REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2480 of 2014

EXCEL CROP CARE LIMITED .....APPELLANT(S)

VERSUS

COMPETITION COMMISSION OF INDIA
AND ANOTHER .....RESPONDENT(S)

W I T H

CIVIL APPEAL NOS. 53-55 OF 2014

CIVIL APPEAL NO. 2874 OF 2014

A N D

CIVIL APPEAL NO. 2922 OF 2014

J U D G M E N T

A.K. SIKRI, J.

All these Civil Appeals arise out of the common judgment and order dated October 29, 2013 passed by the Competition Appellate Tribunal (for short, 'COMPAT'). These proceedings have their origin in

the letter dated February 04, 2011 written by the Food Corporation of India (for short, 'FCI') to the Competition Commission of India (for short, 'CCI') complaining of an anti-competitive agreement purportedly arrived at between M/s. Excel Crop Care Limited, M/s. United Phosphorous Limited (for short, 'UPL'), M/s. Sandhya Organics Chemicals (P) Ltd. respectively (the appellants in CA Nos. 2480, 2874 and 2922 of 2014 and hereinafter referred to as the 'appellants') and Agrosynth Chemicals Limited, in relation to tenders issued by the FCI for Aluminium Phosphide Tablets (for short, 'APT') of 3 gms. between the years 2007 and 2009. The CCI entrusted the matter to the Director General (DG) for investigation, who submitted his report on October 14, 2011 giving his *prima facie* findings affirming the allegations of the FCI that the appellants had entered into an anti-competitive agreement, which was violative of Section 3(3) of the Competition Act, 2002 (hereinafter referred to as the 'Act'). On receipt of this complaint, the CCI issued notices to the appellants who filed their objections. After hearing the parties, the CCI passed the order dated April 23, 2012 whereby it concluded that the appellants had entered into the anti-competitive agreement in a concerted manner thereby offending the provisions of Section 3 of the Act. As a consequence, it imposed penalty @ 9% on the average total turnover of these establishments for last three years. Appeals were filed by the appellants before the COMPAT under Section

53-B of the Act. In these appeals, the issue on merits has been decided against the appellants by COMPAT in its judgment dated October 29, 2013. These appeals question the validity of the order of the COMPAT on the aforesaid aspect.

Now the facts in detail :

2) An Inquiry in this case was initiated by the CCI on the basis of letter/ complaint dated February 04, 2011 written by the Chairman and Managing Director of the FCI to the CCI. It was alleged in this complaint that four manufactures of APT had formed a cartel by entering into an anti-competitive agreement amongst themselves and on that basis they had been submitting their bids for last eight years by quoting identical rates in the tenders invited by the FCI for the purchase of APT. It was alleged that the requirement for APT was almost got doubled during the period 2007-2009 and was likely to rise further in view of the requirement of large quantity of these tablets by the FCI, Central Warehousing Corporation and other State agencies for preservation of food grains, which these agencies were storing in their godowns. The CCI assigned the complaint to the DG for investigation. The DG collected required information from the FCI and other Government agencies dealing in warehousing and storage of food grains and also from Central Insecticides Board and Registration Committee, Faridabad. Representatives of FCI were also examined. After collecting the

aforesaid information, the DG submitted his report with the following findings:

(a) The main market of APT in India was that of the institutional sales and a majority of buyers were Government agencies. The number of private buyers was insignificant. APT is sold in the box of 3 gms. tablets, 12 gms. tablets, and a sachet of 10 gms. in powder. Out of this, 3 gms. tablets constitute 56% of the total sale. Sale of these 3 gms. tablets was restricted to the Government agencies and approved pest control operators, which could not be sold in the open market. These Government agencies were procuring APT tablets of `40 crores annually.

(b) There were only four manufacturers of APT, namely, M/s. Excel Crop Care Limited, M/s. UPL, M/s. Sandhya Organics Chemicals (P) Ltd. (which are the three appellants herein) and Agrosynth Chemicals Limited.

(c) It was noted that the FCI had adopted the process of tender, which is normally a global tender. The concerned tender had two-bid system, that is first techno commercial and then the financial bid. On the basis of the bids, the rate running contracts are executed with successful bidders. The DG found that there was also a Committee comprising of responsible officers for evaluation of technical and price bids. As per the practice, the lowest bidder is invited by the Committee for negotiations

and after negotiations, the Committee submits the report giving its recommendations and the contracts are awarded and after that the payment for the purchased tablets is released by the concerned regional offices.

(d) It was found that right from the year 2002, up to the year 2009, all the four parties used to quote identical rates, excepting for the year 2007. In 2002, Rs. 245/- was the rate quoted by these four parties and in the year 2005 it was `310 (though the tender was scrapped in this year and the material was purchased from Central Ware Housing Corporation @ `290). In November 2005, though the tenders were invited, all the parties had abstained from quoting. In 2007, M/s. UPL had quoted the price which was much below the price of other competitors. In 2008, all the parties abstained from quoting, while in 2009 only the three appellants, barring Agrosynth Chemicals Limited, participated and quoted uniform rate of `388, which was ultimately brought down to `386 after negotiations.

It was also found that the tender documents were usually submitted in-person and the rates were normally filled with hand.

(e) In respect of the tender floated in the year 2009 for procurement of fixed quantity of 600 MT with a provision of ± 10%, the three appellants had quoted identical rates of `388. It was found that the tender documents were to be submitted by 2:00 p.m. on May 08, 2009 and bid

was to be opened at 3:00 p.m. on the same day. For submitting the bids, representatives of the three appellants made common entries in the Visitors' Register. In fact, one Shri S.K. Bose of M/s. Excel Crop Care Limited made these entries on behalf of the representatives of other competitors as well.

(f) By analysing the aforesaid bids carefully and taking into consideration the total number of 16 tenders, including tenders dated May 08, 2009, the DG recorded that:

(i) pricing pattern definitely showed the practice of quoting identical pricing by all the three appellants or at some other times by two appellants, including M/s. Agrosynth Chemicals Limited;

(ii) the explanation given by the appellants was unconvincing. Though, the appellants had stated that rise in price was mostly attributed to increase in price by China during the Beijing Olympics, but it was noticed that even during the period when the Phosphorous prices had fallen, no reflection thereof was seen in the high prices quoted by the appellants;

(iii) examination of the cost structure of each company reflected that there was nothing common between the appellants as far as the said cost structure was concerned and, therefore, quoting of identical prices by all the appellants was unnatural; and

(iv) joint boycotting by the appellants, at times, showed their

concerted action, which happened again in March 2011 when the FCI had issued *e*-tender, which was closed on July 25, 2011. According to the DG, explanation given by the appellants and M/s. Agrosynth Chemicals Limited for boycotting the said tender to the effect that tender conditions were very stringent, was an afterthought and did not inspire any confidence. As per the DG, even if the conditions were stringent, the appellants could discuss the same with the FCI as there was sufficient time between March 2011 and July 25, 2011, but it was not done.

On the basis of the aforesaid findings, the DG framed an opinion that the appellants had contravened the provisions of Sections 3(3)(a), 3(3)(b) and 3(3)(d) read with Section 3(1) of the Act.

3) The CCI took up the report of the DG for consideration and for this purpose sent a copy thereof to all the four manufacturers inviting their objections, if any, thereupon. Since M/s. Agrosynth Chemicals Limited was ultimately exonerated and spared by the CCI, it may not be necessary to deal with the objections of the said party. The three appellants contested the report on facts as well as in law. Identical legal submissions were made, which are pointed out, in capsulated form, as under:

(a) Since Sections 3 and 4 of the Act were activated and brought into

force only with effect from May 20, 2009, tenders prior to this date could not be the subject matter of inquiry for ascertaining whether there was any violation of Section 3 of the Act or not. Qua March 2009 tender, it was contended that last date of submission of tender was May 08, 2009 and the bids were submitted by the appellants on that date, i.e., before the enforcement of Section 3, which came into operation on May 20, 2009. No doubt, the tender was evaluated and awarded only after May 20, 2009, but insofar as role of the appellants is concerned, that came to an end on the submission of the tender and, therefore, tender of March, 2009 could not be the subject matter of enquiry.

(b) Insofar as tender of 2011 is concerned, it was contended that inquiry in respect of boycotting the said tender by the appellants was without jurisdiction inasmuch as the FCI in its complaint dated February 04, 2011 did not mention about the said tender.

(c) On merits, increase in the price over a period of time, particularly between years 2009 and 2011, was sought to be justified on the ground that the *'price of yellow phosphorous, which was to be procured from China, had increased'*. It was further submitted that merely because there was identity of prices quoted by the appellants, it would not mean that there was any bid rigging or formation of cartel by the appellants. Submission in this behalf was that the market forces brought the situation where the prices became so competitive and it had led to the

aforesaid trend. According to them, as a practice, the Central Warehousing Corporation finalised the tender in the beginning of a particular year which used to be considered as the benchmark for other tenders for that year resulting in likelihood of identical pricing. As far as common entry having been made by Mr. S.K. Bose of M/s. Excel Crop Care Limited on May 08, 2009 on behalf of the representatives of the other competitors as well in the Visitors' Register is concerned, it was stated that since the representatives knew each other well and had entered the premises of FCI at the same time, Mr. Bose mentioned the names of others as well which was neither unnatural nor abnormal and no inference of cartel formation could be drawn therefrom. Boycotting of tender of May 2011 was tried to be justified on the ground that there were unreasonable conditions prescribed in the tender making it impossible to submit the bid, particularly, the condition of depositing `30 lakhs as Earnest Money Deposit (EMD), whereas in the earlier tenders the EMD was only `10 lakhs and `8.25 lakhs. It was further submitted that, notwithstanding the same price quoted by the appellants, each time the tender was evaluated by a Committee of Officers of the FCI and no such suspicion was raised by the Committee. On the contrary, this aspect was specifically gone into and the Committee was satisfied that quoting of identical price was not due to any cartalisation.

M/s. Sandhya Organics Chemicals (P) Ltd. raised an additional

plea *qua* non-participation in the 2011 tender by submitting that it did not have the capacity to supply 75 MT per month, which was the requirement in the said tender and, therefore, it chose not to participate.

4) The CCI passed the order discussing all the aforesaid aspects in detail and rejecting each and every contention of the appellants, and, thereby concluding that the appellants had entered into an agreement or understanding, and indulged in anti-competitive activities while submitting their bids in response to the tenders issued by the FCI.

5) For indulging in anti-competitive practices in violation of the provisions of Section 3 of the Act, the CCI imposed penalties upon all the three appellants at 9% of average 3 years' turnover of these appellants under Section 27(b) of the Act. Quantifying the same, penalty to the tune of `63.90 crores was imposed upon M/s. Excel Crop Care Limited, `1.57 crores upon M/s. Sandhya Organics Chemicals (P) Ltd., and UPL was fastened with the penalty of `252.44 crores.

6) The appellants filed three separate appeals before the COMPAT. The legal and factual arguments remained the same before COMPAT as well. In addition, argument was raised on the quantum of penalty. The COMPAT has, vide common judgment dated October 29, 2013, rejected all the contentions, except *qua* penalty, of the appellants. Insofar as imposition of penalty is concerned, COMPAT has held that though

penalty @ 9% of three years' average turnover was not unreasonable, the penalty cannot be on the *'total turnover'* of these establishments, and has to be restricted to 9% of the *'relevant turnover'*, i.e. the turnover in respect of the quantum of supplies made *qua* the product for which cartel was formed and supplies made. In other words, it had to relate to the goods in question, namely, APT and turnover of other products manufactured and sold by the establishments, which were without blemish, could not be included for calculating the penalty.

7) As noted above, before us, three appeals are filed by these manufacturers/suppliers against the findings of the COMPAT holding that there was violation of Sections 3(3)(a), 3(3)(b) and 3(3)(d) of the Act on the part of the appellants. On that basis, it is pleaded that those findings be declared as untenable and penalty imposed be set aside. On the other hand, the CCI has also preferred Civil Appeal Nos. 53-55 of 2014 against that part of the impugned order whereby penalty imposed upon these suppliers is restricted to *'relevant turnover'* instead of *'total turnover'*. Since submissions before us remain substantially the same, we are not pointing out the reasons given by the COMPAT which weighed with it after taking the aforesaid course of action, inasmuch as, while discussing the submissions of the parties, we shall be referring to the reasons adopted by the COMPAT.

8) Having painted the canvas with seminal and essential facts, it becomes manifest that following issues arise for consideration in these appeals:

(i) Whether the dispute regarding violation of Section 3 of the Act by the appellants could not be gone into in respect of tender of March, 2009, as Section 3 was operationalised only by notification dated 20th May, 2009?

(ii) Whether CCI was barred from investigating the matter pertaining to the tender floated by FCI in March, 2011 because of the reason that FCI in its complaint dated 4th February, 2011 given to the CCI had not complained about this tender?

(iii) Whether, on the facts of the case, conclusion of CCI that the appellants had entered into an agreement/arrangement and pursuant thereto indulged in collusive bidding by forming a cartel, resulting into contravention of Section 3(3)(a), 3(3)(b) and 3(3)(d) read with Section 3(1) of the Act, is justified?

(iv) Whether penalty under Section 27(b) of the Act has to be on total/entire turnover of the offending company or it can be only on "relevant turnover", i.e., relating to the product in question?

9) First two issues are in the nature of preliminary objections that were raised by the appellants, which are jurisdictional issues as the attempt of the appellants is to show that CCI was not even empowered to look into the merits of the case because of those objections. Therefore, in the

first instance, we deal with these issues.

10) Issue No. 1

Re: Applicability of Section 3 of the Act in respect of Notice Inviting Tender (NIT) dated 28th March, 2009

Section 3 is the first provision in Chapter II of the Act. Chapter II is titled as "Prohibition of certain agreements, abuse of dominant position and regulation of combinations". It starts by specifying those agreements which are prohibited under this Chapter and Section 3 enumerates such prohibitive agreements. It reads as under:

> "3. (1) 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.
>
> (2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.
>
> (3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—
>
> (a) directly or indirectly determines purchase or sale prices;
>
> (b) limits or controls production, supply, markets, technical development, investment or provision of services;
>
> (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition: Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—
(a) tie-in arrangement;

(b) exclusive supply agreement;

(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance,

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation.—For the purposes of this sub-section,—

(a) "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

(b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;

(c) "exclusive distribution agreement" includes any

agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;

(d) “refusal to deal” includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;

(e) “resale price maintenance” includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

(5) Nothing contained in this section shall restrict—

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—

(a) the Copyright Act, 1957 (14 of 1957);

(b) the Patents Act, 1970 (39 of 1970);

(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

(e) the Designs Act, 2000 (16 of 2000);

(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.”

