, be taken up in later part of the order.

6.2 With respect to sale of sugar mills it is noted that, in June 2007, the GoUP decided to sell sugar mills of UPSSCL and started the process of disinvestment. The sale of ten operating mills of UPSSCL and eleven

closed mills of UPRCGVNL were completed by GoUP in October 2010 and March 2011 respectively.

6.3 The sale of sugar mills was executed in a phased manner. In the first phase, ten operational mills owned by UPSSCL were sold and in the second phase, eleven closed mills owned by UPRCGVNL were sold. The entire sale process in respect of both phases comprised the following stages: (i) Publishing of advertisement in the newspapers; (ii) Receipt of EOI-cum-RFQ till the given date; (iii) Evaluation of EOI-cum-RFQ for sending RFP and receipt of financial bid against RFP till the given date; (iv) In case recourse is taken to the SCM, then advertisement in newspapers; (v) Receipt of EOI-cum-RFQ again; (vi) Receipt of financial bid of challenger under SCM till the given date; (vii) Sale of individual mill.

6.4 The events in the process of the sale of the ten operational sugar mills by UPSSCL alongwith bid price for each mill are stated below:

(Rs. in crore)

Sugar Mill	**Expected Price**	**RFP (Financial bid received)**	**Bid Price quoted**	**Sold to Original Bidder**	**Sold to Bidder (in SCM)**	**Bid Price (approved)**
Amroha	16.70	1. Wave Industries Pvt. Ltd. 2. PBS Foods Pvt. Ltd.	17.01 16.70	Wave Industries Pvt. Ltd.		17.01
Bijnore	161.85	1. Wave Industries Pvt. Ltd. 2. PBS Foods Pvt. Ltd.	81.80 64.80	Taken to SCM	Wave Industries Pvt. Ltd.	101.25*

Bulandshahr	58.80	1. Wave Industries Pvt. Ltd. 2. PBS Foods Pvt. Ltd.	29.75 23.55	Taken to SCM	Wave Industries Pvt. Ltd.	29.75
Chandpur	83.35	1. Indian Potash Ltd. 2. PBS Foods Pvt. Ltd. 3. Wave Industries Pvt. Ltd.	91.80 90.00 8.40	PBS Foods Pvt. Ltd. (IPL withdrew its bid)		90.00
Jarwal Road	25.67	1. Indian Potash Ltd. 2. Wave Industries Pvt. Ltd.	26.95 14.21	Indian Potash Ltd.		26.95
Khadda	20.07	Indian Potash Ltd.	22.05	Taken to SCM	Indian Potash Ltd.	22.65
Rohankalan	41.00	Indian Potash Ltd.	50.40	Taken to SCM	Indian Potash Ltd.	50.40
Saharanpur	70.90	1. Wave Industries Pvt. Ltd. 2. PBS Foods Pvt. Ltd.	35.85 28.40	Taken to SCM	Wave Industries Pvt. Ltd.	35.85
Sakotitanda	41.10	Indian Potash Ltd.	43.15	Taken to SCM	Indian Potash Ltd.	43.15
Siswa Bazar	32.55	1. Indian Potash Ltd. 2. Wave Industries Pvt. Ltd.	34.38 17.91	Indian Potash Ltd.		34.38
Total	**551.99**					**450.79**

6.5 From the above table, it is evident that Wave placed bid for seven mills, IPL for six mills and PBS Foods for five mills. A comparison of the bids submitted by the bidders with the 'Expected Price' *i.e.* the value fixed for the bid amount as determined by the UPSSCL to be the expected price and declared to the bidders prior to submission of their financial bid proposal, shows that bids placed by IPL were above the Expected Price in case of all six mills. The bids by Wave were above 50% of the Expected Price though less than the Expected Price in all cases except Chandpur mill where it submitted an abnormally low quote of only 1/10th of the Expected Price and Amroha mill where it submitted bid above the expected price. The bids by PBS Foods varied from one mill to the other - for Amroha mill it quoted the Expected Price, for Chandpur mill it quoted above the Expected Price and for three mills *i.e.* Bijnore, Bulandshahr and Saharanpur it quoted less than 50% of the Expected Price.

6.6 It is noted that UPSSCL decided to adopt SCM for discovery of a realistic value of sugar mills in those cases where either the financial bid received for purchase of mill was below the Expected Price but above 50% of the Expected Price fixed for the mill or a single financial bid was received in respect of any mill, even if it was above the expected price.

6.7 The provision for SCM adopted by UPSSCL stated that the highest financial bid would continue to remain valid till the conclusion of the SCM process. Accordingly, the highest bidder shall extend its bid validity period till the conclusion of the SCM process. The UPSSCL, under SCM, would issue a public notice inviting challenge in the nature of fresh bid with the same terms of eligibility and other relevant conditions as were applicable for the original bid. The highest financial bid received would be disclosed and a period of 30-45 days would be

given for due diligence and submission of fresh bids. The fresh bids under the SCM process could not be less than the disclosed highest financial bid received. All original bidders excluding the original highest bidder were eligible to submit fresh bids under the SCM process.

6.8 Further, the original highest bidder had the right of first refusal to match the highest financial bid received in the fresh bidding process under the SCM. In case the right of first refusal was not exercised by the original highest bidder (H1), the highest bidder in fresh bidding process (Challenger) under SCM had the right to purchase the mill. H1 had to exercise the right of first refusal within a period of 15 days from the date of receipt of notice from the UPSSCL. In case no fresh bid was received under the SCM process, the UPSSCL, could consider the bid of H1 even though it was lower than the expected price. In case the highest bidder in fresh bidding under SCM refused to purchase the mill, after original highest bidder had not exercised his right of first refusal, the bid security of the highest bidder in fresh bidding under SCM was to be forfeited.

6.9 In accordance with the provision for SCM, six mills were taken to SCM *i.e.* mills at Khadda, Rohan Kalan, Sakoti Tanda (for which IPL was the only bidder) and Bijnore, Bulandshahr and Saharanpur (where the highest bidder submitted below the Expected Price but above 50% of the Expected Price fixed for the mill and the second bidder submitted bids below 50% of the expected price). However, in the absence of challenge bid, these mills were sold to the original bidders.

6.10 The lack of competition in the bidding process and the fact that Wave and PBS Foods had some common directors and shareholders indicated possibility of collusion amongst these companies. Further,

there were other indicators such as sequential numbers on the demand drafts, stamp papers and letters for performance bank guarantee submitted by these companies during bidding process. The observation in the CAG report in this regard have been confirmed by the DG and the DG has found Wave and PBS Foods in contravention of the provisions of Section 3(3)(d) of the Act on this basis.

6.11 Wave and PBS Foods have, however, denied the finding of contravention of the provisions of the Act made against them by the DG. It has been submitted that mere lack of competition at the stage of financial bid cannot lead to finding of contravention when the process of bidding was open to any bidder who qualified as per applicable terms and conditions. In fact at the EOI-cum-RFQ stage ten bidders had participated and there was nothing to suggest that Wave or PBS Foods had in any manner hindered the bidders from participating. In fact the Chief Secretary GoUP in his affidavit before the Hon'ble High Court of Allahabad had stated that no complaint had been received from any company stating that it had been prevented from participation in bidding process. Moreover, no finding had been made by DG against IPL or the other participants at the EOI-cum-RFQ stage for withdrawal of bids, in the absence of which finding against only Wave and PBS Foods has been alleged to be perverse.

6.12 Further, it is submitted there was no incentive to rig the bid in the instant case as the mills which were put up for sale were loss making mills and were under a BIFR reference. The mills were extremely unattractive for several bidders on account of pending court cases, accumulated losses, obsolete plant and machinery, no revenue from by-products, need of huge investment for upgradation, prohibition on change of use of land use or sale etc. It was not a profit making venture and bidders by procuring the mills had actually taken on a huge

liability. Thus, this was not a sale for which there was any reason for bidders to enter into an arrangement for bid rigging.

6.13 Moreover, there is also no probative evidence to show meeting of minds amongst the two bidders. The promoters of Wave and PBS Foods are different and directors of PBS Foods had no shareholding in Wave nor the directors of Wave had shareholding in PBS Foods. There was only one common director Shri Trilochan Singh who, as per minutes of board meeting, was not involved in the process of fixation of bid prices by Wave. Further, the issue of common directorship was irrelevant as all issues concerning the bid process were delegated to officers designated by Board and no discussion regarding the bid price took place in Board meetings.

6.14 Further, it is contended that though there may be common directorships or shareholding or sequential numbers on stamp papers, demand drafts and bank guarantees purchased from the same vendors/ banks; however, these are merely an indication of close relationship between the two bidders. These factors by themselves did not, either individually or cumulatively, gave rise to an inference of bid rigging or cartelisation.

6.15 With respect to the eleven closed sugar mills sold by UPRCGVNL, the facts as to expected price, bids received in the original and the SCM round and the bidders to whom the mills were sold, emerge as follows:

(Rs. in crore)

Sugar Mill	Expected Price	Original Bidder	Bid price	Challenger Bidder	SCM Bid	Response of Original Bidder	Finally sold to bidder
Baitalpur	25.80	Nilgiri	12.96	IB Trading Pvt. Ltd.	13.16	Nilgiri (accepted)	Nilgiri

Bareilly	27.50	Wave	13.78	1. Namrata 2. SR Buildcon	14.11	Wave matched but later withdrew	Namrata
Bhatni	9.00	Trikal	4.55	Shree Radhey Intermediaries	4.75	Trikal (accepted)	Trikal
Deoria	26.86	Nilgiri	13.50	Namrata	13.91	Nilgri matched but later withdrew	Namrata
Shahganj	19.02	Wave	9.54	IB Commercial	9.75	Wave (accepted)	Wave
Barabanki	23.29	Nilgiri	12.00	Giriasho	12.51	Nilgiri matched but later withdrew	Giriasho
Chittauni	4.67	Trikal	3.00	Giriasho	3.60	Trikal matched but later withdrew	Giriasho
Ramkola	7.96	Wave	4.05	Giriasho	4.55	Wave matched but later withdrew	Giriasho
Laxmiganj	6.47	Wave	3.25	Namrata	3.40	Wave did not accept	Namrata
Hardoi	16.12	Nilgiri	8.08	Namrata	8.20	Nilgiri matched but later withdrew	Namrata
Ghughli	6.94	Trikal	3.51	S.R Buildcon	3.71	Trikal matched but later withdrew	S.R Buildcon
Total	**173.63**		**88.22**		**91.65**		

6.16 The above table shows that Wave was the original bidder for four mills at Bareilly, Shahganj, Ramkola and Laxmiganj; Nilgiri was the original bidder for four mills at Baitalpur, Deoria, Barabanki and Hardoi; and Trikal was the original bidder for three mills at Bhatni, Chittauni and Ghughli. In case of all the eleven mills the bid price was between 50 percent and 51 percent of the Expected Price except the Chittauni mill where the bid price was 64 percent of Expected Price. It is noted that only one bid was received in case of each of the eleven

mills and each bid was below the Expected Price. Hence, SCM was applied in case of all the eleven mills.

