COMPETITION APPELLATE TRIBUNAL

(Appeals under Section 53-B of the Competition Act, 2002 against the Order dated 24.02.2012 passed by the Competition Commission of India in Case No.03/2011)

CORAM

Hon'ble Mr. Justice V.S. Sirpurkar
Chairman

Hon'ble Shri Rahul Sarin
Member

Hon'ble Mrs. Pravin Tripathi
Member

In the matter of :

1. M/s International Cylinder (P) Ltd.	…Appeal No. 21/2012
2. M/s. HIM Cylinders Ltd.	… Appeal No. 22/2012
3. M/s. OMID Engineering (P) Ltd.	… Appeal No. 23/2012
4. M/s. S.M. Cylinders (P) Ltd.	…Appeal No. 24/2012
5. M/s. Tirupati LPG Industries Ltd.	…Appeal No. 25/2012
6. M/s. Tirupati Cylinders Ltd.	...Appeal No. 26/2012
7. M/s. Balaji Pressure Vessal Ltd.	…Appeal No. 27/2012
8. M/s. R.M.Cylinders (P) Ltd.	…Appeal No. 28/2012
9. M/s. Confidence Petroleum India Ltd. & Co.	…Appeal No. 29/2012
10. M/s. Singhvi Cylinders (P) Ltd.	…Appeal No. 30/2012
11. M/s. BTP Structural India Pvt. Ltd.	…Appeal No. 31/2012
12. M/s. Konark Cylinders & Containers (P) Ltd.	…Appeal No. 32/2012
13. M/s. SKN Industries Ltd.	…Appeal No. 33/2012
14. M/s. Surya Shakti Vessela (P) Ltd.	…Appeal No. 34/2012
15. M/s. GDR Cylinders (P) Ltd.	…Appeal No. 35/2012
16. M/s. Kurnool Cylinders (P) Ltd.	…Appeal No. 36/2012
17. M.M.Cylinders (P) Ltd.	…Appeal No. 37/2012
18. North India Wires Ltd.	…Appeal No. 38/2012
19. M/s. Krishna Cylinders Ltd.	…Appeal No. 39/2012
20. M/s. Shri Ram Cylinders Ltd.	… Appeal No. 40/2012
21. M/s. Mourya Udyog Ltd.	… Appeal No. 41/2012
22. M/s. Supreme Tecnofabs (P) Ltd.	…Appeal No. 42/2012

23. M/s. Bhiwadi Cylinders (P) Ltd. … Appeal No. 43/2012
24. M/s. Faridabad Metal Udyog Ltd. …Appeal No. 44/2012
25. Haldia Presision Engineering (P) Ltd. …Appeal No. 46/2012
26. M/s. Gopal Cylinders …Appeal No. 47/2012
27. M/s. Om Containers …Appeal No. 48/2012
28. M/s. Universal Cylinders (P) Ltd. …Appeal No. 49/2012
29. M/s. Super Industries …Appeal No. 50/2012
30. M/s. Shri Shakti Cylinders (P) Ltd. …Appeal No. 51/2012
31. M/s. Sarthak Industries Pvt. Ltd. …Appeal No. 52/2012
32. M/s. Alampally Bros Ltd. …Appeal No. 53/2012
33. M/s. ECP Industries (P) Ltd. … Appeal No. 54/2012
34. M/s. Asia Fab Tec. Ltd. …Appeal No. 55/2012
35. M/s A.K.M.N. Cylinders (P) Ltd. …Appeal No. 56/2012
36. M/s. Lite Containers (P) Ltd. …Appeal No. 57/2012
37. M/s. Sahuwala Cylinders (P) Ltd. …Appeal No. 58/2012
38. M/s. Rajasthan Cylinders & Containers (P) Ltd. …Appeal No. 59/2012
39. M/s. Vidhya Cylinders (P) Ltd. …Appeal No. 60/2012
40. M/s. Mahaveer Cylinders Ltd. …Appeal No. 61/2012
41. M/s. Tee Kay Metels (P) Ltd. … Appeal No. 62/2012
42. M/s. Sunrays Engineers (P) Ltd. …Appeal No. 63/2012
43. Jesmajo International Fabrication Karnataka (P) Ltd. …Appeal No. 64/2012
44. Carbac Holdings Ltd. …Appeal No. 65/2012

…...Appellants

- Versus –

Competition Commission of India & Ors. ……Respondents

Appearances : Shri N. Venkat Raman, Senior Advocate with Shri Amol Sinha, Shri Rahul Kochar and Shri Vijay Verma, Advocates for the Appellants in Appeals Nos. 21 to 26/2012 and with Shri R. Sathish Kumar, Advocate for the Appellants in Appeals Nos. 55, 56 and 57 of 2012.

Shri A.B.N. Rao and Shri A. Venkatesh, Advocates for the Appellant in Appeal No.26 of 2012

Shri Gautam Chawla, Advocate for the Appellant in Appeal No.27/2012.