11) At this juncture, it is the applicability of this Section which is dealt with. Though, the Competition Act is of the year 2002 and was passed by the

Legislature on 13th January, 2003, as per the provisions of Section 1(3), the Act was to come into force from the date to be notified by the Central Government in the Official Gazette. Notification was issued by the Central Government wherein 31st March, 2003 was specified as the appointed date. However, vide this notification, some of the provisions of the Act, and not all the provisions, were enforced. Many other provisions came into force vide notification dated 19th June, 2003 and thereafter by notification dated 20th December, 2007 some more provisions were notified. Insofar as Section 3 of the Act is concerned, this provision along with many other provisions came into force on 20th May, 2009 vide S.O. 1241(E) dated 15th May, 2009 on which date the said notification was published in the Gazette of India as well. Remaining provisions were notified by subsequent notifications. It is, thus, a unique example where the entire Act was not enforced by one single notification but different provisions of the Act were enforced in bits and pieces by issuing various notifications over a span of time.

12) NIT in question was issued by FCI on 28th March, 2009. Last date for submission of bids was 8th May, 2009. Few days thereafter, i.e., on 20th May, 2009, Section 3 of the Act was notified. It is on these facts, the argument constructed by the appellants is that as on 8th May, 2009 when the appellants had submitted their bids, Section 3 of the Act was not in operation and, therefore, tender of March, 2009 could not be the subject

matter of inquiry by the CCI. According to the appellants, if this is allowed, it would amount to introducing the provisions of Section 3 of the Act retrospectively though the provision was introduced only prospectively that is from the date of the notification.

13) The answer to the aforesaid argument given by Mr. Neeraj Kaul, learned Additional Solicitor General appearing for the CCI, was that the NIT in question did not come to an end with the submission of bid on May 08, 2009. He pointed out that this bid was opened only on June 01, 2009, on which date Section 3 of the Act had already been activated. Not only this, bidders, that is all the appellants, were called for negotiations on June 17, 2009 and thereafter the award of work was given by placing requisite orders. He, thus, submitted that principle of retroactivity is to be applied as the process of finalisation of the tender was still on. For the applicability of doctrine of retroactivity, Mr. Kaul referred to Section 18 of the Act which casts duty upon the CCI to examine adverse effect on the competition and enumerated following factors for the applicability of this principle:

(e) Continuing effect of agreements/arrangement arrived at by the appellants.

(f) Negotiations with the appellants were held after the promulgation of Section 3 of the Act.

(g) From 2007 to 2011, the rates quoted by the appellants/tenderers

were identical and in order to find out whether there was cartelisation or not, studying of this entire trend became relevant. In this continuing arrangement of cartalisation, period of 2009 and even thereafter gets included.

(h) Even boycott of 2011 tender by all the appellants depicted their common intention which was the result of arrangement/agreement between them.

14) It is not in dispute that against this tender of 2009, all the appellants had offered price of `388, even though their cost of production differed. The COMPAT, in the impugned order, has held that merely because 8th May, 2009 was the last date for submitting the tender, that would not be the end of the matter as that is not the relevant date for the purpose of applicability of Section 3 when the tendering process continued, as the appellants had participated in the said tender process on 1st June, 2009 when the price bids were opened and offered the negotiated price on 17th June, 2009. This would mean that process of bidding was still on which went well beyond the date of notifying provisions of Section 3 of the Act. Relevant discussion in this behalf of the COMPAT is as under:

> '15. ...In this behalf the CCI has also recorded a finding in paragraph 7.13 that 8.5.2009 is not the crucial date but even 1.6.2009 and 17.6.2009 are equally crucial. This discussion would mean that the illegality of collusive bidding or rigging the bidding which commenced on 8.5.2009 was continued thereafter on 1.6.2009 and 17.6.2009 also. The negotiation of prices with the lowest bidder, and in this case all the three appellants were the

lowest bidders, undoubtedly forms the part of the process of bid rigging and cannot be seen separately from the process of bidding. For that matter the process of bidding cannot be restricted to only one date i.e. on 8.5.2009. We have seen in this behalf the investigation report by the D.G. as also the finding arrived at by the CCI which in our opinion is a correct finding. In this behalf it cannot be ignored that all the three appellants were informed by identical letters by the FCI one of which is found in Appeal No. 80 /2012 more particularly on pages 361-362. The letter is in the following terms :-

> "Sub : Tender Enquiry No. Pur-15(4)/2008 dated 28.3.2009 for supply of 600 MTs ± 10% Al. Phosphide conforming to BIS Specification No. IS:6438-1980 with up to date amendments, Technical Bid opened on 08.05.09; Price Bid opened on 01.06.2009 and negotiation held on 17.06.09.
> Gentlemen,
> Please refer to your offer letter No. UPLD:FCI:HQ:ALP:VKJ:09 dated 07.05.2009 and letter of negotiated offer dated 17.06.2009 against the above mentioned tender enquiry.
> **Your offer for supply [ALP] @ 386000/- per MT i.e. Rs. 386/- per 18 kg net... is hereby accepted** for a quantity of 200 MT ± 10% strictly as per the terms and conditions as contained in the tender for including detailed NIT."

This letter thus clarifies and proves that all the three appellants had given the offer at Rs.386/- per kg. which was identical offer for all the three appellants. It is thus clear that the anti-competitive agreement which commenced on 8.5.209 continued thereafter also and manifested itself in the post date, negotiations which was the direct fall out of the original identical offer and at which the offer was reduced by the identical amounts. Each of the appellant had the option of reducing the offer by a different amount or not reducing the offer or not reducing the offer at all and instead the three appellants chose to continue their anti-competitive agreement right up to that date.

17. The term "process for bidding" used in the explanation in Section 3(3) would thus cover every stage from notice inviting tender till the award of the contract and would also include all the intermediate stages such as pre-bid clarification and bid notifications also. Once this inference

> is reached on the basis of the interpretation of Section 3(3) explanation there would be no question of dearth of jurisdiction on the part of the CCI to firstly order the investigation into the matter and also to inquire itself into the complained illegality.'

15) The COMPAT has also noted that the anti-competitive conduct of the appellants was not limited to the 2009 tender alone. It had considered tender dated November 03, 2009 floated by the U.P. State Warehousing Corporation, tender dated July 13, 2010 of the Central Warehousing Corporation, tender dated July 15, 2010 of the M.P. State Warehousing Corporation, and tender dated February 14, 2011 of the Punjab State Cooperative SS & Marketing Federation and found that even against these tenders the appellants had quoted identical prices. Keeping in view the said pattern of quotation, the COMPAT opined that notwithstanding any objection of the appellants premised on retrospective application of Section 3, the anti-competitive conduct of APT manufacturers, i.e. the appellants, continued right up to the year 2011, much after Section 3 of the Act had come into force. Therefore, even if 2009 tender was to be completely ignored, the provisions of the Act would nevertheless be attracted in the instant case.

We are in complete agreement with the aforesaid view taken by the COMPAT. We are also of the firm view that provisions of Section 3 are applicable to 2009 tender as well.

16) Chapter II of the Act deals with three kinds of practices which are treated

as anti-competitive and prohibited. These are:

(a) where agreements are entered into by certain persons with a view to cause an appreciable adverse effect on competition;

(b) where any enterprise or group of enterprises, which enjoys dominant position, abuses the said dominant position; and

(c) regulating the combination of enterprises by means of mergers or amalgamations to ensure that such mergers or amalgamations do not become anti-competitive or abuse the dominant position which they can attain.

17) In the instant case, we are concerned with the first type of practices, namely, anti-competitive agreements. The Act, which prohibits anti-competitive agreements, has a laudable purpose behind it. It is to ensure that there is a healthy competition in the market, as it brings about various benefits for the public at large as well as economy of the nation. In fact, the ultimate goal of competition policy (or for that matter, even the consumer policies) is to enhance consumer well-being. These policies are directed at ensuring that markets function effectively. Competition policy towards the supply side of the market aims to ensure that consumers have adequate and affordable choices. Another purpose in curbing anti-competitive agreements is to ensure 'level playing field' for all market players that helps markets to be competitive. It sets 'rules of the game' that protect the competition process itself,

rather than competitors in the market. In this way, the pursuit of fair and effective competition can contribute to improvements in economic efficiency, economic growth and development of consumer welfare. How these benefits accrue is explained in ASEAN Regional Guidelines on Competition Policy, in the following manner:

> ““**2.2 Main Objectives and Benefits of Competition Policy**
>
> 2.2.1.1 Economic efficiency: Economic efficiency refers to the effective use and allocation of the economy's resources. Competition tends to bring about enhanced efficiency, in both a static and a dynamic sense, by disciplining firms to produce at the lowest possible cost and pass these cost savings on to consumers, and motivating firms to undertake research and development to meet customer needs.
>
> 2.2.1.2 Economic growth and development: Economic growth–the increase in the value of goods and services produced by an economy – is a key indicator of economic development. Economic development refers to a broader definition of an economy's well-being, including employment growth, literacy and mortality rates and other measures of quality of life. Competition may bring about greater economic growth and development through improvements in economic efficiency and the reduction of wastage in the production of goods and services. The market is therefore able to more rapidly reallocate resources, improve productivity and attain a higher level of economic growth. Over time, sustained economic growth tends to lead to an enhanced quality of life and greater economic development.
>
> 2.2.1.3 Consumer Welfare: Competition policy contributes to economic growth to the ultimate benefit of consumers, in terms of better choice (new products), better quality and lower prices. Consumer welfare protection may be required in order to redress a perceived imbalance between the market power of consumers and producers. The imbalance between consumers and producers may stem from market failures such as information asymmetries, the lack of bargaining position towards producers and high transaction costs. Competition policy may serve as a complement to consumer protection policies to address such market failures.”

18) The aforesaid guidelines also spell out few more benefits of such laws incorporating competition policies by highlighting the following advantages:

> "2.2.2 In addition, competition policy is also beneficial to developing countries. Due to worldwide deregulation, privatisation and liberalisation of markets, developing countries need a competition policy, in order to monitor and control the growing role of the private sector in the economy so as to ensure that public monopolies are not simply replaced by private monopolies.
>
> 2.2.3 Besides contributing to trade and investment policies, competition policy can accommodate other policy objectives (both economic and social) such as the integration of national markets and promotion of regional integration, the promotion or protection of small businesses, the promotion of technological advancement, the promotion of product and process innovation, the promotion of industrial diversification, environment protection, fighting inflation, job creation, equal treatment of workers according to race and gender or the promotion of welfare of particular consumer groups.
>
> In particular, competition policy may have a positive impact on employment policies, reducing redundant employment (which often results from inefficiencies generated by large incumbents and from the fact that more dynamic enterprises are prevented from entering the market) and favouring jobs creation by new efficient competitors.
>
> 2.2.4 Competition policy complements trade policy, industrial policy and regulatory reform. Competition policy targets business conduct that limits market access and which reduces actual and potential competition, while trade and industrial policies encourage adjustment to the trade and industrial structures in order to promote productivity-based growth and regulatory reform eliminates domestic regulation that restricts entry and exit in the markets. Effective competition policy can also increase investor confidence and prevent the benefits of trade from being lost through anticompetitive practices. In this way, competition policy can be an important factor in enhancing the attractiveness of an economy to foreign direct investment, and in maximizing the

benefits of foreign investment."

19) In fact, there is broad empirical evidence supporting the proposition that competition is beneficial for the economy. Economists agree that it has an important role to play in improving productivity and, therefore, the growth prospects of an economy. It is achieved in the following manner:

> "**<u>International Competition Network - Economic Growth and Productivity:</u>**
>
> **Competition contributes to increased productivity through:**
>
> ***Pressure on firms to control costs***. In a competitive environment, firms must constantly strive to lower their production costs so that they can charge competitive prices, and they must also improve their goods and services so that they correspond to consumer demands.
>
> ***Easy market entry and exit***. Entry and exit of firms reallocates resources from less to more efficient firms. Overall productivity increases when an entrant is more efficient than the average incumbent and when an exiting firm is less efficient than the average incumbent. Entry – and the threat of entry –incentivizes firms to continuously improve in order not to lose market share to or be forced out of the market by new entrants.
>
> ***Encouraging innovation***. Innovation acts as a strong driver of economic growth through the introduction of new or substantially improved products or services and the development of new and improved processes that lower the cost and increase the efficiency of production. Incentives to innovate are affected by the degree and type of competition in a market.
>
> ***Pressure to Improve Infrastructure***. Competition puts pressure on communities to keep local producers competitive by improving roads, bridges, docks, airports, and communications, as well as improving educational opportunities.

> ***Benchmarking***. Competition also can contribute to increased productivity by creating the possibility of benchmarking. The productivity of a monopolist cannot be measured against rivals in the same geographic market, but a dose of competition quickly will expose inferior performance. A monopolist may be content with mediocre productivity but a firm battling in a competitive market cannot afford to fall behind, especially if the investment community is benchmarking it against its rivals."

Productivity is increased through competition by putting pressure on firms to control costs as the producers strive to lower their production costs so that they can charge competitive prices. It also improves the quality of their goods and services so that they correspond to consumers' demands.

Competition law enforcement deals with anti-competitive practices arising from the acquisition or exercise of undue market power by firms that result in consumer harm in the forms of higher prices, lower quality, limited choices and lack of innovation. Enforcement provides remedies to avoid situations that will lead to decreased competition in markets. Effective enforcement is important not only to sanction anti-competitive conduct but also to deter future anti-competitive practices.

20) When we recognise that competition has number of benefits, it clearly follows that cartels or anti-competitive agreements cause harm to consumers by fixing prices, limiting outputs or allocating markets. Effective enforcement against such practices has direct visible effects in

terms of reduced prices in the market and this is also supported by various empirical studies.