6.17 In SCM round, six bidders *i.e.* IB Trading Private Limited, IB Commercial, Shree Radhey Intermediaries, Giriasho, Namrata and S. R. Buildcon, submitted challenge bids. The bids received in SCM round were higher than the bids of the original bidders but still below the Expected Price. Initially, Wave, Nilgiri and Trikal matched the challenge bids but later withdrew in case of all mills except one mill each. Wave accepted only for Shahganj mill, Nilgiri for Baitalpur mill and Trikal for Bhatni mill. As a result, no mill was finally sold to the three challenging bidders *i.e.* IB Commercial Private Limited, Shree Radhey Intermediaries and IB Commercial. Out of the remaining eight mills, four mills at Bareilly, Deoria, Laxmiganj and Hardoi were sold to Namrata, three mills at Barabanki, Chittauni and Ramkola were sold to Giriasho and one mill at Ghughli was sold to S.R. Buildcon based on their bids submitted during the SCM round.

6.18 The DG observed that for the specific purpose of acquiring the closed units SPVs were formed by each of the bidders to whom the mills were finally sold. The SPVs included Mallow Infratech Pvt. Ltd. of Wave (Shahganj), Dynamic Sugar Pvt. Ltd. of Nilgiri (Baitalpur), Honeywell Sugar Pvt. Ltd. of Trikal (Bhatni), Adarsh Sugar Solutions Pvt. Ltd. of Namrata (Bareilly), Eikon Sugar Mills Pvt. Ltd. of Namrata (Deoria), Agile Sugar Pvt. Ltd. of Namrata (Hardoi), Ablaze Sugar Mills Pvt. Ltd. of Namrata (Laxmiganj), Mastiff Sugar Solutions Pvt. Ltd. of Giriasho (Barabanki), Okara Sugar Pvt. Ltd. of Giriasho (Chittauni), Majesty Sugar Solutions Pvt. Ltd. of Giriasho (Ramkola) and Zircon Sugar Solutions Pvt. Ltd. of S.R. Buildcon (Ghughli) .

6.19 Interestingly, the SPVs formed by Nilgiri, Trikal and Wave for the purchase of mills took unsecured loan from the same company *i.e.* V.K. Healthsolutions and post-acquisition each of these SPVs transferred their 100% equity shares also to the same company *i.e.* Canyon. Further, V.K. Healthsolutions and Canyon were found to belong to the group of Giriasho and Namrata with Giriasho being the holding company of Namrata.

6.20 As per the DG report, bidding companies as well as the SPVs formed by the bidding companies had several common directors. Shri Laique Ahmad Khan, a director in various group companies of Giriasho was also a director in the SPVs formed by bidding companies. He was a director in Canyon which acquired Bhatni, Shahganj and Baitalpur sugar mills. He was later on appointed as a director in the SPVs formed for purchase of these mills also. The DG further observed that Shri Rajinder Singh was the common director in all the three SPVs that were acquired by Canyon. Further, Ms. Shashi Sharma, Ms. Sujata Khandelia and Shri Pawan Kumar Pawan were common directors in various SPVs of Giriasho and Namrata. It was also found that Ms. Shashi Sharma was a common Director in the SPV formed by SR Buildcon and SPVs formed by Giriasho group. In view of above, the DG concluded that clearly there were linkages between the original bidders *i.e.* Nilgiri, Trikal and Wave and the challenger bidders *i.e.* Giriasho, Namrata and SR Buildcon.

6.21 Apart from common directors, the DG also noted that in the initial EOI-cum-RFQ, the demand drafts furnished by Wave, Nilgiri and Trikal had consecutive numbers and were purchased from the bank accounts of Wave. Further, the demand drafts utilized for the purpose of deposit of bid security were also purchased from the same bank accounts and had consecutive numbers. In addition, the bid documents

revealed that Giriasho and Namrata had common addresses, phone numbers and e-mail IDs. Also, Shri Israrul Hassan Zaidi who was authorised signatory of Namrata was authorised by Trikal to receive possession of Bhatni mill from UPRCGVNL.

6.22 Thus, based on the foregoing, the DG concluded that there was an understanding among the bidders *i.e.* Wave, Nilgiri, Trikal, Giriasho, Namrata and SR Buildcon to not bid against each other. They, thus, acted in a collusive manner and also directly/indirectly decided the prices of the mills in violation of Section 3(3)(a) and 3(3)(d) of the Act.

6.23 All bidders *i.e.* Wave, Nilgiri, Trikal, Giriasho, Namrata and SR Buildcon have denied the finding of contravention of Section 3(3)(a) and 3(3)(d) of the Act against them in the DG report. It has been averred that the finding of bid rigging by DG in the instant case is perverse. It has been pointed out that there was no lack of competition in the bidding process as large number of parties came forward at the RFQ stage both in the original and SCM round of bidding. Further, there are no linkages between Wave, Nilgiri and Trikal by way of common shareholding or common parentage. It has been averred that Shri Avej Ahmad and Shri Lalit Kailash Kapoor were never shareholder/ director in Wave. The consecutive number on drafts were merely because Wave got the demand drafts prepared for itself as well as for its established customers *i.e.* Nilgiri and Trikal at their request. As regards common directors in the SPVs, Wave, Nilgiri and Trikal have submitted that Shri Laique Ahmad Khan and Shri Rajender Singh were not directors in their respective SPV at the time of introduction of this company as SPV to UPRCGVNL. They were inducted as directors subsequently on transfer of the SPV to VK Healthsolutions. Thus, they

had nothing to do with bidding and matching of bid by the original bidders.

6.24 Wave, Nilgiri and Trikal have denied the allegation that there was an agreement not to compete. It has been stated that if there had been any understanding with Namrata or Giriasho, then Wave, Nilgiri and Trikal would not have accepted their challenging bid under SCM and Namrata/ Giriasho would have got the mills being the highest bidder in the SCM round. Moreover, Wave, Nilgiri and Trikal would not have suffered loss due to forfeiture of their bid security. It has been stated the decision of withdrawal was a business decision as the management found that these mills would not be feasible to operate and viable to the cost that was required to be invested therein.

6.25 In their submissions, Giriasho and Namrata accepted that both the bidders were group companies and that Giriasho held 86.42% of total shares of Namrata. Further, it has been submitted that since the two bidders were group companies, the correspondence address, email id and phone number mentioned by them in the EOI and RFP documents submitted with UPSSCL was same.

6.26 With respect to the finding of common directors, it has been stated that Ms. Shashi Sharma, Ms. Sujata Khandelia and Shri Pawan Kumar Pawan were the initial directors of the SPVs of Giriasho and Namrata who were appointed at the time of incorporation of these SPVs by the professional firm that incorporated these SPVs. Since Namrata and Giriasho are group companies, the initial directors of the SPVs of Namrata and Giriasho were same. Further, as regards the finding that Shri Laique Ahmed Khan was the director in one SPV each of Wave, Nilgiri, Trikal and four SPVs of Namrata, it has been submitted that Namrata, Giriasho, Canyon and V K Heathsolutions are the group

companies and Shri Laique Ahmed Khan was appointed the director of one SPV each of Wave, Nilgiri and Trikal only at the time of purchasing the closed sugar mills from these companies. Shri Laique Ahmed Khan was never the director of any of the SPVs prior to the date of purchase of these SPVs.

6.27 It has been submitted that mere lack of competition in the bidding process cannot be the basis of arriving at a finding of contravention against the successful bidders unless there is cogent material to prove concerted effort to obstruct other bidders so as to adversely affect the bidding. The condition precedent to establish an allegation of cartelisation is the existence of agreement or action in concert. However, there is no material/ evidence on record to establish that there was meeting of minds or any common object being pursued by any individual or corporate body to thwart/ prevent healthy competition, which might have caused wrongful gain to any, or wrongful loss to the State. Further, the mere fact that bidding companies were group entities cannot lead to an inference of collusion amongst them.

6.28 Having considered the findings of the DG and the submissions of the parties, it is apparent that at the RFP stage (financial bid) for operational as well as closed sugar mills only limited number of bidders participated. In case of operational mills, only three bidders submitted financial bids in the first round of bidding process. Similarly, in case of closed mills also only three bidders submitted financial bids. In the SCM round, no bids were received for operational mills and for closed mills, only one bid was received for each of the eleven mills from six bidders, of which two companies that were group companies placed most bids.

6.29 In view of the above facts, the limited issue before the Commission from the perspective of Competition Law is whether the afore-noted lack of competition in the bidding process for sale of ten operational mills of UPSSCL and eleven closed mills of UPRCGVNL was an outcome of any anti-competitive activity on part of the participating companies *i.e.* whether the competition was distorted due to collusion amongst the bidding companies thwarting other potential bidders from participating.

6.30 An examination of the bidding pattern for operational and closed mills reveals that this is not a case of identical or similar pricing by the bidding firms. In case of sale of operational mills, it is observed that one bidder (PBS Foods) placed bids lower than that of another bidder (Wave) in four out of five cases where they both submitted bids. The competition concern that arises from such bidding pattern is possible collusion amongst the parties to place cover bids and/ or share the mills. In case of closed mills, it is observed that one bid was placed for each mill by the three participating bidders at the RFP stage and the bidding pattern shows that the ratio of bid price to expected price in case of all mills was similar *i.e.* between 50% to 51% except in case of Chittauni mill. Such bidding pattern also raises a similar competition concern of sharing of mills in case of closed mills. Apart from foregoing, another competition concern is whether the non-submission of financial bids by companies that participated at the EOI-cum-RFQ stage was an outcome of collusion or other factors.

6.31 In this regard, the Commission finds it pertinent to refer to the background that led to the sale of the sugar mills and the legal issues that surrounded the sale of these mills. From the material on record, it is observed that in the year 1971, the GoUP promulgated the Uttar

Pradesh Sugar Undertakings (Acquisition) Act, 1971 (the 'Acquisition Act, 1971'), by means of which, the GoUP took over a number of private sugar mills and vested them in UPSSCL, a wholly owned Government company. The purpose of vesting of these sugar mills as stated in the Acquisition Act 1971 was rehabilitation and revival of these mills. At the time of acquisition, most of the sugar mills were sick, having old and obsolete machinery besides adoption of old outdated technology. The incidence of salaries and wages was also very high due to labour oriented plants and overstaffing. Consequent upon vesting of the sugar mills, UPSSCL started running the sugar mills but over a period of time the sugar mills sustained huge losses and many of them had to be closed down.