Mrs. Pallavi Shroff, Ms. Shweta Shroff Chopra and Ms.Sreemoyee Deb, Ms. Sangeetha Mangunathan, Advocates for the Appellant in Appeal Nos. 28, 29 and 30 of 2012

Shri P.S. Narasimha, Senior Advocate with Shri Amit Sharma with Shri S. Singh, Advocates for the Appellant in Appeal No. 31 of 2012.

Shri Anshum Jain, Advocate for the Appellant in Appeal Nos. 32, 33 and 51/2012

Shri Ramji Srinivasan, Sr. Advocate with Shri Manas Kumar Chaudhari, Shri Vijay Chauhan and Shri Sagardeep Rathi, Advocates for the Appellants Nos.38, 46 and 65 of 2012.

Mr. M.M. Sharma, Advocate with Ms. Deepika Rajpal and Mr. Vaibhav Chaukse, Advocate for the Appellant in Appeal No. 41/2012 and 54/2012

Shri N. S. Nandakumar, Advocate for the Appellants in Appeals Nos. 35, 36 and 37 of 2012.

Shri O.P. Aggarwal, Advocate for the Appellant.

Shri Pradeep Aggarwal with Shri Rajesh Aggarwal and Shri Umesh Pratap Singh, Advocates for the Appellants in Appeals Nos. 39, 40, 42, 44 and 47 of 2012.

Shri Atul Nanda, Senior Advocate with Shri Jaiveer Shergill, Shri Ankur Sood, Ms. Rameeza Hakeem and Ms. Priyadarshi, Advocates for Appellant in Appeal Nos. 48, 50, 58 and 62 of 2012

Shri Kuljeet Rawal and Mr. Jagjit Singh, advocates for appellant in Appeal No. 52/2012

Shri P.K. Bhalla, Advocate for the Appellant in Appeal No.53/2012.

Shri O.P. Gaggar, Advocate for the Appellant in Appeal
No. 64 of 2012.

Ms. Anupam Sanghi, Advocate with Dr. Shabistan Aquil, DD(L) for Respondent No. 1/CCI.

ORDER

PER MR. JUSTICE V.S. SIRPURKAR, CHAIRMAN

This judgment will dispose of the following appeals :-

1. M/s International Cylinder (P) Ltd.
2. M/s. HIM Cylinders Ltd.
3. M/s. OMID Engineering (P) Ltd.
4. M/s. S.M.Cylinders (P) Ltd. .
5. M/s. Tirupati LPG Industries Ltd.
6. M/s. Tirupati Cylinders Ltd.
7. M/s. Balaji Pressure Vessal Ltd.
8. M/s. R.M.Cylinders (P) Ltd.
9. M/s. Confidence Petroleum India Ltd. & Co.
10. M/s. Singhvi Cylinders (P) Ltd.
11. M/s. BTP Structural India Pvt. Ltd.
12. M/s. Konark Cylinders & Containers (P) Ltd.
13. M/s. SKN Industries Ltd.
14. M/s. Surya Shakti Vessela (P) Ltd.
15. M/s. GDR Cylinders (P) Ltd.
16. M/s. Kurnool Cylinders (P) Ltd.
17. M. M. Cylinders (P) Ltd.
18. North India Wires Ltd.
19. M/s. Krishna Cylinders Ltd.
20. M/s. Shri Ram Cylinders Ltd.
21. M/s. Mourya Udyog Ltd.
22. M/s. Supreme Tecnofabs (P) Ltd.
23. M/s. Bhiwadi Cylinders (P) Ltd.
24. M/s. Faridabad Metal Udyog Ltd.
25. Haldia Presision Engineering (P) Ltd.
26. M/s. Gopal Cylinders .
27. M/s. Om Containers .
28. M/s. Universal Cylinders (P) Ltd.
29. M/s. Super Industries .

30. M/s. Shri Shakti Cylinders (P) Ltd.
31. M/s. Sarthak Industries Pvt. Ltd.
32. M/s. Alampally Bros Ltd.
33. M/s. ECP Industries (P) Ltd.
34. M/s. Asia Fab Tec. Ltd.
35. M/s A.K.M.N. Cylinders (P) Ltd.
36. M/s. Lite Containers (P) Ltd.
37. M/s. Sahuwala Cylinders (P) Ltd.
38. M/s. Rajasthan Cylinders & Containers (P) Ltd.
39. M/s. Vidhya Cylinders (P) Ltd.
40. M/s. Mahaveer Cylinders Ltd.
41. M/s. Tee Kay Metels (P) Ltd.
42. M/s. Sunrays Engineers (P) Ltd.
43. Jesmajo International Fabrication Karnataka (P) Ltd.
44. Carbac Holdings Ltd.