21) Keeping in view the aforesaid objectives that need to be achieved, Indian Parliament enacted Competition Act, 2002. Need to have such a law became all the more important in the wake of liberalisation and privatisation as it was found that the law prevailing at that time, namely, Monopolistic Restrictive Trade Practices Act, 1969 was not equipped adequately enough to tackle the competition aspects of the Indian economy. The law enforcement agencies, which include CCI and COMPAT, have to ensure that these objectives are fulfilled by curbing anti-competitive agreements.

22) Once the aforesaid purpose sought to be achieved is kept in mind, and the same is applied to the facts of this case after finding that the anti-competitive conduct of the appellants continued after coming into force of provisions of Section 3 of the Act as well, the argument predicated on retrospectivity pales into insignificance.

One has to keep in mind the aforesaid objective which the legislation in question attempts to sub-serve and the mischief which it seeks to remedy. As pointed out above, Section 18 of the Act casts an obligation on the CCI to *'eliminate'* anti-competitive practices and promote competition, interests of the consumers and free trade. It was

rightly pointed out by Mr. Neeraj Kishan Kaul, the learned Additional Solicitor General, that the Act is clearly aimed at addressing the evils affecting the economic landscape of the country in which interest of the society and consumers at large is directly involved. This is so eloquently emphasised by this Court in ***Competition Commission of India*** v. ***Steel Authority of India Limited & Anr.***[1] in the following manner:

> "6. As far as the objectives of competition laws are concerned, they vary from country to country and even within a country they seem to change and evolve over the time. However, it will be useful to refer to some of the common objectives of competition law. The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are threefold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law.
>
> xx xx xx
>
> 8. The Bill sought to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on the competition in market within India and for this purpose establishment of a quasi-judicial body was considered essential. The other object was to curb the negative aspects of competition through such a body, namely, "the Competition Commission of India" (for short "the Commission") which has the power to perform different kinds of functions, including passing of interim orders and even awarding compensation and imposing penalty. The Director General appointed under Section 16(1) of the Act is a specialised investigating wing of the Commission. In short, the establishment of the Commission

1 (2010) 10 SCC 744

and enactment of the Act was aimed at preventing practices having adverse effect on competition, to protect the interest of the consumer and to ensure fair trade carried out by other participants in the market in India and for matters connected therewith or incidental thereto.

9. The various provisions of the Act deal with the establishment, powers and functions as well as discharge of adjudicatory functions by the Commission. Under the scheme of the Act, this Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and to a limited extent even advisory jurisdiction. Vast powers have been given to the Commission to deal with the complaints or information leading to invocation of the provisions of Sections 3 and 4 read with Section 19 of the Act. In exercise of the powers vested in it under Section 64, the Commission has framed regulations called the Competition Commission of India (General) Regulations, 2009 (for short “the Regulations”).

10. The Act and the Regulations framed thereunder clearly indicate the legislative intent of dealing with the matters related to contravention of the Act, expeditiously and even in a time-bound programme. Keeping in view the nature of the controversies arising under the provisions of the Act and larger public interest, the matters should be dealt with and taken to the logical end of pronouncement of final orders without any undue delay. In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly, country's economy cannot be ruled out.

xx xx xx

125. We have already noticed that the principal objects of the Act, in terms of its Preamble and the Statement of Objects and Reasons, are to eliminate practices having adverse effect on the competition, to promote and sustain competition in the market, to protect the interest of the consumers and ensure freedom of trade carried on by the participants in the market, in view of the economic developments in the country. In other words, the Act requires not only protection of free trade but also protection of consumer interest. The delay in disposal of cases, as well as undue continuation of interim restraint orders, can adversely and prejudicially affect the free economy of the country. Efforts to liberalise the Indian economy to bring it on a par with the best of the economies in this era of globalisation would be jeopardised if time-bound schedule and, in any case, expeditious disposal by the Commission is not adhered to. The

> scheme of various provisions of the Act which we have already referred to including Sections 26, 29, 30, 31, 53-B(5) and 53-T and Regulations 12, 15, 16, 22, 32, 48 and 31 clearly show the legislative intent to ensure time-bound disposal of such matters."

23) Having regard to the aforesaid objective, we are of the opinion that merely because the purported agreement between the appellants was entered into and bids submitted before May 20, 2009 are no yardstick to put an end to the matter. No doubt, after the agreement, first sting was inflicted on May 8, 2009 when the bids were submitted and there was no provision like S. 3 on that date. However, the effect of the arrangement continued even after May 20, 2009, with more stings, as a result of which the appellants bagged the contracts and fruits thereof reaped by the appellants when Section 3 had come into force which frowns upon such kinds of agreements.

24) We are, thus, of the opinion that inquiry into the tender of March 2009 by the CCI is covered by Section 3 of the Act inasmuch as the tender process, though initiated prior to the date when Section 3 became operation, continued much beyond May 20, 2009, the date on which the provisions of Section 3 of the Act were enforced. We agree with the COMPAT that the role of the appellants did not come to an end with the submission of bid on May 08, 2009.

25) In this behalf, it is to be emphasised again that merely by submitting the

tenders, role of the appellants as tenderers had not come to an end. As already pointed out, the DG in its report noted that FCI resorted to global tender which had two-bid systems: techno-commercial bid and financial bid. Those who qualified in techno-commercial process, their financial bids were to be opened. The appellants had submitted their bids on May 08, 2009, which was the last date for this purpose. Bids were to be submitted by 2.00 pm on that day and were to be opened at 3.00 pm on the same day. The committee of responsible officers for evaluating the technical price bids was constituted. As per the practice, the lowest bidder is invited by the committee for negotiations. And after negotiations, the committee submits the report giving its recommendations on the basis of which contract is awarded. If there was variation in the prices quoted by the appellants in their bids, things would have been different. Then L-I could have been called for negotiations. However, all the three appellants quoted identical rates of Rs. 388/-. Because of this reason all the appellants were LI and had to be called for negotiations. Therefore, bidding process did not come to an end on May 08, 2009 as argued by the appellants. It continued even thereafter when the appellants appeared before the committee for negotiations, much beyond May 20, 2009 the date on which provisions of Section 3 of the Act were enforced.

26) In the aforesaid conspectus, principle of retroactivity would definitely

apply. For this, we may usefully refer to the judgment of this Court in ***R. Rajagopal Reddy (Dead) by LRs. & Ors.*** v. ***Padmini Chandrasekharan (Dead) By LRs.***[2] wherein it was held that merely because an agreement relating to benami transaction was entered into prior to the coming into force of the Benami Transactions (Prohibition) Act, 1988, it would not mean that the provisions of the said Act would not apply retroactively to such an agreement and render it void. Likewise, in ***Zile Singh*** v. ***State of Haryana & Ors.***[3], this Court held that rule against retrospectivity may not apply to a declaratory statute.

27) Following these judgments, the Bombay High Court has described this very statute, with which we are dealing, to be retroactive in operation in ***Kingfisher Airlines*** v. ***Competition Commission of India***[4]. Following discussion from that judgment needs to be reproduced:

> "8. Shri Seervai, the learned Senior Counsel, submits that the very wording of Section 3 of the Act would make it clear that the Act is prospective in nature. He submits that even a plain reading of the provisions would go to show that. He contends that the legislature in its wisdom has not added any words in the section to say that it would affect the agreement already entered into. He submits that if it wanted to bring the agreement, prior to coming into force of the Act, into its sweep, it would have and could have said so in very many words....
>
> xx xx xx
>
> The Act nowhere declares the agreement already entered into as void. If the Section is read, it says that after coming into force of the Act, no person shall enter into an agreement in contravention of the provisions of the Act and if entered into,

2 (1995) 2 SCC 630
3 (2004) 8 SCC 1
4 (2010) 4 Comp. LJ 557 (Bom)

same shall be void. This, to our mind, at the most, would mean that the Act does not render the agreement entered into, prior to coming into force of the Act, void ab initio. Had the Act been retrospective in operation, it would render the agreement void ab initio. The agreement prior to coming into force of the new act was, therefore, certainly valid, for it was not in breach of any law or affected any law then existing. The question here is whether this agreement, which was valid until coming into force of the Act, would continue to be so valid even after the operation of the law. The parties as on today certain propose to act upon that agreement. All acts done in pursuance of the agreement before the Act came into force would be valid and cannot be questioned. But if the parties want to perform certain things in pursuance of the agreement, which are now prohibited by law, would certainly be an illegality and such an agreement by its nature, therefore, would, from that time, be opposed to the public policy. We would say that the Act could have been treated as operating retrospectively, had the Act rendered the agreement void ab initio and would render anything done pursuant to it as invalid. The Act does not say so. It is because the parties still want to act upon the agreement even after coming into force of the Act that difficulty arises. If the parties treat the agreement as still continuing and subsisting even after coming into force of the Act, which prohibits an agreement of such nature, such an agreement cannot be said to be valid from the date of the coming into force of the Act. If the law cannot be applied to the existing agreement, the very purpose of the implementation of the public policy would be defeated. Any and every person may set up an agreement said to be entered into prior to the coming into force of the Act and then claim immunity from the application of the Act. Such thing would be absurd, illogical and illegal. The moment the Act comes into force, it brings into its sweep all existing agreements. This can be explained further by quoting the following example:

> "A and B enter into agreement of sale of land on 2/1/2008. It is agreed between them that sale-deed would be executed on or before 2/1/2009. Meanwhile, i.e. on 10/8/2008, the Government decides to impose a ban on transfer of the land and declares that any such transfer, if effected, shall be void. The question is, could the parties say that since their agreement being prior to Government putting a ban on transfer, their case is not covered by the ban? The answer has to be in the negative, as on the day the contract is sought to be completed, it is prohibited."

Similar would be the result in the instant case."

28) We approve the aforesaid view taken by the Bombay High Court. It may be added that had the anti-competitive agreement between the appellants been executed and completed in its entirety prior to May 20, 2009, i.e. nothing further was left to be done and all actions as contemplated by the agreement had already been accomplished, it could perhaps be argued that the Act was not applicable to such an agreement or actions taken pursuant to the agreement. However, that is not the factual position in the instant case as the purported arrangement entered into by the appellants continued to be acted upon even after May 20, 2009.

29) The COMPAT has referred to the explanation to Section 3(3)(d) also while arriving at the conclusion that May 08, 2009 cannot be the determinative date on which the bid was submitted, as *'manipulating the process of bidding'* is also covered by virtue of the said explanation and this process of bidding continued even after May 20, 2009.

30) Learned counsel for the appellants submitted that this explanation has no application as it referred only to *'bid rigging'* which is different from *'collusive bidding'*. In an attempt to distinguish the two expressions, it was argued that although the terms *'bid rigging'* or *'collusive bidding'* may, in certain contexts, overlap or even may be referred to as

'synonyms', in certain context they may cover activities which are not identical. *'Bid rigging'* may cover larger and more varied activities than *'collusive bidding'*. It was submitted that in view of the specific exclusion of *'collusive bidding'* from the *'Explanation',* an activity which squarely falls within the scope of *'collusive bidding'* would not be covered by the *'Explanation'* and would be excluded from it. Submission is that since the allegation in the present case relating to identical pricing or identical reduction in price squarely falls within the term *'collusive pricing'*, the *'Explanation'* has no relevance to the present case.

31) Mr. Neeraj Kishan Kaul, learned Additional Solicitor General, refuted the aforesaid submission with vehemence by urging that bid rigging and collusive bidding are not mutually exclusive and these are overlapping concepts. Illustratively, he referred to the findings of the CCI, as approved by the COMPAT, in the instant case itself to the effect that the appellants herein had *'manipulated the process of bidding'* on the ground that bids were submitted on May 08, 2009 collusively, which was only the beginning of the anti-competitive agreement between the parties and this continued through the opening of the price bids on June 01, 2009 and thereafter negotiations on June 17, 2009 when all the parties reduced their bids by same figure of `2 to bring their bid down to `386 per kg. from `388 per kg. From this example, he submitted that on May 08, 2009 there was a collusive bidding but with concerted

negotiations on June 17, 2009, in the continued process, it was rigging of the bid that was practiced by the appellants.

We are inclined to agree with this pellucid submission of the learned Additional Solicitor General.

32) Richard Whish and David Bailey[5], in their book, have given illustrations of various forms of collusive bidding/bid rigging, which include:

(a) Level tendering/bidding (i.e. bidding at same price – as in the present case).

(b) Cover bidding/courtesy bidding.

(c) Bid rotation.

(d) Bid Allocation.

33) Even internationally, '*collusive bidding'* is not understood as being different from *'bid rigging'*. These two expressions have been used interchangeably in the following international commentaries/ glossaries and websites of competition authorities:

(a) **UNCTAD Competition Glossary dated June 22, 2016**

> "Bid Rigging or Collusive Tendering is a manner in which conspiring competitors may effectively raise prices where business contracts are awarded by means of soliciting competitive bids. Essentially, it relates to a situation where competitors agree in advance who will win the bid and at what price, undermining the very purpose of inviting tenders which is to procure goods or services on the most favourable prices and conditions."

5 Competition Law, 7th Edition, page 536

(b) **OECD Glossary of Industrial Organisation Economics & Competition Law.**

"Bid rigging is a particular form of collusive price-fixing behaviour by which firms coordinate their bids on procurement or project contracts. There are two common forms of bid rigging. In the first, firms agree to submit common bids, thus eliminating price competition. In the second, firms agree on which firm will be the lowest bidder and rotate in such a way that each firm wins an agreed upon number or value of contracts.

Since most (but not all) contracts open to bidding involve governments, it is they who are most often the target of bid rigging. Bid rigging is one of the most widely prosecuted forms of collusion."

Collusive bidding (tendering) **– See Bid Rigging**"

[This shows collusive bidding and bid rigging are treated as one and the same]

(c) **OECD Guidelines for fighting bid rigging**

"Bid rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process."

(d) **United States Office of the Inspector General, Investigations (Fraud Indicators Handbook)**

"Collusive bidding, price fixing or bid rigging, are commonly used interchangeable terms which describe many forms of an illegal anti-competitive activity. The common thread throughout all these activities is that they involve any agreements or informal arrangements among independent competitors, which limit competition. Agreements among competitors which violate the law include but are not limited to:

(1) Agreements to adhere to published price lists.