6.32 Since the main object of the acquisition could not be achieved and almost all the acquired units started incurring huge losses, the GoUP decided to privatise/ disinvest those mills which had annual losses of more than Rs. 10 crores and whose net worth had eroded by 50 percent or more on account of huge accumulated losses. In the year 1995, the matter was referred to the Board for Industrial and Financial Reconstruction (the 'BIFR') for rehabilitation of the sugar mills. However, various attempts for rehabilitation did not yield any positive result. On one hand, large number of units of UPSSCL were lying closed; on the other hand, the units of UPSSCL that were running started accumulating losses and were unable to pay their cane dues to the sugar cane farmers, which led to disharmony and discontent in the rural areas. As a result, the Government was obliged to advance huge loans to UPSSCL to ensure that cane dues of the farmers were paid.

6.33 Finding that the loans given to UPSSCL would never be recovered and that proceeding before BIFR would lead to winding up of UPSSCL since innumerable attempts at rehabilitation had failed, the GoUP took

policy decisions several times to convert the loans given by it to UPSSCL into equity. As a result, the GoUP was able to pull out UPSSCL from purview of BIFR in 2005. After taking account of the various factors, the State Government was of the considered opinion that while UPSSCL was sustaining losses and the GoUP was virtually financing its losses, no public interest was being served with continuance of these mills. It was observed that there were 93 sugar factories set up by the private sector throughout the State of Uttar Pradesh, which were of very large capacity and were flourishing because of emergence of new technology that permitted manufacture of ethanol and electricity from the bye-products of sugar.

6.34 Consequently, in June 2007, the GoUP issued a policy decision in form of Guidelines to disinvest UPSSCL and sell entire equity of GoUP in UPSSCL through strategic sale process. Accordingly, an advertisement inviting bids for purchase of the shares/ equities of the GoUP in UPSSCL was issued in various newspapers and published on websites inviting EOI/ RFQ from interested persons. In this process entire corporation including subsidiaries *i.e.* 33 sugar mills alongwith head office was being sold. This decision was challenged in Civil Misc. Writ Petition No. 47934 of 2008 - Rajiv Kumar Mishra v. State of U.P. and others, filed with the Hon'ble High Court of Allahabad. Since the advertisement failed to yield any positive result, the GoUP in November 2008 decided not to continue with disinvestment by sale of its shares and accordingly the said process was dropped. Thereafter, the Acquisition Act 1971 was amended and the Uttar Pradesh Sugar Undertakings (Acquisition) (Amendment) Ordinance, 2008 was promulgated and Section 3A to 3E were inserted in the Acquisition Act, 1971. This Ordinance was subsequently converted into an act known as the Uttar Pradesh Sugar Undertakings (Acquisition)

(Amendment) Act, 2009 (the 'Amendment Act, 2009') and the decision was taken to start the process of privatisation afresh.

6.35 By Section 2 of the Amendment Act, 2009, Section 3-A, 3-B, 3-C, 3-D and 3-E which were inserted in the Act were to the following effect:

"*3-A Notwithstanding anything to the contrary contained in any other provision of this Act, the State Government may, if it considers necessary or expedient in public interest, divest, sell off, transfer or otherwise part with all or any of its shares in the Corporation at any time.*

3.B. Notwithstanding anything to the contrary contained in any other provision of this Act, the Corporation or any of its subsidiaries may, in public interest, sell or transfer any of the assets and /or liabilities or part thereof which have vested in the Corporation in accordance with the provisions of this Act, of in any other manner.

3.C Notwithstanding anything to the contrary contained in any other law for the time being in force it shall be lawful for the state Government, if it is satisfied that in the public interest it is necessary to do so, to change the land use of to issue directions for change of land use in relation to the land belonging to the scheduled undertaking of the Corporation or its subsidiaries at any time.

3.D. The Government Order No. 1215S.C./18.2-07-56 T.C., dated June 4,2007 and all subsequent Government Orders, notification of policy statements issued and action taken in relation to disinvestment, privatization, sale, transfer in any form or closure of the scheduled undertaking or sugar mills of the Corporation and its subsidiaries or in relation to the Corporation itself shall stand validated.

3.E Power to remove difficulties. If any difficulty arises in giving effect to the provision of this Act, the State Government may, by notified order make provisions not inconsistent with the provisions of

this Act as may appear to in to be necessary or expedient for removing such difficulty.

Provided that no order under this section shall be made after expiration of a period of two years from the commencement of the Uttar Pradesh Sugar Undertakings (Acquisition) (Amendment) Act, 2009".

6.36 Consequent to the Amendment Act 2009 being enacted, the ongoing writ petition was amended to challenge the *vires* of the Amendment Act, 2009. In addition, another Writ Petition was filed with the High Court of Allahabad by the Chini Mills Karmchari Sangh against the State of Uttar Pradesh and others in 2009. In these writ petitions, the Hon'ble High Court *vide* order dated 01.04.2010 directed that "*In both the writ petitions, the challenge to Expression of Interest dated 29 June 2009 has also been made and different clauses of the said Expression of Interest have been referred to. We having found that the Amendment Act, 2009 in so far as it inserts Sections 3-C, 3-D to the extent indicated above, is beyond the legislative competence of the State of U.P other consequential actions relating to the aforesaid two sections have also to be held invalid to that extent. In the result both the writ petitions are partly allowed. Section 3-C and Section 3-D to the extent it provides "closure of the scheduled undertakings or sugar mills of the Corporation and its subsidiaries or in relation to the Corporation itself" is struck down as lacking legislative competence. All consequential actions to the above extent shall automatically fall on the ground. The other provisions of the Amendment Act, 2009 and the actions taken there in are held to be intra-vires.*"

6.37 In July 2010, the GoUP filed Special Leave Petition ('SLP') in the Hon'ble Supreme Court against the part of the decision of the Hon'ble High Court holding the amendment in the Act regarding change of

land use/closure of mills to be beyond legislative competence. Rajiv Kumar Mishra and Chini Mills Karmchari Sangh also filed SLPs in May 2010 and July 2010 with Hon'ble Supreme Court against the part of the decision of the Hon'ble High Court holding the process of sale of sugar mills to be valid. In response to SLP filed by Rajiv Kumar Mishra against the decision of Hon'ble High Court holding the process of sale of sugar mills to be valid, the Hon'ble Supreme Court in its interim orders dated 28.05.2010 and 14.07.2010 directed that "any action taken by the GoUP in furtherance of Amended Act 2009 shall remain subject to final adjudication of the appeal. Hence, any action of the GoUP with regard to sale of sugar mills shall be subject to the final decision of the Hon'ble Supreme Court and shall be binding on the GoUP and the purchaser of sugar mills." Final decision of the Hon'ble Supreme Court in the said matter is still pending. Notably, neither the Hon'ble High Court nor the Hon'ble Supreme Court stayed the sale of sugar mills. Therefore, the process of sale of sugar mills was continued.

6.38 However, it is obvious that the order of the Hon'ble High Court effectively prohibited the purchasers of mills from closing the sugar mills and changing the use of land. This made the purchase of mills onerous from the point of view of the prospective purchasers who intended to bid for these mills with this purpose. In addition, the direction of the Hon'ble Supreme Court, which made the transfer of title of assets of sugar mills to the purchaser subject to the final adjudication of the appeal, may have further rendered the proposal of purchase of sugar mills less attractive. More particularly so, when the mills were hardly viable from economic point of view. Thus, pursuant to the afore-said orders the purchase of the mills of UPSSCL and

UPRCGVNL became an uncertain and unattractive proposition for the prospective buyer.

6.39 To ascertain whether this development affected the response to the submission of RFP (financial bid), the sequence of events in the bidding process was compared with the date of decision of the Courts. It was observed that for the operational mills the date of advertisement for EOI-cum-RFQ was 29.06.2009 and last date for receipt of same was 21.07.2009. By this date there was no order of the Hon'ble High Court that prohibited closing of sugar mills or change of land use. However, by the last date of receipt of RFP (financial bid) *i.e.* 03.06.2010, not only the order of the Hon'ble High Court had been passed but the Hon'ble Supreme Court had passed interim directions that made any action taken by the GoUP in furtherance of Amendment Act 2009 subject to final adjudication of the appeal. Thus, it is apparent that reduction in participation observed in bidding process at RFP stage coincided with the decision of the Courts.

6.40 In case of closed mills, the date of advertisement itself was 21-23 June 2010. However, from the material on record, it is observed that the eligibility criteria was revised/ relaxed atleast twice between the date of advertisement and date of submission of EOI-cum-RFQ *i.e.* 13.08.2010. Even, thereafter, the eligibility criteria was further relaxed on 31.08.2010 and final expected price for the eleven closed mills was arrived at only on 26.08.2010. The date for submission of RFP (financial bid) was 16.09.2010. It seems that some of the prospective purchasers interested in purchasing these mills were expecting reduction in Expected Price for the mills pursuant to the onerous orders of the Court. Consequently, they participated at the EOI-cum-RFQ stage. However, finding the reduction inappropriate, most of them may have refrained from submission of financial bid.

6.41 The above facts indicate that the directions of the Court, which effectively restricted the purchasers not only in terms of usage of property but also put a question mark on the transfer of title to the them, played a significant role in reducing participation in the bidding process. In addition, the onerous and litigious nature of the property itself also seems to have acted as deterrent for prospective purchasers from bidding. These factors taken together appear to have resulted in obvious lack of competition for the purchase of these mills and reluctance of the bidders to place bids at or above the expected price. No evidence has been found during investigation that establishes that the non-submission of financial bids observed at the RFP stage or non-participation/ limited participation observed in the SCM round was because of collusion or meeting of mind amongst the bidders. Thus, there is not enough evidence on the record which can form basis for arriving at a finding of contravention of the provisions of the Act in this respect.

6.42 As regards the concern whether there was placing of cover bids and sharing of mills by the participating companies in the bidding process for the operational mills, it is observed that out of the three bidders who submitted financial bids this concern mainly relates to Wave and PBS Foods which were stated to be related companies in the CAG report. No evidence of collusion has been found against IPL during investigation. It is pertinent to note here that under the scheme of the tender, any entity that submitted EOI-cum-RFQ could have participated at the RFP stage. Given such competitive constraint from other bidders, the allegation of cover bidding or entering into arrangement to share the mills is not sustainable unless it is established that the participating companies colluded with non-participating companies at the RFP stage or had prior knowledge about their

non-participation. However, the DG has found no such evidence of collusion amongst participating and non-participating companies or of prior knowledge of non-participation with the participating companies.