(2) Agreements to raise prices by a specified increment.

(3) Agreements to establish, adhere to, or eliminate discounts.

(4) Agreements not to advertise prices.

(5) Agreements to maintain specified price differentials based on quantity, type or size of product."

(e) **Australian Competition & Consumer Commission**

> "Bid rigging, also referred to as collusive tendering, occurs when two or more competitors agree they will not compete genuinely with each other for tenders, allowing one of the cartel members to *'win'* the tender. Participants in a bid rigging cartel may take turns to be the *'winner'* by agreeing about the way they submit tenders, including some competitors agreeing not to tender."

34) As the Leigman of the law, it is our task, *nay* a duty, to give proper meaning and effect to the aforesaid 'Explanation': it can easily be discussed that the Legislature had in mind that the two expressions are inter-changeably used. It is also necessary to keep in mind the purport behind Section 3 and the objective it seeks to achieve. Sub-section (1) of Section 3 is couched in the negative terms which mandates that no enterprise or association of enterprises or person or association of persons shall enter into any agreement, when such agreement is in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services and it causes or is likely to cause an appreciable adverse effect on competition within India. It can be discerned that first part relates to the parties which are prohibited from entering into such an agreement and embraces within it persons as well as enterprises thereby signifying its very wide coverage. This becomes

manifest from the reading of the definition of *"enterprise"* in Section 2(h) and that of *'person'* in Section 2(l) of the Act. Second part relates to the subject matter of the agreement. Again it is very wide in its ambit and scope as it covers production, supply, distribution, storage, acquisition or control of goods or provision of services. Third part pertains to the effect of such an agreement, namely, 'appreciable adverse effect on competition', and if this is the effect, purpose behind this provision is not to allow that. Obvious purpose is to thwart any such agreements which are anti-competitive in nature and this salubrious provision aims at ensuring healthy competition. Sub-section (2) of Section 3 specifically makes such agreements as void. Sub-section (3) mentions certain kinds of agreements which would be treated as *ipso facto* causing appreciable adverse effect on competition. It is in this backdrop and context that 'Explanation' beneath sub-section (3), which uses the expression *'bid rigging'*, has to be understood and given an appropriate meaning. It could never be the intention of the Legislature to exclude *'collusive bidding'* by construing the expression *'bid rigging'* narrowly. No doubt, clause (d) of sub-section (3) of Section 3 uses both the expressions *'bid rigging' and 'collusive bidding',* but the Explanation thereto refers to *'bid rigging'* only. However, it cannot be said that the intention was to exclude *'collusive bidding'*. Even if the Explanation does contain the expression *'collusive bidding'* specifically, while interpreting clause (d), it

can be inferred that *'collusive bidding'* relates to the process of bidding as well. Keeping in mind the principle of purposive interpretation, we are inclined to give this meaning to *'collusive bidding'.* It is more so when the expressions *'bid rigging'* and *'collusive bidding'* would be overlapping, under certain circumstances which was conceded by the learned counsel for the appellants as well.

We are, therefore, of the opinion that the two expressions are to be interpreted using the principle of *noscitur a sociis*, i.e. when two or more words which are susceptible to analogous meanings are coupled together, the words can take colour from each other {See – ***Leelabai Gajanan Pansare & Ors.*** v. ***Oriental Insurance Company Limited & Ors.***[6], ***Thakorlal D. Vadgama*** v. ***State of Gujarat***[7], and ***M.K. Ranganathan*** v. ***Government of Madras & Ors.***[8]}.

We, thus, answer Issue No. 1 in the negative by holding that the CCI was well within its jurisdiction to hold an enquiry under Section 3 of the Act in respect of tender of March, 2009.

ISSUE NO.2

Re.: Jurisdiction of DG/CCI to investigate into the boycott of 2011 FCI's tender

35) The CCI had entrusted the task to DG after it received representation/complaint from the FCI vide its communication dated

6 (2008) 9 SCC 720
7 (1973) 2 SCC 413
8 (1955) 2 SCR 374

February 04, 2011. Argument of the appellants is that since this communication did not mention about the 2011 tender of the FCI, which was in fact even floated after the aforesaid communication, there could not be any investigation in respect of this tender. It is more so when there was no specific direction in the CCI's order dated February 24, 2011 passed under Section 26(1) of the Act and, therefore, the 2011 tender could not be the subject matter of inquiry when it was not referred to in the communication of the FCI or order of the CCI. The COMPAT has rejected this contention holding that Section 26(1) is wide enough to cover the investigation by the DG, with the following discussion:

> "28. As per the sub-section (1) of Section 26, there can be no doubt that the DG has the power to investigate only on the basis of the order passed by the Commission under Section 26(1). Our attention was also invited to sub-section (3) of Section 26 under which the Director-General, on receipt of direction under sub-section (1) is to submit a report of its findings within such period as may be specified by the Commission. The argument of the parties is that if on the relevant date when the Commission passed the order, even the tender notice was not floated, then there was no question of Direction General going into the investigation of that tender. It must be noted at this juncture that under Section 18, the Commission has the duty to eliminate practices having adverse effect on competition and to promote and sustain competition. It is also required to protect the interests of the consumers. There can be no dispute about the proposition that the Director General on his own cannot act and unlike the Commission, the Director General has no suo-moto power to investigate. That is clear from the language of Section 41 also, 28 which suggests that when directed by the Commission, the Director General is to assist the Commission in investigating into any contravention of the provisions of the Act. Our attention was also invited to the Regulations and more particularly to Regulation 20, which pertains to the investigation by the Director General. Sub-regulation (4) of Section 20 was pressed into service by all the learned counsel, which is in the following term :-

> "The report of the Director-General shall contain his findings on each of the allegations made in the information or reference, as the case may be, together with all evidences or documents or statements or analyses collected during the investigation:"
> (proviso not necessary)

From this, the learned counsel argued that the Director General could have seen into the tender floated on 08.05.2009 only, and no other tender as the information did not contain any allegation about the tender floated in 2011. Therefore, the investigation made into the tender floated in 2011 was outside the jurisdiction of the Director General. This argument was more particularly pressed into service, as the Director General as well as the Competition Commission of India have found that all the appellants had entered into an agreement to boycott the tender floated in 2011 and thereby had rigged the bids.

29. We have absolutely no quarrel with the proposition that the Director General must investigate according to the directions given by the CCI under Section 26(1). There is also no quarrel with the proposition that the Director General shall record his findings on each of the allegations made 29 in the information. However, it does not mean that if the information is made by the FCI on the basis of tender notice dated 08.05.2009, the investigation shall be limited only to that tender. Everything would depend upon the language of the order passed by the CCI on the basis of information and the directions issued therein. If the language of the order of Section 26(1) is considered, it is broad enough. At this juncture, we must refer to the letter written by Chairman and Managing Director of FCI, providing information to the CCI. The language of the letter is clear enough to show that the complaint was not in respect of a particular event or a particular tender. It was generally complained that appellants had engaged themselves in carteling. The learned counsel Shri Virmani as well as Shri Balaji Subramanian are undoubtedly correct in putting forth the argument that this information did not pertain to a particular tender, but it was generally complained that the appellants had engaged in the anticompetitive behaviour. When we consider the language of the order passed by the CCI under Section 26(1) dated 23.04.2012 the things becomes all the more clear to us. The language of that order is clearly broad enough to hold, that the Director General was empowered and duty bound to look into all the facts till the investigation was completed. If in the course of investigation, it came to the light that the parties had boycotted the tender in 2011 with pre-concerted agreement, there was no question of the DG not going into it. We must view this on the background that when the information was led, the Commission

> had material only to form a prima facie view. The said prima-facie view could not restrict the Director General, if he was duty bound to carry out a comprehensive investigation in keeping with the direction by CCI. In fact the DG has also taken into 30 account the tenders by some other corporations floated in 2010 and 2011 and we have already held that the DG did nothing wrong in that. In our opinion, therefore, the argument fails and must be rejected."

We entirely agree with the aforesaid view taken by the COMPAT.

36) If the contention of the appellants is accepted, it would render the entire purpose of investigation nugatory. The entire purpose of such an investigation is to cover all necessary facts and evidence in order to see as to whether there are any anti-competitive practices adopted by the persons complained against. For this purpose, no doubt, the starting point of inquiry would be the allegations contained in the complaint. However, while carrying out this investigation, if other facts also get revealed and are brought to light, revealing that the 'persons' or 'enterprises' had entered into an agreement that is prohibited by Section 3 which had appreciable adverse effect on the competition, the DG would be well within his powers to include those as well in his report. Even when the CCI forms *prima facie* opinion on receipt of a complaint which is recorded in the order passed under Section 26(1) of the Act and directs the DG to conduct the investigation, at the said initial stage, it cannot foresee and predict whether any violation of the Act would be found upon investigation and what would be the nature of the violation revealed through investigation. If the investigation process is to be

restricted in the manner projected by the appellants, it would defeat the very purpose of the Act which is to prevent practices having appreciable adverse effect on the competition. We, therefore, reject this argument of the appellants as well touching upon the jurisdiction of the DG.

ISSUE NO. 3:

RE.: MERITS

37) It is not in dispute that in respect of 2009 tender of the FCI, all the three appellants had quoted the same price, i.e. `388 per kg. for the APT. The appellants have attempted to give their explanations and have contended that it cannot be presumed that it was the result of any prior agreement or arrangement between them. This aspect shall be taken note of and dealt with in detail later at the appropriate stage. Before that, it needs to be highlighted that it is not only 2009 FCI tender in respect of which DG found the violation. Pertinently, the investigation of DG revealed that the appellants had been quoting such identical rates much prior to and even after May 20, 2009. No doubt, in relation to tenders prior to 2009, it cannot be said that there was any violation of law by the appellants. However, prior practice definitely throws light on the formation of cartelisation by the appellants, thereby making it easier to understand the events of 2009 tender. Therefore, to take a holistic view of the matter, it would be essential to point out that the DG in his report had tabulated this tendency of quoting identical rates by these

parties in respect of various tenders issued by even other Government bodies before and after 2009. The statistics in this behalf, given in tabulated form by the DG, are reproduced below:

S.No.	Tendering Agency	Tender Opening Date	Rates quoted (Rs. Per kg.)			
			Excel	United	Sandhya	Agro
1.	U.P. State Warehousing Corp.	14/03/2007	225	225	-	-
2.	Punjab State Civil Supplies Corp.	28/04/2008	260	260	-	-
3.	Central Warehousing Corp.	06/08/2008	450	-	450	-
4.	U.P. State Warehousing Corp.	19/09/2008	449	449	-	-
5.	Punjab State Co-op SS & Mktg. Fed.	26/12/2008	419	419	-	-
6.	Central Warehousing Corp.	06/01/2009	414	414	-	-
7.	Punjab State Civil Supplies Corp.	27/02/2009	409	409	-	-
8.	Food Corporation of India	08/05/2009	388	388	388	-
9.	Punjab State Civil Supplies Corpn.	15/06/2009	399	-	-	399
10.	U.P. State Warehousing	03/11/2009	399	399	-	-
11.	Director, SS & Disposal, Haryana	01/12/2009	-	-	399	399
12.	Punjab State Civil Supplies Corp.	18/03/2010	419	-	-	410
13.	Central Warehousing Corp.	13/07/2010	421	421	421	-
14.	M.P. State Warehousing Corp.	15/07/2010	436	-	436	-
15.	Punjab State Co-op SS & Mktg. Fed.	14/02/2011	415	415	-	-
16.	Punjab State	15/03/2011	-	415	-	415

	Civil Supplies Corp.					

38) The aforesaid table shows identical pricing by these parties even in respect of tenders floated by the U.P. State Warehousing Corporation and Punjab State Civil Supplies Corporation. It was repeated in respect of 2008 tender floated by the Central Warehousing Corporation. Tenders up to S.No.7 above, no doubt, relate to the period which is earlier to coming into force of the provisions of Section 3. At S.No. 8 is the tender of the FCI of March, 2009, which is held to be covered on the principle of retroactivity, as already held above. However, insofar as tenders mentioned at S.Nos. 9 to 16 are concerned, they all pertain to the period after Section 3 became operational. These are clear cut examples of identical pricing by the three appellants. No doubt, the appellants cannot be penalised in respect of tenders mentioned at S.Nos. 1 to 7 as there was no provision like Section 3 at that time. However, such illustrations become important in finding out the *mens rea* of the appellants, i.e. arriving at an agreement to enter into collusive bidding which continued with impunity right up to 2011. Further, this trend of quoting identical price in respect of so many tenders, not only of FCI but other Government bodies as well, is sufficient to negate all explanations given by the appellants taking the pretext of coincidence or economic forces.

39) We may record here the submission of Mr. Krishnan Venugopal, learned senior counsel appearing for M/s. Excel Crop Care Limited, that the APT pesticide is needed only by the FCI and the Central Warehousing Corporation or the Central and State Warehousing Corporations and it creates a monopoly situation where buyer is in a dominant position. There are only four suppliers who are given '*MFN'* status, but since the supply is only to the aforesaid Government agencies, the supplier is entirely dependent upon these parties for supplies. It creates oligopoly market. It was argued that since dominant position is enjoyed by the buyer, it leads to parallel pricing and this conscious parallelism takes place leading to quoting the same price by the suppliers. The explanation, thus, given for quoting identical price was the aforesaid economic forces and not because of any agreement or arrangement between the parties. It was submitted that merely because same price was quoted by the appellants in respect of the 2009 FCI tender, one could not jump to the conclusion that there was some *'agreement'* as well between these parties, in the absence of any other evidence corroborating the said factum of quoting identical price. In respect of this submission, Mr. Venugopal had also referred few judgments.

40) The aforesaid argument is highly misconceived. A neat and pellucid reply of Mr. Kaul, which commands acceptance, is that argument of parallelism is not applicable in bid cases and it fits in the realm of market

economy. It is for this reason the entire history of quoting identical price before coming into operation of Section 3 and which continued much after Section 3 of the Act was enforced has been highlighted. There cannot be coincidence to such an extent that almost on all occasions price quoted by the three appellants is identical, not even few paisa more or less from each other. That too, when the cost structure, i.e. cost of production of this product, of the three appellants sharply varies with each other. Following factors in this behalf need to be highlighted:

(a) there is a 10 years' history of quoting identical prices;

(b) there are only four suppliers of the product in the market out of which three are the appellants;

(c) even when the cost of production is different, they have quoted identical price;

(d) even when the geographical location of the three suppliers is different, strange coincidence of identical pricing is found, that too repeatedly;

(e) profit margins would be different, still quotations are same; and

(f) to different parties in respect of different tenders, different rates are quoted. Still whatever price is quoted in respect of one particular tender, that is identical. It would be too much of a coincidence, difficult to believe.

Thus, onus was on the appellants in view of Section 3 of the Act,

and that too heavy onus, to justify the above trend, but they have failed to discharge this burden. We are, therefore, of the opinion that ingredients of Section 3 stand satisfied and the CCI rightly held that provisions of Section 3(3)(a), 3(3)(b) and 3(3)(d) have been contravened by the appellants.

41) It needs to be emphasised that collusive tendering is a practice whereby firms agree amongst themselves to collaborate over their response to invitations to tender. Main purpose for such collusive tendering is the need to concert their bargaining power, though, such a collusive tendering has other benefits apart from the fact that it can lead to higher prices. Motive may be that fewer contractors actually bother to price any particular deal so that overheads are kept lower. It may also be for the reason that a contractor can make a tender which it knows will not be accepted (because it has been agreed that another firm will tender at a lower price) and yet it indicates that the said contractor is still interested in doing business, so that it will not be deleted from the tenderee's list. It may also mean that a contractor can retain the business of its established, favoured customers without worrying that they will be poached by its competitors.

42) Collusive tendering takes many forms. Simplest form is to agree to quote identical prices with the hope that all will receive their fair share of

orders. That is what has happened in the present case. However, since such a conduct becomes suspicious and would easily attract the attention of the competition authorities, more subtle arrangements of different forms are also made between colluding parties. One system which has been noticed by certain competition authorities in other countries is to notify intended quotes to each other, or more likely to a central secretariat, which will then cost the order and eliminate those quotes that it considers would result in a loss to some or all members of the cartel. Another system, which has come to light, is to rotate orders. In such a case, the firm whose turn is to receive an order will ensure that its quote is lower than the quotes of others.

43) We are here concerned with parallel behaviour. We are conscious of the argument put forth by Mr. Venugopal that in an oligopoly situation parallel behaviour may not, by itself, amount to a concerted practice. It would be apposite to take note of the following observations made by U.K. Court of Justice in Dyestuffs[9]:

> "By its very nature, then, the concerted practice does not have all the elements of a contract but may *inter alia* arise out of coordination which becomes apparent from the behaviour of the participants. *Although parallel behaviour may not itself if identified with a concerted practice,* it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not respond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market. Such is the case especially where the parallel behaviour is such as to permit the parties to seek price

9 (1972) ECR 619

> equilibrium at a different level from that which would have resulted from competition, and to crystallise the status quo to the detriment of effective freedom of movement of the products in the [internal] market and free choice by consumers of their suppliers (emphasis added.

At the same time, the Court also added that the existence of a concerted practice could be appraised correctly by keeping in mind the following test:

> "If the evidence upon which the contested decision is based is considered, not in isolation, but as a whole, account being taken of the specific features of the products in question."

44) It would be significant to note that in Dyestuffs' judgment, the Court rejected the argument predicated on Oligopolistic market structure, after finding that the market is not a pure oligopoly: rather it was one in which firms could realistically be expected to adopt their own pricing strategies, particularly, in view of the compartmentalisation of the markets along national boundaries. In the instant case, argument of oligopoly market was not even raised either before the CCI or COMPAT. Moreover, with the eloquent facts, mentioned above, staring at the appellants, we do not agree with the arguments put forth by Mr. Venugopal.

45) At this juncture, we would advert to tender of May, 2011. It is not in dispute that all the three appellants, as well as M/s. Agrosynth Chemicals Limited did not participate in the said tender. These are the four manufacturers in all. When this fact is not in dispute, the only

question is as to whether it was a concerted action on the part of the appellants herein. According to all the appellants, their decision not to participate in the aforesaid bid was the onerous, unreasonable, arbitrary and unquestionable conditions that were put in the said tender. As these were not acceptable to them, they individually decided not to take part in the tender, which was a valid business decision and not result of pre-concerted agreement of the appellants.

46) The conditions which are perceived as 'onerous' by these appellants are the following:

2) Earnest money deposit was raised from `10 lakhs to `30 lakhs.

3) Supply required as per this standard was 75 MT per month which was too high a demand/requirement and it was difficult to effect supplies of this magnitude every month.

M/s. Sandhya Organics Chemicals (P) Ltd. additionally submitted that they had placed on record that their production capacity was much less and supplying 75 MT of APT every month was beyond their means. Therefore, they were unable to tender against the said NIT. Before the COMPAT, M/s. Excel Crop Care Limited attempted to project their *bona fides* by showing that they had even written letter dated May 26, 2011 to the FCI conveying their inability to take part in that tender.

47) The COMPAT, after discussing the matter, arrived at the conclusion that

it was clearly an after-thought move, inasmuch as the tender was published on April 28, 2011 and the last date for submitting the price bids was May 27, 2011, but only a day before i.e. on May 26, 2011, such a letter was sent by M/s. Excel Crop Care Limited to the FCI. Insofar as M/s. UPL is concerned, it did not even bother to give any representation. Likewise, M/s. Sandhya Organics did not approach the FCI at all with the representation that the quantities to be supplied were huge and the tender conditions be suitably modified.

48) We feel that COMPAT has examined the matter in right perspective. After examining the record, one finds that important fundamental conditions were the same which used to be in the earlier tenders. In 2009 tender, a specific quantity of 600 MT was prescribed. At that time, all the three appellants participated and did not object to the same. As against this in 2011 tender, the tentative annual requirement of APT was stated to be 400 MT and not 75 MT per month. The condition referred to by the appellants was not for supply of 75 MT per month. It only stated that in a given month the tenderer should have capacity to supply 75 MT. It was nowhere stated that 75 MT will have to be supplied by the successful tenderer every month. In any case, from the conduct of the three appellants, it becomes manifest that reason to boycott the May 2011 tender was not the purported onerous conditions, but it was a concerted action. Otherwise, if the appellants were genuinely interested

in participating in the said tender and were aggrieved by the aforesaid conditions, they could have taken up the matter with the FCI well in time. They, therefore, could request the FCI to drop the same (in fact FCI dropped these conditions afterwards when the matter was brought to their notice). However, no such effort was made. As pointed out above, M/s. Excel Crop Care wrote the letter only a day before, just to create the record which cannot be termed as a bona fide move on its part. UPL did not even make any such representation in writing. Likewise, M/s. Sandhya Organics Chemicals (P) Ltd. would not have liked itself to be rendered disqualified and silently swallowed this situation. After all, it would have liked to remain a supplier of APT to FCI having regard to the fact that the said product is consumed by handful of Government sector undertakings. Therefore, not making any sincere effort in this behalf by any of the appellants clearly shows that they were in hand in glove in taking a decision not to bid against this tender. This conclusion gets strengthened by the fact that these are the only four suppliers (including three appellants) in the market for this product. Reaction of not participating in the said tender by four suppliers could have been perceived otherwise, had there been a number of manufacturers in the market and four out of them abstaining. Abstention by hundred percent (who are only four) makes the things quite obvious. Events get quite apparent when examined along with past history of quoting identical

prices, an aspect already commented above.

49) Since collusion stands proved by the aforesaid conduct of the appellants in abstaining from the bidding in respect of May 2011 tender, requirement of Section 3(3)(d) of the Act read with 'explanation' thereto stands satisfied, viz., concerted action based on an agreement/arrangement between the appellants, resulted in restricting or manipulating competition or process of bidding, since the said act was collusive in nature.

50) We, therefore, agree with the conclusions of the COMPAT on this aspect as well.

51) Issue No. 4

Re: Penalty

After giving its finding that there was a contravention of the provisions of Section 3 of the Act by the appellants, the CCI imposed the following penalties on the three entities/ appellants:

Name of the firms	Average of three years turnover (in Crore)	Penalty at 9% of average turnover (in Crore)
Excel Crop Care Ltd.	710.09	63.90
United Phosphorus Ltd.	2804.95	252.44
Sandhya Organics Chemicals (P) Ltd.	57.4 Crore	1.57 Crore

52) Under Section 27(b) of the Act, penalty of 10% of the turnover is prescribed as the maximum penalty with no provision for minimum

penalty. CCI had chosen to impose 9% of the average turnover keeping in view the serious nature of the breach on the part of these appellants.

53) The COMPAT has maintained the rate of penalty i.e. 9% of the three years average turnover. However, it has not agreed with the CCI that 'turnover' mentioned in Section 27 would be 'total turnover' of the offending company. In its opinion it has to be 'relevant turnover' i.e. turnover of the product in question. Since, M/s. Excel Crop Care and UPL were multi-product companies, products other than APT could not have been included for the purpose of imposing the penalty. It, therefore, held that penalty of 9% would be limited to the product/service in question – in this case, the APT – which was the relevant product for the enquiry. The penalty, thus, stands substantially reduced in the cases of M/s. Excel Crop Care and UPL as can be seen from the following chart:

Name of the firms	Average of three years turnover (in Crore)	Average of three years relevant turnover (Rs. Crore)	Reduced Penalty at 9% of relevant turnover (Rs. Crore)
Excel Crop Care Ltd.	710.09	32.41 crore	2.92
United Phosphorus Ltd.	2804.95	77.14 crore	6.94

54) Insofar as M/s. Sandhya Organics Chemicals (P) Ltd. is concerned, the 'relevant turnover' and 'total turnover' is the same as this company

produced only APT tablets. CCI had imposed penalty of `1.57 crores on the basis of their turnover of this product. However, in its case also, penalty is reduced on the ground that it is relatively a small enterprise. Moreover, in respect of May 2011 tender, it could not have taken part since its production capacity was only 25 MT a month. Though, the aforesaid plea was not accepted while discussing the merits of the case, the COMPAT deemed it proper to take this aspect into consideration when it came to imposition of penalty. On the aforesaid basis, COMPAT reduced the penalty to 1/10th of penalty awarded by CCI i.e. `15.70 lakhs.

55) The CCI is not happy with the aforesaid outcome whereby penalty imposed by it is sharply reduced by the COMPAT. Against this part of the impugned judgment, CCI is in appeal.

56) In the aforesaid backdrop, the moot question is as to whether penalty under Section 27(b) of the Act has to be on 'total/entire turnover' of the company covering all the products or it is relatable to 'relevant turnover', viz., relating to the product in question in respect whereof provisions of the Act are contravened. Section 27 of the Act stipulates nature of the orders which the CCI can pass after enquiry into agreements or abuse of dominant position. This Section empowers CCI to pass various kinds of orders the nature whereof is spelt out in clauses (a), (b), (d) and (g)

(clauses (c) and (f) stand omitted). As per clause (b), CCI is empowered to inflict monetary penalties, the upper limit whereof is 10% "of the average of turnover for the last three preceding financial years". Operative portion of Section 27 of the Act is reproduced below:

> "27. **Orders by Commission after inquiry into agreements or abuse of dominant position. –** Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:-
>
> xxx xxx xxx
>
> (b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:
>
> [provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent of its turnover for each year of the continuance of such agreement, whichever is higher.]"

57) Extensive as well as intensive argument of Mr. Kaul, learned Additional Solicitor General, was that in S. 27(b) of the Act, there is no reference to 'relevant turnover'. On the contrary, clause (b) of S. 27 in clear terms, stipulates penalty on the 'turnover' i.e. average of the turnover for the last three preceding financial years and it plainly suggests that this 'turnover' has to be of the enterprise which had contravened the provisions of Section 3 or Section 4. He submitted that clear intention of

the Legislature was to take into consideration entire turnover of the enterprise. Reading the word 'relevant' thereto would be doing violence to the plain language of the statute, by adding the word which is not there.

58) According to him, the expression *'turnover'* is not limited or restricted in any manner and introduction of concept of *'relevant turnover'* amounts to adding words to the statute. He premised his submission on well-settled principle of statutory interpretation that where the language of a statute is plain and clear, the Court ought not to add words to limit or alter the meaning of the statute and cited the following judgments in support : ***Prabhudas Damodar Kotecha & Ors.*** v. ***Manhabala Jeram Damodar & Anr.***[10]; ***Raghunath Rai Bareja & Anr.*** v. ***Punjab National Bank & Ors.***[11]; ***V.L.S. Finance Ltd.*** v. ***Union of India & Ors.***[12]; and ***Bharat Aluminium Company*** v. ***Kaiser Aluminium Technical Services Inc.***[13].

59) Mr. Kaul also placed heavy reliance on the following discussion in the case of ***Steel Authority of India Ltd.***[14] in the context of the Competition Act:

> "52. A statute is stated to be the edict of legislature. It expresses the will of legislature and the function of the court is to interpret the document according to the intent of those who made it. It is a settled rule of construction of statute that the provisions should be interpreted by applying plain rule of

10 (2013) 15 SCC 358
11 (2007) 2 SCC 230
12 (2013) 6 SCC 278
13 (2012) 9 SCC 552
14 Footnote 1

construction...

xx xx xx

> 56. Thus, the court can safely apply rule of plain construction and legislative intent in light of the object sought to be achieved by the enactment. While interpreting the provisions of the Act, it is not necessary for the court to implant, or to exclude the words, or overemphasise language of the provision where it is plain and simple. The provisions of the Act should be permitted to have their full operation rather than causing any impediment in their application by unnecessarily expanding the scope of the provisions by implication."

60) According to him, a plain reading of Section 27 as a whole, which includes Section 27(a) as well, also makes it clear that the target of the penalty is the 'person' or 'enterprise' that has acted in violation of the Act, and not the 'product' or the 'service' alone which is made the subject of the violation. As such, the expression *'turnover'* must necessarily mean the turnover of the 'person' or the 'enterprise' which is party to the anti-competitive agreement or abuse of dominance.