6.43 Further, it is also noted that out of five mills where Wave and PBS Foods submitted financial bids, PBS Foods has followed no singular pattern of bidding. In three mills *i.e.* mills at Bijnor, Bulandshahr and Saharanpur, it submitted bids which were below 50% of the Expected Price. In case of Amroha mill it matched the Expected Price and in case of Chandpur mill it placed a bid higher than Expected Price. In case of all mills except Chandpur mill its bids were lower than Wave. Its bid in case of Chandpur mill was higher than Wave but lower than IPL. Thus, in case of Chandpur mill, unless IPL withdrew in collusion with Wave and PBS Foods, the case for cover bidding cannot be made out. However, the DG has not found any evidence to establish that IPL was in collusion with Wave and PBS Foods. The allegation of collusion amongst Wave and PBS also does not sustain in case of mills at Bijnor, Bulandshahr and Saharanpur as in case of these mills PBS Foods bid below 50% of the Expected Price. As a result, these mills were not sold to Wave and were taken to SCM round where fresh bids were invited.

6.44 Thus, in view of the foregoing, it is evident that given the tender conditions and the methodology adopted for inviting bids for the sale of sugar mills, it was open for any bidder who satisfied the eligibility criteria to participate not only in the original but also in the SCM round. The DG has found no evidence of collusion or coercion which prevented the potential bidders from participating. In these circumstances, it is not possible to draw an inference of collusion merely based on the fact that two out of three participating bidders had one common director and submitted demand drafts/ stamp paper

bearing consecutive numbers. Therefore, on the basis of facts and evidence in the case, no conclusion of contravention of provisions of the Act can be drawn against the participating bidders in the sale of ten operational mills of UPSSCL.

6.45 For the similar reasons, no conclusion of contravention of provisions of the Act can be drawn against the participating bidders in the original as well as the SCM round of the sale of eleven closed mills of UPRCGVNL also. Even if the participating bidders in the original round or in the SCM round were related, the fact that there is no evidence of collusion or coercion to show that several potential bidders were prevented from participating in the bidding process for the sale of closed mills rules out possibility of premeditation of outcome by the participating bidders and hence collusion by them. This is further buttressed by the submission of the Chief Secretary GoUP in his affidavit before the Hon'ble High Court of Allahabad wherein it was stated that no complaint had been received from any company stating that it had been prevented from participation in bidding process. Further, in absence of corroborative evidence of meeting of minds, mere commonality of directors in the SPVs of the three original bidding companies and some of the companies participating in the SCM round or their SPVs is not sufficient to conclude that any collusive arrangement existed at the time of or prior to submission of bids in the original or SCM round.

6.46 Thus, based on the above observations, the Commission is of the considered opinion that the facts and evidences do not categorically support the conclusion of collusion or bid rigging in the instant case. Accordingly, the matter is herewith closed.

6.47 The Commission notes that the parties have raised certain issues relating to applicability of Section 3(3)(a) and 3(3)(d) to sale of sugar mills, thereby, challenging the jurisdiction of the Commission in the instant case. In this regard, the Commission is of the opinion that in absence of a finding of collusion/ bid rigging in the instant case, there remains no immediate requirement to deal with these issues in the present order. The Commission may take up these issues in a more appropriate case where the facts and circumstances present more opportune occasion for deliberation and decision on these issues.

6.48 The Secretary is directed to inform the parties accordingly.

Sd/-

(Devender Kumar Sikri)
Chairperson

Sd/-
(U. C. Nahta)
Member

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

New Delhi

Dated: 04/05/2017

Supplementary Note

Per:

Augustine Peter, Member

1) The Competition Commission of India (hereinafter called as 'the Commission'), in the instant matter, passed order under section 26(1) on 10/01/2013 directing the Director General (hereinafter called as 'the DG') to cause an investigation in the same after taking note of the Audit Report of the Comptroller and Auditor General (hereinafter called as 'The CAG') titled "Performance Audit Report on Sale of Sugar Mills" (hereinafter called as the CAG Report) wherein the CAG observed that in the bidding by firms for the sale of sugar mills by Uttar Pradesh State Sugar Corporation Limited (hereinafter called as 'UPSSCL') and its subsidiary M/s Uttar Pradesh Rajya Chini Evam Ganna Vikas Nigam Limited (hereinafter called as 'UPRCGVNL') there was lack of competitive process and the bidders were engaged in the bid rigging activities. It was also observed that such bid rigging activities affected the realization of fair value for the sugar mills. The Commission on taking cognizance of the CAG Report and after making enquiry into the facts of the case from the point of view of the Act, was satisfied that *prima facie* case of violation of section 3(3) (a) and 3(3) (d) of the Act was made out and accordingly directed the DG to submit the investigation report (hereinafter called as 'the DG report') within 60 days.

2) Since the order of the Commission has already dealt with the facts and other details of the case, I shall elaborate on only those that are necessary for my purpose of writing a Supplementary Note. While I endorse the findings, analysis and conclusion arrived at by the Commission, my purpose of writing this Supplementary Note is to

elucidate certain aspects that are not touched upon in the order of the Commission. The Commission, in its order in Para 6.47, notes as under:

> "*The Commission notes that the parties have raised certain issues relating to applicability of Section 3(3) (a) and 3(3) (d) to sale of sugar mills, thereby, challenging the jurisdiction of the Commission in the instant case. In this regard, the Commission is of the opinion that in absence of a finding of collusion/ bid rigging in the instant case, there remains no immediate requirement to deal with these issues in the present order. The Commission may take up these issues in a more appropriate case where the facts and circumstances present more opportune occasion for deliberation and decision on these issues."*

3) I am not in agreement with the observation of the Commission in the above said para 6.47 of the final order wherein it postpones the dealing of the jurisdictional issues to a future date in a more opportune case. In my opinion, dealing with these jurisdictional issues are vital for laying down the jurisprudence for competition law in India, which is still in its emerging stages. Moreover, since these jurisdictional issues are raised as specific submissions by the OPs, both oral and in writing, during the course of hearing, I find it important to dispose them off instantly rather than defer them to a future date. Moreover, since all the OPs in the matter herein have raised these jurisdictional concerns, it, in my opinion, becomes even more essential for the Commission to deal with them. However, since the final order of the Commission is silent on the above said aspect, I desire to append a Supplementary Note since the stands of my reasoning, on certain aspects, differ.

4) The factual matrix, in brief, leading to the present position is that the Government of Uttar Pradesh (hereinafter called as 'GoUP') formulated a policy of Privatization/ Disinvestment of PSUs in June 1994 which provided for review of privatization of enterprises whose annual loss was more than Rs 10 Crores and eroded net worth by 50 percent or more. The net worth of UPSSCL had been eroded due to continued losses and in May 1995 it was referred to the Board of Industrial and Financial Reconstruction (hereinafter called as 'the BIFR') wherein a rehabilitation scheme was framed which provided for UPSSCL to retain 11 (eleven) potentially healthy (operating) mills, while 10 (ten) non-performing and 8 (eight) unviable mills were to be transferred to a newly formed subsidiary of UPSSCL, named UPRCGVNL. In June 2007, GoUP decided to privatize/ sell the sugar mills of UPSSCL. UPSSCL and UPRCGVNL advertised in June 2009 and June 2010 for the sale of 11 (eleven) sugar mills and 14 (fourteen) sugar mills respectively. Of these, sale of 10 (ten) mills of UPSSCL and 11 (eleven) mills of UPRCGVNL were finalized in July – October 2010 and January – March 2011 respectively. It was in this entire process of sale of sugar mills, both operating and closed, that the Commission was of, *prima facie*, view that there was lack of competitive process and the bidders were engaged in the bid rigging activities and that, *prima facie*, there was violation of section 3(3) (a) and 3(3) (d) of the Act.

5) In its order, the Commission has come to the conclusion that the facts and evidences do not categorically support the conclusion of collusion or bid rigging in the instant case and have, accordingly, closed the matter, which I am in consonance with. In its final order, Commission has also adequately dealt with the findings of the DG and the respective submissions of the OPs thereon, which, I find no

reason to reiterate. In the ensuing paras, I shall *only* deal with some of the objections raised by the OPs which are in the nature of jurisdictional challenges to the mandate of the Commission to entertain the present matter which, I am convinced, are required to be dealt with so as to evolve a jurisprudence for future cases of similar nature. I shall dispose of two major issues raised by the OPs, which they elevate as jurisdictional issues. These are as follows:

a) The parties have called into question the jurisdiction of the Commission to look into the case of alleged concerted practices for bid rigging/ collusive bidding for the sugar mills on the ground that the Act applies to goods and services whereas the same is not the case here, as in bidding for sugar mills the parties are not bidding for goods and services.

b) The parties have also questioned the applicability of section 3(3) which relates to persons or enterprises engaged in identical or similar trade of goods or provision of services (competitors) on the ground that the parties who are bidding are engaged in diverse activities and therefore do not fall in the category of competitors.

Issue 1: Applicability to goods and services

6) The first submission of the OPs which I shall take up on the issue of jurisdiction is wherein the OPs submit that under the provisions of section 3 of the Act, the jurisdiction of the Commission is confined to agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provisions of services, which causes or is likely to cause an appreciable adverse effect on competition (AAEC) within India and that if a transaction does not

involve production, supply, distribution, storage, acquisition or control of goods or provisions of services, the said transaction and any agreement in relation thereto would be beyond the purview of the provision of section 3 and hence beyond the jurisdiction of the Commission.

7) M/s Wave (hereinafter called as 'Wave') has referred to provisions of Section 3(3) of the Act read with the definition of 'Goods' under Section 2(i) and has contended that the power to inquire into the allegations of bid rigging under Section 3 is confined to 'Goods' and that the purchase of operational and closed sugar mills on 'as is where is basis' through a 'Slump Sale Agreement' is not a sale or purchase of 'Goods' as defined under the Sale of Goods Act, 1930 (hereinafter called as SGA). It is not 'sale of any movable property or property severed from the land of closed mills' so as to attract section 3. Further, it is submitted that the term 'cartel' in Section 2(c) of the Act is also used in relation to the market of goods and services only which makes the whole bidding process beyond the purview of Section 3 and, *ex- facie*, beyond the statutory mandate of the Commission. In order to substantiate the aforesaid contention that slump sale of unit/ mill is not sale of 'goods' under the Act, Wave has relied on the following judgements – ***Coromandel Fertilizers Limited* v. *State of A.P* (112 STC 1)**; ***Deputy Commissioner (C.T.)* v *K. Behanan Thomas* [1997 (39) STC Madras]**, ***The Deputy Commissioner of Sales* v *Dat Pathe* [1985 (59) STC 374 Kerala]**, wherein the courts held, *inter alia*, that in case of sale of entire business undertaking or a branch of the business undertaking as a going concern, the sale of movables involved in such a transaction cannot be regarded as sale in the course of business nor can the seller be treated as having been engaged in any business activity in

disposing of the entire undertaking including movable, immovable and all other properties.

8) M/s PSB Foods Private Limited (hereinafter called as 'PSB'), in its response to the DG Report raises objections as to the maintainability of the proceedings before the Commission and the jurisdiction of the Commission to entertain the matter. In its response it submits that the present inquiry is beyond the scope of Section 3 of the Act which provides that the jurisdiction of the Commission is limited to agreements for production, supply, distribution, storage, acquisition or control of goods or provision of services, whereas the underlying transaction involves the acquisition of a sugar mill as a going concern by the selected bidder on slump sale basis along with land, buildings, plant and machinery and other immovable, movable and intangible assets of the mill. The sale consideration is also a lump sum consideration for the unit as a whole and no separate valuation has been ascribed to the individual assets comprised in the unit/mill. PSB maintains that in view of the characterisation of the unit/mill as a going concern, the sale of unit/ mill cannot be construed to be sale of goods. Further, as per PSB, it cannot be contended that the State of Uttar Pradesh or its instrumentality were providing any service while auctioning off its sugar mills. Finally, it was argued that since as per the provisions of the Act the object of bid rigging agreement is 'goods', the parties are not amenable to the jurisdiction of the Commission.

9) Similarly, the primary objection raised by M/s Nilgiri (hereinafter called as 'Nilgiri') relates to the sale of sugar mills under a 'Slump Sale', which is not covered within the definition of the term 'Goods'. Nilgiri, relying on cases ***Coromandel Fertilizers Limited*** **v**. ***State of***

***A.P* (112 STC 1)**, ***Deputy Commissioner (C.T.) Coimbatore* v *K. Behanan Thomas* (1977) 39 STC 325 (Mad)** and ***Sri Ram Sahai* v *Commissioner of Sales Tax* (1963) 14 STCd 275 (All)** submits that though the term 'Slump Sale' has not been defined under the Competition Act or the Companies Act, the issue whether slump sale constitutes sale of goods has been considered in various judicial pronouncements pertaining to sales tax and courts have held that slump sale does not constitute 'Goods' as defined under SGA. Moreover, Nilgiri maintains that even if sugar mills is considered as a commodity/ goods, it is not a marketable commodity as there is no market for the same.

10) Likewise, M/s Trikal (hereinafter called as 'Trikal'), submits that the power of the Commission to make inquiry into the allegations of bid rigging under Section 3 of the Act is confined to cartel in respect of sale of 'Goods' as defined in Section 2(i) of the Act and that the Commission does not possess the necessary jurisdiction to entertain the present matter.

11) M/s Giriasho and M/s Namrata (hereinafter called as 'Giriasho' and 'Namrata' respectively) have submitted that the present proceedings are *ex facie* beyond the provisions of Section 3 of the Act and hence out of the scope of jurisdiction of the Commission. Akin to other OPs, Giriasho and Namrata submits that the provisions of Section 3(1) and Section 3(3) of the Act emphasise the necessity of an underlying transaction in 'Goods' or provision of services which is absent in the case here. It is stated that sugar mill, when proposed to be auctioned as a whole on slump sale basis, cannot be characterized as movable property or goods within the meaning of Section 2(7) of the SGA and hence outside the purview of the Act.

12) M/s S.R. Buildcon (hereinafter called as 'Buildcon') submits that the instant proceedings are wholly beyond the jurisdiction conferred upon the Commission by the Act, as under Section 3, the jurisdiction of the Commission is confined to agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause AAEC in India. It is also submitted that the subject matter of the transaction i.e. sale of 14 closed sugar mills by 'slump sale' on 'as is where is basis' does not involve production, supply, distribution, storage, acquisition or control of goods or provision of services and is therefore beyond the purview of Section 3. The argument of other OPs pertaining to definition of 'Goods' under Section 2(i) of the Act and the same not concerning a slump sale is reiterated by Buildcon.

13) It is noted that the OPs defend themselves contending that all findings of the DG are factually wrong and unsustainable and that under section 3(3) the Commission is required to examine anticompetitive practices in the sale of goods of provision of services in the market and in the present case, the material on record does not disclose any sale of goods or provisions of services to be provided so as to attract section 3(3). Further, the stand of the OPs is that the subject matter of the transaction is the sale of Sugar Mills of UPSSCL on Slump Sale basis, which does not, in law, relate to production, supply, distribution, storage, acquisition or control of goods or provisions of services and hence falls outside the purview of the Act. In other words, the OPs defend themselves contending that they are not covered by the provisions of the Act as the purchase of the ongoing manufacturing unit through slump sale agreement is not a sale or purchase of goods as defined under SGA.

14) In dealing with the abovementioned submissions put forward by the parties in paras 7 to 12 above, let me reproduce section 3(1) of the Act which reads as:

> '*No* ***enterprise or association of enterprises or person or association of persons*** *shall 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.'* (Emphasis added)

15) Thus, to fall within the purview of section 3(1) the following ingredients have to be fulfilled:

a) First, the parties to the transaction ought to qualify as **enterprise or association of enterprises or person or association of persons;**

b) Second, the parties to the transactions must have entered into an **agreement**

c) The agreement ought to be ***in respect of production*****, supply, distribution, storage, acquisition or control of** ***goods*** **or provision of services;**

d) Third, the agreement **causes** or is **likely to cause** AAEC

(Emphasis added)

16) There is no doubt regarding the 1st ingredient {(**a)** above} being met. With respect to the 2nd ingredient {(**b)** above}, the OPs defend themselves saying that they never entered into an agreement whatsoever as defined under the Act. However, to analyse whether there has been a contravention of the provisions of section 3, the 2nd ingredient {(**b**) above)} has to be read in totality {with (**c**) above}, viz, agreement '***in respect of production, supply etc of goods***'. For

disputing the case (of section 3) against themselves the OPs contend that the said transaction and any agreement in respect thereof is beyond the purview of the Commission for the reason that bidding for a sugar mill (not being a good or service) does not find place under section 3(3) of the Act. The OPs refute the findings of the DG by claiming that by participating in bids for sugar mills they do not fall within the purview of Act which is applicable to goods and services and that the acquisition of a sugar mill through bidding process does not involve 'good' or a 'service'. In my opinion, this defence of the OPs is of no avail and deserves outright rejection for the reasons I discuss in paras 17 to 45 hereinafter.

17) Under the scheme of the Act, an agreement entered into by persons or enterprises or association thereof in respect of production, supply, storage, acquisitions or control of goods or services which cause or likely to cause AAEC stands prohibited. Section 3(2) makes such agreements, if entered into, void. Section 3(3) provides that any agreement, practice or decision by persons or enterprises engaged in identical or similar trade of goods or provision of services shall be presumed to be having AAEC. Further from the mandate of the Competition Act, as evident from the preamble, is: "*An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices* ***having adverse effect on competition****, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.*" (Emphasis added)

18) The aforesaid mandate is accomplished by the Commission by enforcement of section 3, 4, 5 and 6 coupled with the duty the

Commission is expected to discharge, i.e. eliminating practices having AAEC (Section 18). Thus, what follows from a bare reading of the provisions of section 3 read with section 18 and the preamble is that the Commission is under an obligation not only to prevent practices having AAEC but also to eliminate them to achieve the objectives laid down in the preamble. Discharging this mandate includes, *inter alia*, acknowledging and allowing an expansive interpretation, wherever warranted, to the provisions of the Act. This may be done by giving the widest possible meaning and interpretation to the words incorporated in the Act by the legislature to ensure that the mandate for which the Commission is established, is achieved. This approach, if followed, shall serve two concurrent purposes. On one hand, it shall bring cases within the ambit of the Commission which, even though fall within the spirit of the Act, lack the letter of it. On the other, it would give regard to the true intention of the Legislature in enacting this economic piece of legislation. In ***Carew And Company Ltd* v *Union of India***, **1975 AIR 2260**, Krishna Iyer, J observed:

> "*The law is not 'a brooding omnipotence in the sky' but a pragmatic instrument of social order. It is an operational art controlling economic life, and interpretative effort must be imbued with the statutory purpose. No doubt, grammar is a good guide to meaning but a bad master to dictate. Notwithstanding the traditional view that grammatical construction is the golden rule, Justice Frankfurter used words of practical wisdom when he observed :(1) "There is no surer way to misread a document than to read it literally".*
>
> ***If the language used in a statute can be construed widely so as to salvage the remedial intendment, the Court must adopt it.***
>
> (Emphasis added)

19) The language used by the legislature in section 3(1) qualifies 'production, supply, storage, acquisition and control of goods' with the phrase '***in respect of***'. In common parlance the phrase means 'as regards', 'with reference to', 'concerning', 'attributable to' etc. In the context of the case in hand, let us see how the inculcation of this phrase adds meaning and purpose to the section.

20) The phrase '***in respect of***' is defined in the Shorter Oxford English Dictionary on Historical Principles (Oxford University Press, 5th ed, 2002) to mean:

"... as concerns; with reference to.."

21) Time and again, courts in India, including the Apex Court, as well as courts in other jurisdictions have interpreted the phrase '***in respect of***' to convey a meaning of the widest possible import. Let me give a glimpse of how the phrase 'in ***respect of***' is treated in legal parlance.