61) Critiquing the approach of the COMPAT, he submitted that it has introduced the concept of *'relevant'* turnover in Section 27 despite the absence of the word *'relevant'*, failing to notice that wherever the Act wanted to introduce the concept of *'relevance'* the word *'relevant'* has, in fact, been used in the appropriate sections. In this regard, he referred to Sections 2(r), 2(s), 2(t), 4(2)(e), 6, 19(6), 19(7), etc. where the expression *'relevant'* is specifically used. He also referred to the definition of *'turnover'* as contained in Section 2(y) of the Act, which

includes value of goods or services, and submitted that it is the aforesaid definition of *'turnover'* which has to be applied wherever this expression occurs in the Act and it cannot be read to have different criteria for determining penalty and the thresholds applicable for regulation of combinations. He also sought to highlight that where the expression is used in the same section, it should generally be given the same meaning, as held in ***Suresh Chand*** v. ***Gulam Chisti***[15] and ***Raghubans Narain Singh*** v. ***Uttar Pradesh Government through Collector of Bijnor***[16].

62) Taking this very argument further, he submitted that interpretation given by the COMPAT would render the proviso after Section 27 redundant, as the said proviso specifically provides for situations where more than one member of a group (each may be producing different products/services) is part of the anti-competitive conduct.

63) Mr. Kaul went to the extent of arguing that even if purposive interpretation is to be given to the provisions of Section 27(b) of the Act, main purpose which cannot be lost sight of and ignored is that it is a deterrent provision. The purpose behind such a provision is to give a message that the persons or enterprises should not indulge in such anti-competitive activities, as otherwise they will be inflicted with heavy

15 (1990) 1 SCC 593
16 (1967) 1 SCR 489

penalties. According to him, the kind of cartalisation formed by the appellants in this case is a clear example of *'hardcore cartel'* behaviour which is deprecated by even the OECD as such hardcore cartels benefit only the cartel members and are extremely injurious to the interest of all others, with extraordinary adverse affect on the market and the consumers. He further submitted that formation of cartels reduces social welfare and the COMPAT has ignored these factors as well while giving restricted interpretation to *'turnover'* by making it product specific and not person/enterprise specific.

64) Advancing this very argument further, he even drew parallel with the laws in other jurisdictions by stating the comparative legal position in European Union, United Kingdom, Australia, etc. and submitted that it could be discerned from the law enacted in those jurisdictions that everywhere overall cap is of 10% of *'worldwide turnover'* and is not restricted to *'relevant turnover'*.

65) He further submitted that the aforesaid provision imposed a cap on the penalty by stipulating that it shall not be more than 10%. Thus, the CCI had the discretion to impose the penalty from 0% to 10% and this was sufficient safeguard to take care of the proportionality aspects of the penalty wherever penalty on total turnover is found to bring unreasonable results. In other words, in respect of multi-product

companies where the turnover covering non-offending products, is quite high, the CCI can always impose much lesser rate of penalty so that the penalty does not sound to be excessive and unconscionable and remains proportionate to the nature of contravention. However, it is not permissible to tinker the language of a statute.

66) Adverting to the specific case of M/s. Sandhya Organics Chemicals (P) Ltd., submission of Mr. Kaul was that the reason given by COMPAT in reducing the penalty was self-contradictory inasmuch as contention of this appellant that it did not bid in May 2011 tender of FCI was because of the reason that its production capacity was mere 25 MT per month was specifically rejected by the COMPAT, but this very rejected contention formed the basis of reducing the penalty. It was also submitted that in any case there was no justification in reducing the penalty to 1/10th of the penalty imposed by the CCI, i.e. from 9% to 0.9%, when the COMPAT itself observed that the nature of breach committed by the appellants was very serious and going by this consideration, the COMPAT maintained the penalty @ 9% in the case of the other two appellants.

67) Learned counsel appearing for the three appellants attempted to put an astute and sagacious answer to the aforesaid arguments of the Learned Additional Solicitor General. Justifying the approach of the COMPAT in

this behalf, it was argued that even the plain language of Section 27(b) leads to the interpretation that is given by the COMPAT. They also stressed that this provision being a penal provision, has to be strictly construed. No wider meaning can be given to it. The learned counsel quoted the illustration in cases where identical infringement is alleged in respect of several enterprises, some of which may be *'single product companies'* and others may be *'multi-product companies'* (which was the position in the instant case itself), and submitted that there would be no justification for prescribing the maximum penalty based on the total turnover of the enterprise, as it would result in prescribing a higher maximum penalty for multi-product companies, as against the single product companies, thereby bringing very inequitable results. For identical infringement, there would be no justification for prescribing such differential maximum limits. Keeping this aspect into consideration, it is all the more reason for interpreting Section 27(b) on the basis of its plain language as the word 'total' was also not prefixed with 'relevant' by the Legislature. Since it was a provision relating to penalty, which was to be imposed on 'turnover', the said 'turnover' was necessarily relatable to the offending product only and Legislature never intended to punish any person or enterprise even in respect of unblemished product. It was also emphasized that penalty under Section 27(b) is to be levied for contravention of Section 3 in respect of any *'agreement'* resulting in

appreciable adverse effect on competition. Therefore, it would not relate to all the products of the company included in the total turnover of the enterprise. As such, when penalty is being imposed in respect of any infringing product, the turnover of that product would be relevant. The learned counsel criticised the approach of the CCI in imposing penalties by taking the maximum penalty as the starting point of determination and then purporting to reduce it suitably, as totally incorrect approach. It was argued that the quantum of appropriate amount of penalty has to be first determined after taking into consideration the relevant factors. The relevance of the maximum penalty is only for the limited purpose to ensure that the quantum so determined, does not exceed the maximum penalty.

68) Learned counsel for the appellants also advocated for applying the doctrine of proportionality which has universal application and lays down that *'the broad principles that the punishment must be proportioned to the offence is or ought to be of universal application'* as held in ***Arvind Mohan Sinha*** v. ***Amulya Kumar Biswas & Ors.***[17] Attention of the Court was also drawn to another judgment of this Court in ***State of Haryana & Ors.*** v. ***Sant Lal & Anr.***[18] where penalty for evasion of tax sought to be levied on the basis of 20% of the value of the tax was held to be *ultra vires*. Likewise, application of this doctrine of proportionality applied in

17 (1974) 4 SCC 222
18 (1993) 4 SCC 380

Bhagat Ram v. ***State of Himachal Pradesh & Ors.***[19] was emphasised by referring to the following passage therein:

> "16...It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct, and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution..."

69) Countering the argument of the learned Additional Solicitor General predicated on the parallel drawn with the law in the other countries, it was submitted that in other jurisdictions specific guidelines were issued which formed the basis of exercising the discretion in an objective manner. In contra-distinction, no guidelines are prescribed under the Act in India and it was submitted that a perusal of the guidelines issued by the European Union as well as the Office of Fair Trading in the United Kingdom would show that for determining the appropriate quantum of penalty, the *'relevant turnover'*, i.e. the turnover of the infringing product, is taken into consideration. This assumes great importance in cases where an enterprise is a multi-product company.

70) In addition to the aforesaid arguments, learned counsel appearing for UPL submitted that since it was a multi-product company, its average of the total turnover of three years was `2804.95 crores. By imposing penalty of 9% on the total turnover, the CCI had levied penalty of `252.44 crores, which was highly disproportionate as even the total

19 (1983) 2 SCC 442

production and sale of APT tablets, for the three years, was much less than the aforesaid penalty. It was pointed out that the average total turnover of the APT tablets comes to `77.14 crores only, which is hardly 3% of the total turnover. On that basis it was argued that by taking total turnover for the purpose of penalty clearly amounted to disproportionate penalty as it was more than 300% of the total turnover of APT tablets. This, according to the learned counsel, itself provided full justification in the approach of the COMPAT by reading the concept of *'relevant turnover'* while interpreting Section 27(b) of the Act.

71) We have given our serious thought to this question of penalty with reference to *'turnover'* of the person or enterprise. At the outset, it may be mentioned that Section 2(y) which defines *'turnover'* does not provide any clarity to the aforesaid issue. It only mentions that turnover includes value of goods or services. There is, thus, absence of certainty as to what precise meaning should be ascribed to the expression *'turnover'*. Somewhat similar position appears in EU statute and in order to provide some clear directions, EU guidelines on the subject have been issued. These guidelines do refer to the concept of *'relevant turnover'*. Grappling with the same very issue, the judgment of the Competition Appeal Court of South Africa in the case of ***Southern Pipeline Contractors Conrite Walls (Pty) Ltd.*** v. ***The Competition***

Commission[20] provides the answer in the following manner:

> "51. The concept of 'turnover' is not defined in the Act and is only referred to in Section 59(2), being annual turnover. There is thus some uncertainty as to the precise meaning of 'turnover'. However, Section 59(3) refers on more than one occasion to 'the contravention', in particular, in dealing with the nature, duration, gravity and extent 'of the contravention', the loss or damage suffered as a result of the 'contravention' the market circumstances in which 'the contravention' the market circumstances in which 'the contravention' took place and the level of profit derived from 'the contravention'. Thus there is a legislative link between the damage caused and the profits which accrue from the cartel activity. The inquiry, in terms of Section 59(20), appears to envisage that consideration be given to the benefits which accrue from the contravention: that is to amount to affected turnover. By using the baseline of affected turnover' the implications of the doctrine of proportionality that is between the nature of the offence and benefit derived therefrom, the interests of the consumer community and the legitimate interests of the offender can be taken more carefully into account and appropriately calibrated." *[Emphasis supplied]*

72) Judgement in the case of ***Southern Pipeline Contractors Conrite Walls (Pty) Ltd.***[19] reveals that the Court therein was concerned with the provisions of Section 59 of the Competition Act, 1998 of South Africa which also provides for maximum penalty of 10% of the annual turnover. The Court held that the appropriate amount of penalty had to be determined keeping into consideration the damage caused and the profits which accrue from the cartel activity. The Appeal Court used the words *'affected turnover'*. It determined the amount of penalty on the basis of these guidelines issued by the European Union (EU) and the Office of Fair Trade (OFT). In that case the concerned company

20 Case No. 105/CAC/Dec 10) (106/CAC/Dec 10)

Southern Pipeline Contractors was a multi-product company and the *'affected turnover'* was comparatively small.

73) It is interesting to note that the parties on either side are resting their cases on the same principle of statutory interpretations. Pertinently, Section 27(b) of the Act while prescribing the penalty on the 'turnover', neither uses the prefix 'total' nor 'relevant'. It is in this context, taking aid of the applicable and well-recognised principle of statutory interpretations we have to determine the issue.

74) In the absence of specific provision as to whether such turnover has to be product specific or entire turnover of the offending company, we find that adopting the criteria of *'relevant turnover'* for the purpose of imposition of penalty will be more in tune with ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties. For arriving at this conclusion, we are influenced by the following reasons:

(a) Under Section 27(b) of the Act, penalty can be imposed under two contingencies, namely, where an agreement referred to in Section 3 is anti-competitive or where an enterprise which enjoys a dominant position misuses the said dominant position thereby contravening the provisions of Section 4. In case where the violation or contravention is of Section 3 of the Act it has to be pursuant to an *'agreement'*. Such an

agreement may relate to a particular product between persons or enterprises even when such persons or enterprises are having production in more than one product. There may be a situation, which is precisely in the instant case, that some of such enterprises may be multi-product companies and some may be single product in respect of which the agreement is arrived at. If the concept of total turnover is introduced it may bring out very inequitable results. This precisely happened in this case when CCI imposed the penalty of 9% on the total turnover which has already been demonstrated above.

(b) Interpretation which brings out such inequitable or absurd results has to be eschewed. This fundamental principle of interpretation has been repeatedly made use of to avoid inequitable outcomes. The Canadian Supreme Court in ***Ontario*** *vs.* ***Canadian Pacific Ltd.***[21] wherein the expression 'use' occurring in Environment Protection Act was given restricted meaning. The principle that absurdity should be avoided was explained in the following manner:

> "The expression "for any use that can be made of the natural environment has an identifiable literal or "plain" meaning when viewed in the context of the EPA as a whole, particularly the other paragraphs of s. 13(1). When the terms of the other paragraphs are taken into account, it can be concluded that the literal meaning of the expression "for any use that can be made of the natural environment" is "any use that can conceivably be made of the natural environment by any person or other living creature". In ordinary circumstances, once the "plain meaning" of the words in a statue have been identified there is no need for further interpretation. Different considerations can apply, however, in cases where a statute

21 (1995) 2 SCR 1031

would be unconstitutional if interpreted literally. This is one of those exception cases, in that a literal interpretation of s. 13(1)(a) would fail to meet the test for overbreadth established in *Heywood.*

The state objective underlying s. 13(1)(a) EPA is, as s. 2 of the Act declares, "the protection and conservation of the natural environment". This legislative purpose, while broad, is not without limits. In particular, the legislative interest in safeguarding the environment for "uses" requires only that it be preserved for those "uses" that are normal and typical, or that are likely to become normal or typical in the future. Interpreted literally, s. 13(1)(a) would capture a wide range of activities that fall outside the scope of the legislative purpose underlying it, and would fail to meet s.7 overbreadth scrutiny. There is, however, an alternative interpretation of s.13(1)(a) that renders it constitutional. Section 13(1)(a) can be read as expressing the general intention of s. 13(1) as a whole, and paras. 13(1)(b) through (h) can be treated as setting out specific examples of "impairment(s) of the quality of the natural environment for any use that can be made of it". When viewed in this way, the restrictions place on the word "use" in paras. (b) through (h) can be seen as imported into (a) through a variant of the *ejusdem generis* princile. Interpreted in this manner, s.13(1)(a) is no longer unconstitutionally overbroad, since the types of harms captured by paras. (b) through (h) fall squarely within the legislative intent underlying the section. In light of the presumption that the legislature intended to act in accordance with the constitution, it is appropriate to adopt this interpretation of s.13(1)(a). Thus, the subsection should be understood as covering the situations captured by paras. 13(1)(b) through (h), and any analogous situations that might arise."

We would also like to quote the following observations from ***State of Jharkhand and Another*** v. ***Govind Singh***[22]***:***

"20. While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse deemed necessary. [See *CST* v. *Popular Trading C. : (2000) 5 SCC 511 : AIR 2000 SC 1578]* . The legislative casus omissus cannot be supplied by judicial interpretative process."