22) In ***Paterson* v *Chadwick* [1974] 2 All ER 772 (QBD)**, Boreham, J adopted the comments of Mann CJ in the Australian case ***Trustees, Executors & Agency Co Ltd* v *Reilly* [1941] VLR 110**, where Mann CJ said:

"The ***words "in respect of" are difficult of definition but they have the widest possible meaning of any expression intended to convey some connection or relation in between the two subject-matters to which the words refer****."* (Emphasis added)

Boreham J, while holding that the words '***in respect of***' convey some connection or relation between the plaintiff's claim and the personal

injuries that she sustained and while quoting the abovementioned case of Australia, observed that:

> *"I think it is unnecessary for me to go any further.* ***For me those words of Mann, CJ provide helpful guidance, at any rate as to the ordinary meaning of the words 'in respect of' and I accept that guidance.***" (Emphasis added)

23) The Supreme Court of Canada in ***Nowegijick* v *The Queen* [1983] 1 S.C.R. 29** gave the words ***'in respect of'*** a very wide interpretation. In that case the Supreme Court of Canada observed that:

> *"The* ***phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters****."* (Emphasis added)

24) In ***The Queen* v *Savage* [1983] CTC 393** Dickson J, Supreme Court of Canada accepted the view laid down in Nowegijick v The Queen and in the former case and observed that:

> "*Our Act contains the stipulation, not found in the English statutes referred to, "benefits of any kind whatever ... in respect of, in the course of, or by virtue of an office or employment". ... Further, our Act speaks of a benefit "in respect of" an office or employment. In* ***Nowegijick v The Queen****, **[1983] C.T.C. 20, 83 D.T.C. 5041** this Court said, at 25 [5045], that:*
>
> ***The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" probably the widest of any expression intended to convey some connection between two related subject matters.***
>
> *I agree with what was said….."* (Emphasis added)

25) In ***Godavaris Misra*** **v** ***Nandakisore Das, Speaker, Orissa,*** **AIR 1953 Ori 111,** the Orissa High Court quoted the English case 'Seaford Court ***Estates Ltd***. **v** ***Asher***', **(1949) 2 K.B. 481 (C)** where Asquith L.J. (at p. 496) observed that:

> ***"The phrase "in respect of" was a very comprehensive expression."*** **(**Emphasis added)

26) The Court also observed:

> Again in -- 'Van Den Berghs Ltd. v. G.W. Rly. Co.', (1922) 38 TLR 14 at p. 18 (D), ***the same phrase was construed "in a wide sense".*** (Emphasis added)

27) In ***Tolaram Relumal and Anrs*** **v** ***State of Bombay*** **AIR 1954 SC 496,** the Apex Court had the occasion to interpret the words "***in respect of***".

> ***It has used an expression which has the widest connotation and the expression used is "in respect of." "In respect of" means in its plain meaning "connected with or attributable to"*** *and therefore…"* (Emphasis added)

28) In ***SS. Light Railway Co Ltd*** **v** ***Upper Doab Sugar Mills Ltd & Anrs,*** **(1960 2 S.C.R. 926)**, The Supreme Court was vexed with the interpretation of section 3(14) of the Railways Act, 1890 which defines terminals as: "terminals" includes charges in respect of stations, sidings, wharves, depots, warehouses, cranes and other similar matters, and of any services rendered thereat. In pursuance of Section 32 of the Indian Railways Act, 1890, the Central Government had by means of a notification, fixed certain rates of terminal charges for loading and unloading goods carried from one station to another

by Railway. In-spite of this notification the appellant Railway Company did not levy any terminal charges in accordance with those rates up to a certain point of time and continued to charge at a rate which was then prevalent and in which no terminal charges were included. Subsequently, however, the Railway Company issued a Local Rates Advice by which terminal charges were added to the prevalent rates with the result that the total charges payable to the Railway by the respondent mills rose considerably. It was for relief against this increase that the mills made a complaint under Section 41 (1) (i) of the Indian Railway Act to Railway Rates Tribunal. The contention of the railway company, *inter alia*, was that as in increasing the charges the administration had merely applied standardized terminal charges as notified by the Central Government no complaint could be made in respect thereof under s. 41 (1) (i). The Tribunal by a majority held that this was not a case of application of a standardized terminal charge and so it had jurisdiction to consider the question, and they ordered a reduction of terminal charges from the total charges. The railway company appealed.

29) The Supreme Court gave a broad interpretation to the phrase ***"in respect of"*** and construed it in a manner so as to include not only the actual user of the services but the mere provision of services with the conclusion that irrespective of the fact of the actual user by any particular consignor of the stations, sidings and other things mentioned in s. 3(14) "terminal charges" are leviable by reason of the mere fact that these things have been provided by the Railway Administration. In other words, while giving the context a broad interpretation, the Apex Court observed that the term terminal charges means "for the provision of" and not merely "for the user of".

30) The Supreme Court observed:

Terminals" includes "charges in respect of stations, sidings, wharves, depots, warehouses, cranes and other similar matters, and of any service rendered thereat." Thus two classes of charges are included in the definition. The first is "charges in respect of stations, sidings wharves, depots, warehouses, cranes and other similar matters." The second is "charges in respect of any services rendered thereat." Whether or not therefore any services have been rendered "thereat ", that is, at the stations, sidings, wharves, depots, warehouses, cranes and other similar matters the other class of terminals in respect of these-stations, sidings, wharves, depots, warehouses, cranes and similar other matters remain. ***A further question thus arises as regards the interpretation of the phrase "in respect of ". Does it mean charges for the mere provision and maintenance of stations, sidings, depots, wharves, warehouses, cranes and other similar matters are the terminals or does it, contemplate charges only for use of sidings, stations, wharves, depots, warehouses, cranes and other similar matters? The words " in respect of " are wide enough to permit charges being made as terminals so long as any of these things, viz., stations, sidings, wharves, depots, warehouses, cranes and other similar matters have been provided and are being maintained.*** *The question is whether the import of this generality of language should be cut down for any reason.* ***It is well- settled that a limited interpretation has to be made on words used by the legislature in spite of the generality of the language used where the literal interpretation in the general sense would be so unreasonable or absurd that the legislature should be presumed not to have intended the same. Is there any such reason for cutting down, the result of the generality of the language used present here?***

The answer, in our opinion, must be in the negative. It is true that in many cases stations, sidings, wharves, depots, warehouses, cranes and other similar things will be used and it is arguable that in using the words "in respect of " the legislature had such user in mind. It is well to notice however that the legislature must have been equally aware that whereas in some cases accommodation provided by stations will be used, in some cases sidings will be used, in others wharves, in other warehouses and in other cases cranes, and in certain cases several of these may be used, in most cases there will be no use of all of these. From the practical point of view it is impossible to regulate terminal charges separately in respect of user of each of these several things mentioned. *When therefore the legislature authorised the Central Govt., to fix terminals as defined in s. 3(14), the intention must have been that the terminals leviable would not depend on how many of these things would be used. It is also worth noticing that the user of a depot, warehouse and cranes would necessarily mean some service rendered "thereat "****. If terminals did not include charges in respect of the provisions of depots, warehouses and cranes unless these were used, there would be no need of including these in the first portion as they would be covered by the second part of the definition, viz., "of any services rendered thereat ".*** *Far from being there any reason to cut down, the consequence of the generality of language used viz., " in respect of ", there is thus good ground for thinking that the legislature used this language deliberately to cut across the difficulty of distinguishing in a particular case as to which of these things had been used or whether any of them had been used at all Innumerable people carry goods over the Railways and many of them, for the purpose of the carriage make use of the stations,*

sidings, wharves, depots, warehouses, cranes and other similar matters, while many do not. ***Though at first sight it might seem unreasonable that those who had not used would have to pay the same charge as those who had made use of these, it is obvious that the interminable disputes that would arise between the Railway Administration and the Railway users, if the fact of user of stations, sidings and other things mentioned had to determine the amount payable, would be unhelpful not only to the Railway Administration but also to the using public. The sensible way was therefore to make a charge leviable for the mere, provision of these things irrespective of whether any use was made thereof. That was the reason why such wide words "in respect of " was used. We are therefore of opinion that the words "in respect of "used in s. 3(14) means "for the provision of "and not "for the user of ".*** (Emphasis added)

31) In ***Har Prasad* v *Hansram AIR 1966 All 124*** Allahabad High Court gave a wide interpretation to the words '***in respect of***' contained in section 195 (1)(c) Criminal Procedure Code (Cr P.C). Section 195(1)(c) read:

"(1) No Court shall take cognizance--

(c) of any offence described in Section 463 or punishable under Section 471, Section 475 or Section 476 of the same Code, when such offence is alleged to have been committed by a party to any proceeding in any Court ***in respect of*** *a document produced or given in evidence in such proceeding, except on the complaint in writing of such court, or of some other court to which such Court is subordinate." In other words, the words "in respect of" are wide enough to include even a document which was prepared before the proceedings*

started in a court of law but was produced or given in evidence in that proceeding.

32) The Allahabad High Court further observed that:

"In other words, ***the words "in respect of" are wide enough*** *to include even a document which was prepared before the proceedings started in a court of law but was produced or given in evidence in that proceeding."* (Emphasis added)

33) ***I.T Commissioner*** **v** ***Chunilal***, **AIR 1968 Pat 364**, the Patna High Court observed that:

"It is well known that the expression "in respect of" is of wider connotation than the word "in" or "on". *Hence, a class of municipal tax, though not a tax on the premises or buildings, may nevertheless be a tax in respect of the premises or building used for the business."* (Emphasis added)

34) ***Renusagar Power Company Ltd*** **v** ***General Electric Company and Anr*** **1985 AIR 1156**, the Supreme Court, yet once again observed that:

*"****Expressions such as 'arising out of" or "in respect of" or "in connection with" or "in relation to" or "in consequence of" or "concerning" or "relating to" the contract are of the widest amplitude*** *and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement."* (Emphasis added)

35) The above mentioned case was quoted by the Supreme Court in ***Mansukhlal Dhanraj Jain and ors*** **v** ***Eknath Vithal Ogale Etc*** **(1995) 2 SCC 665** and the same approached was followed therein.

36) In yet another case ***Union of India & anrs*** **v** ***Vijay Chand Jain*** **1997 AIR 1302,** the Supreme Court, in interpretation of Section 2(d) of the Foreign Exchange Regulation Act, observed:

> "***The words "in respect of" admit of a wide connotation****; Lord Greene M.R. in Cunerd's Trustees v Inland Revenue Commissioner, calls them colourless words. This Court in SS. Light Railways Co Ltd v Upper Doab Sugar Mills Ltd & Anrs construction these words in section 3(14) of the Indian Railways Act 1890 (1960 2 S.C.R. 926) has held that they are very wide.* ***It seems to us that in the context of section 23(1B) "in respect of" has been used in the sense of being " connected with" and we have no difficulty in holding that the currency in respect of which there has been contravention covers the sale proceeds of foreign currency, sale of which is prohibited under section 4(1)****..."* (Emphasis added)

37) Thus, it is clear that irrespective of the subject matter, the courts, including the Hon'ble Supreme Court and courts in foreign jurisdictions, have given a wide amplitude to the words ***'in respect of'***. Various courts have, time and again, given this kind of an extensive dimension to the term ***'in respect of'*** and has used it in the sense of being 'connected to', 'attributable to'. Not only have the courts not hesitated in giving an amplified interpretation to the term in cases ranging from taxation law to criminal law, but in India the same approach figures out in the interpretation of the Constitution. In ***General Manager, Southern Railways*** **v** ***Rangachari***, **AIR 1962 SC 36,** in interpreting Article 16(2) of the Constitution to be wide, the Apex Court observed that:

"The words "in respect of any employment" used in Art. 16(2) must, therefore, include all matters relating to employment as specified in Art. 16(1)."