22 (2005) 10 SCC 437

Likewise, following passages from the judgment of this Court in ***Commissioner of Income Tax, Bangalore*** v. ***J.H Yadagiri***[23] shed light of similar nature.

> "**45.** In the case of *K.P. Varghese* v. *IT0* [(1981) 4 SCC 173 : 1981 SCC (Tax) 293 : (1981) 131 ITR 597] this Court emphasised that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided.
>
> **46.** Where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the Legislature, the Court might modify the language used by the Legislature so as to achieve the intention of the Legislature and produce a rational construction. The task of interpretation of a statutory provision is an attempt to discover the intention of the Legislature from the language used. It is necessary to remember that language is at best an imperfect instrument for the expression of human intention. It is well to remember the warning administered by Judge Learned Hand that one should not make a fortress out of dictionary but remember that statutes always have some purpose or object to accomplish and sympathetic and imaginative discovery is the surest guide to their meaning.
>
> **47.** We have noted the object of Section 16(3) of the Act which has to be read in conjunction with Section 24(2) in this case for the present purpose. If the purpose of a particular provision is easily discernible from the whole scheme of the Act which in this case is, to counteract the effect of the transfer of assets so far as computation of income of the assessee is concerned then bearing that purpose in mind, we should find out the intention from the language used by the Legislature and if strict literal construction leads to an absurd result i.e. result not intended to be subserved by the object of the legislation found in the manner indicated before, and if another construction is possible apart from strict literal construction then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction. Furthermore, in the instant case we are

23 (1985) 4 SCC 343

> dealing with an artificial liability created for counteracting the effect only of attempts by the assessee to reduce tax liability by transfer. It has also been noted how for various purposes the business from which profit is included or loss is set off is treated in various situations as assessee's income. The scheme of the Act as worked out has been noted before.

In ***Southern Motors vs. State of Karnataka and Others***[24]***,*** the Court explained the task that is to be undertaken by a Court while interpreting such statutes:

> "33. The following excerpts from Tata Steel Ltd. (supra), being of formidable significance are also extracted as hereunder.
>
> Xxx xxx xxx
>
> > "25. In Oxford University Press v. Commissioner of Income Tax [MANU/SC/0052/2001]:(2001) 3 SCC 359, Mohapatra, J. has opined that interpretation should serve the intent and purpose of the statutory provision. In that context, the learned Judge has referred to the authority in State of T.N. v. Kodaikanal Motor Union (P) Ltd. [MANU/SC/0127/1986] : (1986) 3 SCC 91 wherein this Court after referring to K.P. Varghese v. ITO [MANU/SC/0300/1981] : (1981) 4 SCC 173 and Luke v. IRC (1964) 54 ITR 692 has observed:
> >
> > The courts must always seek to find out the intention of the legislature. Though the courts must find out the intention of the statute from the language used, but language more often than not is an imperfect instrument of expression of human thought. As Lord Denning said it would be idle to expect every statutory provision to be drafted with divine prescience and perfect clarity. As Judge learned Hand said, we must not make a fortress out of dictionary but remember that statutes must have some purpose or object, whose imaginative discovery is judicial craftsmanship. We need not always cling to literalness and should seek to endeavour to avoid an unjust or absurd result. We should not make a mockery of legislation. To make

24 AIR 2017 SC 476

> sense out of an unhappily worded provision, where the purpose is apparent to the judicial eye 'some' violence to language is permissible.
>
> "26. Sabharwal, J. (as His Lordship then was) has observed thus:
>
> ...It is well-recognised Rule of construction that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. It was held that construction suggested on behalf of the Revenue would lead to a wholly unreasonable result which could never have been intended by the legislature. It was said that the literalness in the interpretation of Section 52(2) must be eschewed and the court should try to arrive at an interpretation which avoids the absurdity and the mischief and makes the provision rational, sensible, unless of course, the hands of the court are tied and it cannot find any escape from the tyranny of literal interpretation. It is said that it is now well-settled Rule of construction that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the court may modify the language used by the legislature or even "do some violence" to it, so as to achieve the obvious intention of the legislature and produce a rational construction. In such a case the court may read into the statutory provision a condition which, though not expressed, is implicit in construing the basic assumption underlying the statutory provision....
>
> 34. As would be overwhelmingly pellucid from hereinabove, though words in a statute must, to start with, be extended their ordinary meanings, but if the literal construction thereof results in anomaly or absurdity, the courts must seek to find out the underlying intention of the legislature and in the said pursuit, can within permissible limits strain the language so as to avoid such unintended mischief."

(iii) The principle of strict interpretation of a penal statute would support and supplement the aforesaid conclusion arrived at by us. In a

recent Constitution Bench judgment in the case of ***Abhiram Singh and Others*** v. ***C.D. Commachen (Dead) by L.Rs. and Ors.***[25], this Court scanned through the relevant case law on the subject and applied this principle even while construing "corrupt practice" in elections which is of a *quasi* criminal nature. We would like to reproduce following discussion from the said judgment :

> "98. Election petitions alleging corrupt practices have a quasi-criminal character. Where a statutory provision implicates penal consequences or consequences of a quasi-criminal character, a strict construction of the words used by the legislature must be adopted. The Rule of strict interpretation in regard to penal statutes was enunciated in a judgment of a Constitution Bench of this Court in **Tolaram Relumal** v. **State of Bombay** [(1951) 1 SCR 158 = AIR 1954 SC 496] where it was held as follows:
>
> > "...It may be here observed that the provisions of Section 18(1) are penal in nature and it is a well settled Rule of construction of penal statutes that if two possible and reasonable constructions can be put upon a penal provision, the Court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the Court to stretch the meaning of an expression used by the Legislature in order to carry out the intention of the Legislature. As pointed out by Lord Macmillan in *London and North Eastern Railway Co. v. Berriman*, "where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language.
>
> This principle has been consistently applied by this Court while construing the ambit of the expression 'corrupt practices'. The Rule of strict interpretation has been adopted in **Amolakchand Chhazed** v. **Bhagwandas**; MANU/SC.0086/1976 : (1977) 3 SCC 566. A Bench of three Judges of this Court held thus:

25 AIR 2017 SC 401

> "12....Election petitions alleging corrupt practices are proceedings of a quasi-criminal nature and the onus is on the person who challenges the election to prove the allegations beyond reasonable doubt."

(iv) In such a situation even if two interpretations are possible, one that leans in favour of infringer has to be adopted, on the principle of strict interpretation that needs to be given to such statutes.

(v) When the agreement leading to contravention of Section 3 involves one product, there seems to be no justification for including other products of an enterprise for the purpose of imposing penalty. This is also clear from the opening words of Section 27 read with Section 3 which relate to one or more specified products. It also defies common sense that though penalty would be imposed in respect of the infringing product, the *'maximum penalty'* imposed in all cases be prescribed on the basis of 'all the products' and the '*total turnover'* of the enterprise. It would be more so when total turnover of an enterprise may involve activities besides production and sale of products, like rendering of services etc. It, therefore, leads to the conclusion that the turnover has to be of the infringing products and when that is the proper yardstick, it brings home the concept of *'relevant turnover'*.

(vi) Even the doctrine of 'proportionality' would suggest that the Court should lean in favour of *'relevant turnover'*. No doubt the objective contained in the Act, viz., to discourage and stop anti-competitive practices has to be achieved and those who are perpetrators of such

practices need to be indicted and suitably punished. It is for this reason that the Act contains penal provisions for penalising such offenders. At the same time, the penalty cannot be disproportionate and it should not lead to shocking results. That is the implication of the doctrine of proportionality which is based on equity and rationality. It is, in fact, a constitutionally protected right which can be traced to Article 14 as well as Article 21 of the Constitution. The doctrine of proportionality is aimed at bringing out 'proportional result or proportionality *stricto sensu'.* It is a result oriented test as it examines the result of the law in fact the proportionality achieves balancing between two competing interests: harm caused to the society by the infringer which gives justification for penalising the infringer on the one hand and the right of the infringer in not suffering the punishment which may be disproportionate to the seriousness of the Act.

No doubt, the aim of the penal provision is also to ensure that it acts as deterrent for others. At the same time, such a position cannot be countenanced which would deviate from 'teaching a lesson' to the violators and lead to the 'death of the entity' itself. If we adopt the criteria of total turnover of a company by including within its sweep the other products manufactured by the company, which were in no way connected with anti-competitive activity, it would bring about shocking results not comprehended in a country governed by Rule of Law. Cases

at hand itself amply demonstrate that the CCI's contention, if accepted, would bring about anomalous results. In the case of M/s. Excel Crop Care Limited, average of three years' turnover in respect of APT, in respect whereof anti-competitive agreement was entered into by the appellants, was only 32.41 crores. However, as against this, the CCI imposed penalty of Rs. 63.90 crores by adopting the criteria of total turnover of the said company with the inclusion of turnover of the other products as well. Likewise, UPL was imposed penalty of 252.44 crores by the CCI as against average of the three years' turnover of APT of Rs. 77.14 crores. Thus, even when the matter is looked into from this angle, we arrive at a conclusion that it is the relevant turnover, i.e., turnover of the particular product which is to be taken into consideration and not total turnover of the violator.

(vii) The doctrine of *'purposive interpretation'* may again lean in favour of *'relevant turnover'* as the appropriate yardstick for imposition of penalties. It is for this reason the judgment of Competition Appeal Court of South Africa in the ***Southern Pipeline Contractors Conrite Walls***[19], as quoted above, becomes relevant in Indian context as well inasmuch as this Court has also repeatedly used same principle of interpretation. It needs to be repeated that there is a legislative link between the damage caused and the profits which accrue from the cartel activity. There has to be a relationship between the nature of offence and the

benefit derived therefrom and once this co-relation is kept in mind, while imposing the penalty, it is the affected turnover, i.e., 'relevant turnover' that becomes the yardstick for imposing such a penalty. In this hue, doctrine of 'purposive interpretation' as well as that of 'proportionality' overlaps.

In fact, some justifications have already appeared in this behalf while discussing the matter on the application of doctrine of proportionality. What needs to be repeated is only that the purpose and objective behind the Act is to discourage and stop anti-competitive practice. Penal provision contained in Section 27 of the Act serves this purpose as it is aimed at achieving the objective of punishing the offender and acts as deterrent to others. Such a purpose can adequately be served by taking into consideration the relevant turnover. It is in the public interest as well as in the interest of national economy that industries thrive in this country leading to maximum production. Therefore, it cannot be said that purpose of the Act is to 'finish' those industries altogether by imposing those kinds of penalties which are beyond their means. It is also the purpose of the Act not to punish the violator even in respect of which there are no anti-competitive practices and the provisions of the Act are not attracted.

We may mention that Mr. Kaul, learned Additional Solicitor General had referred to the statutory regimes in various other countries

in his endeavour to demonstrate that it is the concept of total turnover which was recognised in other jurisdictions as well. The attempt was to show that the principle of 'total turnover' was prevalent across the globe wherever such laws are enforced. On the contrary, the learned counsel for the appellants pointed out the provision contained in similar statutes of some countries where the concept of relevant turnover had been adopted. South Africa is one such example and, in fact, COMPAT has referred to the judgment of Southern African Competition Appeal Court in this behalf, i.e., ***Southern Pipeline Contractors Conrite Walls (Pty) Ltd.***[19] case. In such a scenario, it may not be necessary to deal with the statutory provisions contained in different countries. In view of interpretation that is given by us to the provision at hand, we would, however, like to comment that in some of the jurisdictions cited by Mr. Kaul, learned Additional Solicitor General, the guidelines are also framed which ensure that the penalty does not become disproportionate, for example, in the UK, the Office of Fair Trade (OFT) has 'guidelines as to the appropriate amount of penalty'. In contrast, there are no similar guidelines issued as far as India is concerned and in the absence thereof imposition of penalty, taking into consideration total turnover, may bring about disastrous results which happened in the instant case itself with the imposition of penalty by the CCI.

Thus, we do not find any error in the approach of the order of the

COMPAT interpreting Section 27(b).

75) The upshot of the aforesaid discussion would be to dismiss the appeals of the appellants as well as the appeals filed by the CCI. There shall, however, be no order as to costs.

.....J.
(A.K. SIKRI)

.....J.
(N. V. RAMANA)

NEW DELHI;
MAY 08, 2017.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2480 OF 2014

EXCEL CROP CARE LTD. ... APPELLANT(S)

VERSUS

COMPETITION COMMISSION OF INDIA AND ANOTHER ... RESPONDENT (S)

WITH

CIVIL APPEAL NOS. 53-55 OF 2014

CIVIL APPEAL NOS. 2874 OF 2014

AND

CIVIL APPEAL NO. 2922 OF 2014

N. V. RAMANA, J.

1. I have had the privilege of going through the erudite and well considered judgment of my learned brother. In view of well considered judgment, in the usual course, it may not have warranted another concurring judgment. But when the issue at hand is being grappled by jurisdictions across the globe, a concurring judgment cannot

be treated as a repetitive exercise. Although I accept the conclusions reached by my learned brother, there was a need felt by me to pen down my own thoughts on a small aspect concerning imposition of penalty under Section 27(b) of the Competition Act, 2002 [*hereafter* '**Act**' *for brevity*]. Though my opinion is only limited to the legal question involved in this case, a brief reference to facts might be necessary.