38) Let us apply the above discussion to the case in hand. The words '***in respect of'*** forming part of section 3(1) are immediately followed by the words production, supply, storage, acquisition and control of good and/or provision of services. Having regard to the interpretation given by the courts to the words '***in respect of'*** and assigning to the phrase '***in respect of production of goods…..***' its natural meaning, it is clear that section 3(1) will not only apply to bare activities of production, supply, storage etc. but will encompass every activity that is '***in respect of production, supply, storage etc. of 'goods' and/or provision of services'***. In other words, section 3(1) cannot be constrained to include only those cases relating to agreements involving 'goods' and/or services per se, as claimed by the OPs, but includes all activities ***related to*** production, supply etc. of goods and/or provision of services or ***connected to*** production, supply etc. of goods and/or provision of services etc. or ***attributable to*** production, supply of goods and/or provision of services or, to put it simply ***in respect of*** production, supply etc. of goods and/or provision of services etc. A narrow interpretation of the words of section 3(3) would render the law relating to anticompetitive agreements nugatory by excluding the agreements which, even though, are covered ***in respect of*** production of goods and provision of services but are not goods and services as such. For example, an agreement involving a sugar mill is not a 'good' as such but it is definitely an agreement 'in respect of production of good', i.e. sugar.

39) It is noted that the term 'Goods' under the Act is defined under Section 2(i) which endorses the same definition as provided under SGA. That means 'goods' for the purpose of Competition Act are the ones which fall under the definition of 'Goods' as per the SGA. What the OPs have done is the purchase of operational or non-operational sugar mills on 'as is where basis' through a 'Slump Sale Agreement' is, which they contend, is not a sale or purchase of 'Goods' as defined under the SGA. A sugar mill, by its very nature, is a factory that processes sugar cane to produce raw sugar, which may be processed further. In other words, it is nothing but a coalition of a large chunk of land, plant and machinery such as sifters, kneaders, moulding machines, weighing scales, free tools such as vessels, racks, work tables, equipment, raw materials, personnel etc. which all combine to produce the final product that is sugar. While, a sugar mill as such may not be a 'goods' for the purpose of the Act, nevertheless, it cannot be said that it is not an activity '***in respect of***' production of goods', i.e. sugar. Had the legislature used the bare words production, storage, supply, acquisition or control without qualifying them with '***in respect of***' the logical interpretation that would have prevailed would have been to include only the activities of production, storage, supply etc. of goods. However, that has not been the case nor has that been the intention of the legislature. The legislature in its wisdom chose to add the phrase '***in respect of***' to give wide powers to the Commission to include, within its purview, not only production of goods and provision of services, but all activities '***in respect of***' and ***related to*** production of goods and provision of services. Thus a sugar mill, even though not a good under the SGA, is a manufacturing unit undertaking the process that is directly ***related to*** or ***in respect of*** production of sugar. This makes an agreement to bid for a sugar mill find coverage under the provisions of section 3(3) of Act for the

simple reason that the legislature intended to include all agreements ***'in respect of'*** production, supply etc. under the purview of the Act.

40) To defeat the provisions of the Act, the parties may want to contend that a sugar mill is nothing but a plant and machinery that is annexed to the earth and is not 'goods' under the SGA but the fact is that in setting up of an entire sugar mill (consisting of land, labour, plant and machinery and other equipment etc.) the OPs have undertaken an activity which is ***'in respect of production of goods'*** even though it may not be covered under '***production of goods***' as such. It is noted that in any activity relating to production, the factors of that combine therefor are land, labour, capital and enterprise. These are used in the production process to produce outputs, i.e. the finished goods and services. While land includes all natural resources, capital includes all man made resources such as plant and machinery, fixtures, technology, infrastructure etc. All of these when combined in the process of production creates goods for supply in the market which means that while the mere existence of land, or plant and machinery may not necessarily be a factor of production but it becomes so when it actually *assists* or *contributes* to production.

41) In ***Carew and Company Ltd* v *Union of India***, **1975 AIR 2260**, Krishna Iyer, J stressed:

> *Obviously, a dynamic economic concept cannot be imprisoned into ineffectualness by a static strict construction.* ***'Is engaged in production', in the context, takes in not merely projects which have been completed and gone into production but also blueprint stages, preparatory moves and like ante-production points. It is descriptive of the series of steps culminating in production. You are engaged in an undertaking for production of certain goods***

when you seriously set about the job of getting everything essential to enable production. Economists, administrators and industrialists understand the expression in that sense *and oftentimes projects in immediate prospect are legitimately set down as undertakings engaged in the particular line.*

(Emphasis added)

42) A look at the totality of the fact and circumstances of the case in hand, it is established that the crux of the argument of the OPs is that the Commission is not vexed with the jurisdiction to entertain the present matter as when the transaction does not involve production, supply, distribution, storage, acquisition or control of goods or provision of services, the said transaction and any agreement in relation to or leading thereto would be beyond the purview of the provisions of Section 3 of the Act and hence beyond the jurisdiction of this Commission.

43) I am not convinced with this argument of the OPs. When plant and machinery pertaining to a sugar mill on one hand, and land on which the sugar mill is erected on the other, is acquired by the OPs on a going concern basis or with the commitment to make it operational, as the case may be and the plant and machinery and the land to which it is annexed ultimately contributes to the production of sugar then it is inconceivable that it does not fall under the broad parameter of ***'in respect of production of goods'***. In such a case, any agreement as defined under section 2(b) of the Act entered into by the OPs wherein they bid for acquiring the plant and machinery and the land as a slump sale on a going concern basis, will amount to an agreement ***'in respect of production of goods'***. This, obviously, brings the case within the purview of the Commission for the simple reason that the

Legislature intended to cover not just agreements on production, supply, distribution etc. of 'goods' and provision of services as such, but all agreements '***in respect of production of goods***' under the Act.

44) It is to be noted that the agreement dated 17/07/2010 entered into by the Uttar Pradesh State Sugar Corporation Limited and Wave Industries Private Limited explicitly provides under Clause 2: TRANSFER OF UNIT that the sugar mill is purchased as a going concern and shall operate as such. Clause 2: TRANSFER OF UNIT reads:

2.1 In consideration of the Purchase Price to be paid by the Purchaser to the Seller in the manner set out herein and subject to the provisions of this Agreement, on the Closing Date, the Seller shall Transfer and deliver to the Purchaser and the Purchaser shall purchase, acquire and accept from the Seller, all rights, title and interest of the Seller in and to the Unit, together with all Assets and Labilities except Excluded Liabilities as a going concern on an 'as is where is basis' collectively ("The Unit")

2.2 It is clearly understood between the Parties that ***the sale of Unit is as a going concern/operating unit and the Purchaser shall operate the mill as running unit for manufacture of sugar and allied activities*** *only subject to Applicable Laws.*

(Emphasis added)

45) Similar provision exists in the slump sale agreement dated 17/07/2010 between UPSSCL and PSB. A bare reading of the above provisions makes it amply clear that the OPs who have purchased the operational unit shall operate the same for the purpose of manufacture

of sugar and allied activities and no other. As far as the closed units are concerned Wave, in its additional submission dated 08/04/2016, submits: "*that the sale of closed sugar mills of Uttar Pradesh Rajya Chini Avam Ganna Vikas Nigam Ltd (UPRCGVNL) on a 'slump sale' and 'going concern' basis as per Slump Sale Agreement in respect of each Unit, was intended through a competitive bidding process*." Thus, in case of closed sugar mills also implicit commitment exists as to make the sugar mills operational. In such a case it is inconceivable as to how the OPs acquire the assets pertaining to the sugar mill, which not only assist in production but is indispensable in the entire process of production of sugar, without terming it as being '***in respect of production of goods.***' Even though a sugar mill may not be a 'good' for the purpose of the Act, but what is to be seen here is not that a sugar mill falls under the phrase production of goods, but the phrase under section 3 has to be read in its totality as agreement '***in respect of production of goods***' rather than mere agreement on 'production of goods'.

Issue 2: Identical or similar trade

46) The second submission on jurisdictional aspect of the OPs which they advance to defend themselves before the Commission is that they are not operating at the horizontal level. In other words, the OPs defend themselves on the ground that the bidders who submitted RFP for the sugar units were not engaged in identical or similar trade and thus section 3(3)(a) and 3(3)(d) of the Act is not attracted. It is their defence that they are engaged in different businesses, viz, Wave is engaged, largely, in liquor, PSB is engaged in processed and canned foods, Nilgiri is engaged in packed food industry, Trikal is engaged in amylase rich energy food, Giriasho is engaged in financial services and Namrata, a subsidiary of Giriasho, is engaged in business of

trading, exporting, buying, selling and dealing in goods of all descriptions etc, Buildcon is engaged in the business of dismantling of scraped units put to auction by courts and that all of them are involved in ventures other than dealing in sugar, sugar products etc. and hence do not fall within the requirement of identical/similar trade of goods or provision of services thereby escaping the clutches of the Act.

47) Wave, before the Commission, submits that Section 3(3) of the Act required that for bid rigging there must be an agreement between enterprises or persons who are engaged in identical or similar production or trading of goods or provision of services and that in this case, the requirement is not fulfilled. The Memorandum of Association of the bidders clearly shows that the bidders who submitted RFP for operating sugar mills and closed sugar mills were not engaged in production or trading of identical or similar goods or provisions of services. Thus, *a priori* the jurisdictional facts to invoke Section 3(3) (a) and 3(3) (b) of the Act are absent in the present case and the allegations of bid rigging by cartelization is not maintainable under the Act.

48) M/s PSB Foods contend that for 'bid rigging' the explanation to Section 3(3) of the Act provides that, there must be an agreement between entities or persons who are engaged in identical or similar production or trading of goods or provision of services. However, this requirement is not satisfied in the present case, as the entities that are alleged to have engaged in bid rigging are not engaged in production or trading of identical or similar goods.