2. On a complaint being instituted by the Food Corporation of India [*hereinafter* '**FCI**' *for brevity*], Director General for Investigation (Competition Commission of India) (**DG**) investigated into the matter and found that four companies namely Excel Corp. Care Ltd. [*hereinafter* '**ECCL**' *for brevity*], United Phosphorus Ltd. [*hereinafter* '**UPL**' *for brevity*], Sandhya Organics Chemicals (Pvt.) Ltd. [*hereinafter* '**SOCL**' *for brevity*] (three appellants herein) and Agrosynth Chemicals Ltd. [*hereinafter* '**ACL**' *for brevity*] were involved in collusive bidding in relation to tenders issued by FCI for Aluminium Phosphide Tablets [*hereinafter* '**APT**' *for brevity*]. Following chart would indicate the pattern of bidding undertaken by the aforesaid companies-

TABLE 1.1 - *pattern of bidding*

YEAR	NAME OF TENDERS	RATES QUOTED	TENDERS AWARDED	RRC RATES	REMARKS
2002	**UPL**		UPL	Rs. 245/- per Kg. inclusive of all charges and taxes F.O.R destination against issue of 'C' Form.	FCI had to award Rate Running Contract to all tenders as they quoted to same rates
	ECCL		ECCL		
	SOCL		SOCL		
	ACL		ACL		
Mar-05	**UPL**	Rs. 310 per Kg. was quoted by all the parties	Tender was scrapped	Tender was scrapped	Tenders had quoted same rates and upon negotiations all the parties reduced to the rate to Rs. 290/-
	ECCL				
	SOCL				
	ACL				
Nov-05	**UPL**	No party submitted tender	Tender was scrapped	Tender was scrapped	All parties abstained from the process of tendering
	ECCL				
	SOCL				
	ACL				
2007	**UPL**	Rs. 200/- per Kg.	UPL	Rs. 200/- per kg.	The period of RRC was extended for another year as per tender terms but the party failed to supply during the extended period
	ECCL	Rs. 235/- per Kg.			
	SOCL	Rs. 236/- per Kg.			
	ACL	Rs. 234/- per Kg. With 'C' Form and Rs. 247.50 without 'C' forms			
2008	Fresh tender was floated at the risk & cost of UPL but no party participated in the tender.				
2009	**UPL**	Rs. 388/- per KG.	UPL, ECCL, SOCL	After negotiations the rate was brought down to	
	ECCL				
	SOCL				

					Rs. 386 per Kg.	

3. After considering the report of DG, CCI exonerated ACL but found the three appellant companies had indulged in anti-competitive practices in violation of Section 3 of the Act and imposed 9% of average 3 years' of total turnover under Section 27(b) of the Act in the following manner-

TABLE 1.2 – *penalty as imposed by the CCI*

NAME OF THE COMPANY	AVERAGE OF THREE YEARS TURNOVER (IN CRORE)	PENALTY OF 9% OF AVERAGE TURNOVER (IN CRORE)
ECCL	710.09	63.9
UPL	2804.95	252.44
SOCL	17.52	1.57

4. Aggrieved by the order of the CCI, appellants approached COMPAT by way of separate appeals. By a common order, dated 29.10.2013, COMPAT held that in case of multi-product companies, only 'relevant turnover' of the product/service in question should be taken into consideration while imposing penalty in the following manner-

TABLE 1.3 – *penalty as imposed by the COMPAT*

NAME OF THE COMPANY	AVERAGE OF THREE YEARS TURNOVER (IN CRORE)	AVERAGE OF THREE YEARS RELEVANT TURNOVER (IN CRORE)	REDUCED PENALTY AT 9% OF RELEVANT TURNOVER (IN CRORE)
ECCL	710.09	32.41	2.92
UPL	2804.95	77.14	6.94

SOCL	The penalty was reduced to on the consideration of SOCL being a small enterprise to Rs. 15.70 Lakhs.

5. Being aggrieved by the order of the COMPAT, CCI as well as the companies are in appeal before us. With respect to other issues, my learned brother has dealt exhaustively, which does not require any more consideration. The only issue which in my opinion requires further consideration is the issue of quantum of penalty under Section 27 of the Act. Therefore the limited question which I will be dealing is 'Whether 'turnover' as occurring under Section 27 of the Act means 'relevant turnover' or 'total turnover'?'

6. At the outset it would be useful to reproduce Section 27 (b) of the Act as a starting point before we delve into discussions in this case-

> **SECTION 27**
> **...**
> (b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:
>
> Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover for each year of the continuance of such agreement whichever is higher;
> ...

A plain reading of this Section elucidates that the commission is empowered to impose penalty and to the extent as it deems fit but not exceeding ten percent of the turnover. Section 27 (b) emphasize that penalty is to be levied on 'person or enterprise' who have contravened Section 3 or Section 4 of the Act. It is to be noted that proviso to Section 27(b), before it was amended, was couched in following terms-

> 'provided that in case any agreement referred to in section 3 has been entered into by any cartel, the commission shall impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent of the average of the turnover of the cartel for the last preceding three financial years.

After the amendment [*Central Act 39 of 2007*] the proviso as it stands today has been quoted above. The change which was brought about by the aforesaid amendment is that the mandatory nature of the *Proviso* was made discretionary by substitution of 'shall' with 'may'. This amendment was done to bring the proviso in tune with the rest of Section 27, which uses the expression "it may pass all or any of the following order" and main part of clause (b), which confers discretion upon the Commission to impose penalty as it may deem fit, subject to the rider that it shall not be more than 10% of the average of the turnover for the last three preceding financial years. It is important to note that Clauses (c) and (d) of Section 27 also uses the

word ‘may’, which signifies that the Commission has the discretion to pass a particular order, which it may deem proper in the facts and circumstances of the case.

7. Two interpretations were canvassed before us, wherein either the turnover, as occurring under Section 27(b), is equivalent to the ‘relevant turnover’ or is equivalent to the ‘total turnover’. In order to strengthen their arguments, respective Counsel have drawn our attention to various interpretations of ‘turnover’ applied across the globe, such as the judgment of *Bundesgerichtshof* (German Supreme Court) on 26th February 2013, *BCN Aduanas y Transportes, SA v Attorney General*, Judgment of the Supreme Court of Spain, No 112/2015, Case 2872/2013, OCL 183 (ES 2015) dated 29th January 2015 and *Southern Pipeline Contractors Conrite Walls (Pty) Ltd. and the Competition Commission*, 105/CAC/Dec10 (South Africa). Further we have perused Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of regulation 1/2003 (2006/C 210/02) issued by the European Commission and Guidance as to the appropriate amount of penalty (September 2012) issued by the Office of fair Trading (OFT), United Kingdom. It is my considered opinion that the interpretation to Section 27(b) of the Act requires fresh indigenous consideration rather than relying on foreign jurisprudence.

8. First a word on interpretation, before we indulge ourselves in the legal discussion. As the interpretative exercise, as this case,

involves various equitable facets[26], literal interpretation might not be conclusive. It should be noted that an interpretation should sub-serve the intent and purpose of the statutory provision. Therefore we would have to look beyond the plain and simple meaning, to extract the intention of the Act and rationalize the fining policy under Section 27 (b) of the Act.

9. It is well settled that the Competition Act, 2002 is a regulatory legislation enacted to maintain free market so that the Adam Smith's concept of invincible hands operate unhindered in the background.[27] Further it is clear from the Statement of objects and reason that this law was foreseen as a tool against concentration of unjust monopolistic powers at the hands of private individuals which might be detrimental for freedom of trade. Competition law in India aims to achieve highest sustainable levels of economic growth, entrepreneurship, employment, higher standards of living for citizens, protect economic rights for just, equitable, inclusive and sustainable economic and social development, promote economic

---

26 Such as proportionality.

27 *CCI v. SAIL*, (2010) 10 SCC 744.

democracy, and support good governance by restricting rent seeking practices. Therefore an interpretation should be provided which is in consonance with the aforesaid objectives.

10. At this point, I would like to emphasize on the usage of the phrase '*as it may deem fit*' as occurring under Section 27 of the Act. At the outset this phrase is indicative of the discretionary power provided for the fining authority under the Act. As the law abhors absolute power and arbitrary discretion, this discretion provided under Section 27 needs to be regulated and guided so that there is uniformity and stability with respect to imposition of penalty. This discretion should be governed by rule of law and not by arbitrary, vague or fanciful considerations. Here we may deal with two judgments which may be helpful in deciding the concerned issue. In *Dilip N. Shroff v. Joint CIT*[28], this Court while dealing with the imposition of the penalty has observed that-

> The legal history of section 271(1)(c) of the Act traced from the 1922 Act prima facie shows that the Explanations were applicable to both the parts. However, each case must be considered on its own facts. The role of the Explanation having regard to the principle of statutory interpretation must be borne in mind before interpreting the aforementioned provisions. Clause (c) of sub-section (1) of section 271 categorically states that the penalty would be leviable if the assessee

28 (2007) 6 SCC 329.

> conceals the particulars of his income or furnishes inaccurate particulars thereof. By reason of such concealment or furnishing of inaccurate particulars alone, the assessee does not ipso facto become liable for penalty. **Imposition of penalty is not automatic. Levy of penalty is not only discretionary in nature but such discretion is required to be exercised on the part of the Assessing Officer keeping the relevant factors in mind. Some of those factors apart from being inherent in the nature of penalty proceedings as has been noticed in some of the decisions of this court, inheres on the face of the statutory provisions.** Penalty proceedings are not to be initiated, as has been noticed by the Wanchoo Committee, only to harass the assesse. The approach of the Assessing Officer in this behalf must be fair and objective."
> (**emphasis supplied**)

Moreover in the case of *Hindustan Steel Ltd. vs. State of Orissa*,[29] this Court made following observations-

> "An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi criminal proceedings and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. **Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances.** Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."
> (**emphasis supplied**)

---

29 AIR 1970 SC 253.

11. It should be noted that any penal law imposing punishment is made for general good of the society. As a part of equitable consideration, we should strive to only punish those who deserve it and to the extent of their guilt. Further it is well established by this Court that the principle of proportionality requires the fine imposed must not exceed what is appropriate and necessary for attaining the object pursued. In *Coimbatore Distict Central Co-operative Bank v. Coimbatore District Central Co-operative Bank Employees Assn.*,[30] this Court has explained the concept of 'proportionality' in the following manner-

> "'proportionality' is a principle where the Court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of the decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise- the elaboration of a rule of permissible priorities. De Smith states that 'proportionality' involves 'balancing test' and 'necessity test'. Whereas the former ('balancing test') permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter ('necessity teat') requires infringement of human rights to the least restrictive alternative'

In consonance of established jurisprudence, the principle of proportionality needs to be imbibed into any penalty imposed

30 (2007) 4 SCC 699.

under Section 27 of the Act. Otherwise excessively high fines may over-deter, by discouraging potential investors, which is not the intention of the Act. Therefore the fine under Section 27(b) of the Act should be determined on the basis of the relevant turnover. In light of the above discussion a two step calculation has to be followed while imposing the penalty under Section 27 of the Act.

STEP 1: DETERMINATION OF RELEVANT TURNOVER.

12. At this point of time it needs to be clarified that relevant turnover is the entity's turnover pertaining to products and services that have been affected by such contravention. The aforesaid definition is not exhaustive. The authority should have regard to the entity's audited financial statements. Where audited financial statements are not available, the Commission may consider any other reliable records reflecting the entity's relevant turnover or estimate the relevant turnover based on available information. However the Tribunal is free to consider facts and circumstances of a particular case to calculate relevant turnover as and when it is seized with such matter.

STEP 2: DETERMINATION OF APPROPRIATE PERCENTAGE OF PENALTY BASED ON AGGRAVATING AND MITIGATING CIRCUMSTANCES.

13. After such initial determination of relevant turnover,

commission may consider appropriate percentage, as the case may be, by taking into consideration nature, gravity, extent of the contravention, role played by the infringer (ringleader? Follower?), the duration of participation, the intensity of participation, loss or damage suffered as a result of such contravention, market circumstances in which the contravention took place, nature of the product, market share of the entity, barriers to entry in the market, nature of involvement of the company, bona fides of the company, profit derived from the contravention etc. These factors are only illustrative for the tribunal to take into consideration while imposing appropriate percentage of penalty.

14. At the cost of repetition it should be noted that starting point of determination of appropriate penalty should be to determine relevant turnover and thereafter the tribunal should calculate appropriate percentage of penalty based on facts and circumstances of the case taking into consideration various factors while determining the quantum. But such penalty should not be more than the overall cap of 10% of the entity’s relevant turnover. Such interpretation of Section 27 (b) of the Act, wherein the discretion of the commission is guided by

principles established by law would sub-serve the intention of the enactment.

15. Lastly, I am of the opinion that the penalty imposed by COMPAT is appropriate in this case at hand and requires no further interference.

16. These appeals are, accordingly, disposed of in the above terms.

.....J.

(N. V. RAMANA)

NEW DELHI,
DATED: MAY 08, 2017.

ITEM NO.1A COURT NO.8 SECTION XVII
(FOR JUDGMENT)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 2480/2014

EXCEL CROP CARE LTD. Appellant(s)

VERSUS

COMPETITION COMMN. OF INDIA & ANR. Respondent(s)

WITH
C.A. No. 53-55/2014

C.A. No. 2874/2014

C.A. No. 2922/2014

Date : 08/05/2017 These appeals were called on for pronouncement of judgment today.

Counsel for the parties:

Mr. N.K. Kaul, ASG
Mr. Vaibhav Gaggar, Adv.
Mr. Arjun Krishnan, Adv.
Mr. Saksham Dhingra, Adv.
Mr. Sanyat Lodha, Adv.
Ms. Neha Mishra, Adv.
Mr. Ankur Singh, Adv.
Mr. Shiv Johar, Adv.
Mr. A.K. Jha, Adv.

Mr. Rohit K. Singh,Adv.

Mr. Rajan Narain,Adv.

Mr. Mohit Paul,Adv.

Mr. Krishnan, Venugopal, Sr. Adv.
Mr. Rahul Goel, Adv.
Ms. Anu Monga, Adv.
Mr. Neeraj Lalwani, Adv.
Mr. Rishabh Arora, Adv.
Mr. Nitish Sharma, Adv.
Mr. Gaurav Ray, Adv.
Mr. Rohit K. Singh, Adv.

Mr. Ajit Pudussery,Adv.
Mr. K. Vijayan, Adv.

Mr. S.S. Haranka, Adv.

Hon'ble Mr. Justice A.K. Sikri pronounced the judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice N.V. Ramana.

Hon'ble Mr. Justice N.V. Ramana pronounced separate but concurring judgment.

The appeals are dismissed in terms of the signed reportable judgment.

Pending application(s), if any, stands disposed of accordingly.

(Ashwani Thakur)	**(Mala Kumari Sharma)**
COURT MASTER	**COURT MASTER**

(Signed reportable judgment is placed on the file)