49) Nilgiri submits that the applicability of Section 3(3) of the Act is when the enterprises are engaged in identical or similar trade. However, in the present case, all the entities are engaged in different trades and, therefore, the provisions of Section 3(3) (a) and 3(3) (d) cannot be applied. It is submitted that while Wave is engaged in the business of Sugar and liquor, Nilgiri is in packed food industry, Trikal in Food processing industry, Giriasho in financial services etc.

50) On the other hand, Trikal submits that during the relevant period of bidding the Memorandum of Association of the bidders who participated in the bidding process show that they were not engaged in the similar trade of goods and services, therefore, Section 3(3) (a) and 3(3) (d) of the Act are not attracted in the present case.

51) Likewise, Giriasho and Namrata submits that explanation to Section 3(3) specifically envisages that the agreement in relation to bid rigging must be between enterprises or persons who are engaged in identical or similar production or trading of goods or provision of services.

52) Finally, S.R. Buidcon, referring to explanation to Section 3(3) maintains that there must be an agreement between enterprises who are engaged in identical or similar production or trading of goods or provision of services and that since the present case concerns neither production of goods nor trading thereof, the provisions of Section 3(3) shall not come into play.

53) Let me reproduce the provision of section 3(3) for ready reference:

"Any agreement entered into between enterprises or association 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)…. (b)…(c)…(d)* ***directly or indirectly results in bid rigging or collusive bidding,****…*

(Emphasis added)

54) A careful perusal of the language of section 3(3) shows that any agreements, practice, or decision, including cartels, by enterprises, persons or association thereof is amenable to the jurisdiction of the Commission if the parties are *engaged in identical or similar trade of goods of provision of service which directly or indirectly engaged in bid rigging/ collusive bidding* which basically means that they are competitors in the market. All the opposite parties herein, however, contend that they are not competitors as they are engaged in varied trades.

55) The ordinary meaning of the term 'engaged in business/trade' no doubt conveys an idea of one being employed or involved in the activity. As per Black's Law Dictionary, 9th Edition, engage means: '*to employ or involve oneself; to take part in; to embark on.'*

56) What has to be seen is whether, in the context of section 3(3)(d), to accord the phrase 'engaged in' with the literal meaning or to give it a meaning that advances the objectives of the Act. To repeat for emphasis, when two interpretations are feasible, that which advances the remedy and suppresses the evil has to be preferred as envisioned by the legislature. This is particularly true in cases of economic legislations.

57) When a person or enterprise participates in the process of bidding for a tender there may exist three different scenarios with which they

may be faced: *first*, he/it may already be in the line of activity for which bid is called; *second*, he/it may be present in any established business activity and may be wanting to diversify to the line of activity in respect of which bid is called; *third*, he/it may have conceived of the idea of entering into business for the first time and may not, at that point of time, be in any business at all. In all the three scenarios the prospective bidders take the same bidding process and one of them ultimately qualifies as the winner. In the process of bidding, all the participants are subject to the same set of rules contained in the bid document and all of them have to qualify the same set of criteria in order to be eligible. What has to be seen, in the context of section 3(3) (d) is that when bid rigging is alleged in the tender process after the same has taken place, is it open for any of them to contend that he/it was new to the idea of business and not started business activity at all whereas the others were well established players? The answer is no. In my opinion, it is obvious that if the parties are allowed to take the plea that they were engaged in diversified trades this would render the provisions of section 3(3) (d) nugatory as all the parties to the bid will find this an easy escape by contending that they were engaged in something else.

58) It is worthwhile to recollect the words of Krishna Iyer, J, in the case quoted above in para 41:***"Is engaged in production', in the context, takes in not merely projects which have been completed and gone into production but also blueprint stages, preparatory moves and like ante-production points. It is descriptive of the series of steps culminating in production. You are engaged in an undertaking for production of certain goods when you seriously set about the job of getting everything essential to enable production. Economists, administrators and industrialists understand the expression in that***

sense and oftentimes projects in immediate prospects are legitimately set down as undertakings ungagged in the particular line. Not the tense used but the integration of the steps is what is decisive. What will materialize as a productive enterprise in future can be regarded currently as an undertaking, in the industrial sense. It is not distant astrology but imminent futurology, and the phrase of the statue are amenable to services of the purposes of the law, liberally understood." (Emphasis added)

59) I find sufficient reason to outright reject the contentions of the OPs claiming that they are not engaged in identical/ similar trade of goods or provision of services and that they are involved in different sphere of business activities not making them competitors. Accepting the arguments of the OPs that they are not competitors in the same tender for the same sugar mills, would amount to defeating the very purposes of the Act for the reasons which I have adequately explained above. The OPs cannot be allowed to blow hot and cold at the same time. In the instant case, in analysing the relevant business/activity/trade performed by the parties what has to be seen is the objective with which the bidders participated in the bidding. If the parties are bidding for same sugar mill, it is immaterial whether they are, at the time of bidding, involved in the activity of fertilizers, chemicals, bread etc. In other words, what is relevant as a test for their being competitors for the purpose of section 3(3) is the object that they are bidding for, i.e. sugar mill. Through the process of bidding for the same sugar mill they have adequately demonstrated that they are competitors in the market. Thus, the very fact that the OPs bid for a tender to acquire same sugar mill(s) (whether operational or closed) on an ongoing basis makes it very clear that the intention of the OP was to carry out business in sugar, sugar products, etc. even though they may not have been engaged in the same at the

time the bidding took place. This, coupled with the covenant that it is not open for the successful parties to change the use of the land, makes it clear beyond doubt that after emerging as winners the parties had to continue with or re-start (as the case may be) the sugar mills by taking further steps towards production of sugar.

60) It is important to note that for some of the OPs the business of sugar is not reflected in their objects clause but as part of their ancillary or incidental objects. However, it is to be noted that even if the sugar business does not reflect as an object anywhere in the Memorandum of Association for any of the bidders, it is open for them to anytime change their objects clause so as to incorporate the same. In fact, some of the OPs, during the course of oral hearing, have indicated that the Memorandum of Association was amended so as to include sugar production business.

61) In fact, the above forms part of submissions of several OPs wherein they themselves state that the bidders were required to continue to operate the going concern as sugar unit. For e.g. Giriasho and Namrata, in their combined objections dated 22/07/2015, on page 36, para 29 (a) submit:

> *The underlying transaction involved a going concern alongwith land, building, plant and machinery and other immoveable, movable and intangible assets of the unit wherein* ***the selected bidder was to continue to operate the going concern as a sugar unit.*** (Emphasis added)

62) Similarly, Giriasho, in its affidavit dated 04/04/2016, on page 16, para 22, submits: "*The pricing,* ***conditions of sale****, the sale process to be adopted as also utilization of proceeds of proposed sale was duly*

decided and ratified by the Legislative Assembly of the State, the validity of which is beyond question and no statutory body can go into correctness thereof excepting only possibility where the legislature itself decides otherwise." Further in para 46 (e), page 35, it is submitted: "***Because in view of the express stipulation in clauses of the Slump Sale Agreement and of the sale deed, the entire transaction relating to sale of the going concern is premised on the unit being taken as an inseparable whole*** *and there is no contract between the parties …"* (Emphasis added)

63) This being the fact, it is inconceivable as to how the OPs can now, before the Commission, argue that they are not competitors. The OPs, being aware that all of them were bidding for specific sugar mill(s), cannot, after the bidding process is complete, and when questioned (for whatsoever reason), approbate and reprobate at the same time.

64) It is also imperative to note that after the advertisement inviting bids for the purchase of the shares/equity of the GoUP in UPSSCL was issued in various newspapers and published on websites inviting EOI/RFQ from interested persons the same was challenged in Civil Misc Writ Petition No 47934 of 2008 by one Shri Rajiv Kumar Mishra titled as Rajiv Kumar Mishra v State of U.P. & ors wherein it was held by the Hon'ble High Court that the process of sale of sugar mills was valid. In response to the SLP filed by Rajiv Kumar Mishra against the decision of the Hon'ble High Court, holding the process of sale of sugar mills to be valid, the Hon'ble Supreme Court in its interim orders dated 28/05/2010 and 14/07/2010 directed that "*any action taken by the GoUP in furtherance of Amended Act 2009 shall remain subject to final adjudication of the appeal. Hence, any action of the GoUP with regard to sale of sugar mills shall be subject to the*

final decision of the Hon'ble Supreme Court and shall be bidding on the GoUP and the purchaser of sugar mills." Final decision of the Hon'ble Supreme Court in the said matter is still pending. However, what is obvious for our purpose is that the Hon'ble High Court effectively prohibited the purchasers of the mills from closing the sugar mills and changing the land use pattern. Not only were the terms of usage effectively restricted by the Court but also the transfer of title to the parties was prohibited from taking effect. Moreover, it is worthwhile to note that before the last date of the receipt of RFP (financial bid), i.e. 03/06/2010, not only the order of the Hon'ble High Court was passed but the Apex Court also passed its interim directions. Hence, the fact that even before the process of final bidding started, there were orders from the Hon'ble High Court to continue the sugar mills as they are and not to change the use of the land, make it amply clear that the opposite parties were very well aware of the fact that they are competing against each other for the procurement of mills for the production of sugar. This makes the defence of the OPs that they are not competitors due to being engaged in varied business activities, futile.

65) Thus, in a nutshell, it is the business activity of the parties that they are actually bidding for and the one regarding which the violation of law has been alleged which is relevant for the purpose of the applicability of Section 3(3)(d) Act rather than any other business activities the parties 'were' or 'are' engaged in. If the parties were allowed to escape the grasp of the Act by considering them not competitors on the pretext that they are actually engaged in varied businesses distinct from sugar production it would amount to defeating the very purpose of the provisions of section 3(3) (d) of the Act. Any construction other than this would mean to say that the new entrants are totally exempt from the provisions of bid rigging for the

reason that they are not involved in that business at the time of bidding. This would not only render the provision of section 3(3) (d) nugatory but would make it redundant altogether taking out a large segment of the agreements related to bidding out of the purview of the Act.

66) Thus, I reject both the above contentions of the OPs on the issue of jurisdiction holding that the Commission has jurisdiction to entertain the present matter.

67) As regards the merits of the case, I concur with the final order of the Commission that no case of contravention is made out against the OPs and the case is, accordingly, closed. However, it is reiterated that the case warrants a closure as the facts and evidences do not support the conclusion of collusion or bid rigging between the OPs and not because the Commission has no jurisdiction to entertain the present matter for the reasons duly recorded hereinabove.

68) The Secretary is directed to inform the parties accordingly.

Sd/-

(Augustine Peter)

Member

New Delhi

Date: 04/05/2017