(total 44 Nos.). All these appeals were disposed of by a common order and all the appellants were found guilty for the contravention of Section 3(3)(d) of the Competition Act, 2002 (for short 'the **Act'**). In the same order, however, two other companies namely JBM Industries Ltd. and Punjab Cylinders Ltd. were exonerated by the common order which was majority order. However, the learned Member Shri Prasad in his minority order found them guilty of contravention of Section 3(3)(d) and also under Section 3(3)(a) of the Act. Shri Prasad, however, agreed with the majority in so far as the finding of guilty was concerned against the above appellants. He also agreed with the penalty ordered under Section 27 of the Act. The common order of the Competition Commission of India (for short 'the **CCI'**) has taken a view that the appellants' company were liable to pay penalty on the basis of

the average of the last three years turn over. In some cases the turn over was not available the CCI calculated the average turn over of last two years. In case of Hyderabad Cylinders, the penalty was imposed @2.1 times of its net profits as details were not available at all. Needless to say we need not consider the imposed penalty against the Hyderabad Cylinders as Hyderabad Cylinders have not come up in appeal before us. The CCI has neatly discussed the details of the penalty separately in case of defaulting companies. Thus, out of original 47 companies, one company M/s. Hyderabad Cylinders has not filed an appeal at all while two companies were totally exonerated as stated earlier. The rest 44 companies have come up before us in these appeals.

2. The *suo-motu* proceedings were started by the CCI on the basis of the information received by it in case No. 10 of 2010 M/s. Pankaj Gas Cylinders Ltd. Vs. Indian Oil Corporation Ltd. In that case a complaint was made by M/s. Pankaj Gas Cylinders complaining before the CCI about unfair conditions in the tender floated by M/s. Indian Oil Corporation Ltd. (for short 'IOCL') for the supply of 105 lakh 14.2 Kg. capacity LPG Cylinders with SC valves in the year 2010-11. The tender No. being LPG-O/M/PT-03/09-10. While considering the Director General's investigation report in case No. 10 of 2010 the CCI

in pursuance of its duties under Section 18 felt that investigation was necessary in case of all the bidders who were the suppliers of 14.2 kg. LPG cylinders in that tender. In the investigation report in case No. 10 of 2010, the D.G. had noted that out of 63 bidders who participated in the tender, 50 bidders were qualified for opening of price bids, while 12 bidders were qualified as new vendors who were not required to submit price bids and one bidder was not qualified for the opening of the price bid. The technical bid of the subject tender was opened on 3.3.2010 and the price bids of 50 qualified bidders were opened on 23.3.2010. According to the D.G., there was a similar pattern in the bids by all the 50 bidders who submitted price bids for various States. The bids of a large number of parties were exactly identical or near to identical for different States. The D.G. had observed that there were strong indications of some sort of agreement and understanding amongst the bidders to manipulate the process of bidding.

3. It was on this basis the CCI directed further investigation in the matter. The Director General after careful consideration submitted his report to the CCI and gave a detailed investigation report to the CCI. After the CCI considered the freshly ordered investigation report, directed a

copy of the report be sent to the parties seeking their objections. In all, 44 opposite parties submitted their objections. After giving them the opportunity to be heard, the CCI has passed the impugned order.

4. Its commonly known that the Oil Companies operating in India namely – India Oil Corporation Ltd. (IOCL), Bharat Petroleum Corporation Ltd. (BPCL) and Hindustan Petroleum Corporation Ltd. (HPCL) require these cylinders which they supply to the consumers for the domestic gas uses after the process of bottling. Under the essential conditions of the tender each bidder was permitted to apply for supply in eight States to the maximum. In his investigation report, the D.G. had reported that IOCL is a leading market player in the Liquefied Petroleum Gas (LPG) and its market share was 48.2% and that it was a major procurer of 14.2 Kg. LPG Cylinders. The D.G. had reported that in the year 2010-11 the IOCL procured 105.16 lakh cylinders, HPCL floated a tender for 36 Lakh Cylinder and BPCL floated a tender for 40.33 lakh cylinders. While HPCL and BPCL had adopted e-platform for tender invitation, IOCL had procured cylinders by way of invitation of tenders.

5. Be that as it may. As per the D.G.'s report, the process of bidding followed by the IOCL in the tender was as under :-

i) The bidders would submit their quotations with the bid documents.

ii) The existing bidders, who were existing suppliers, were required to submit the price bids and technical bids.

iii) The bidders were to quote for supplies in different States of India in keeping with their installed capacity.

iv) After price bids were opened the bidders were arranged according to the rates in the categories of L-1, L-2 and L-3.

v) The rates for the supplies in different States were approved after negotiations with L-1 bidder. In case the L-1 bidder could not supply a required number of cylinders in a particular States, the orders of supplies went to L-2 and also L-3 bidders or likewise depending upon the requirement in that state as per fixed formula provided in the bid documents.

vi) Certain bidders were called new parties. They were required to submit only technical bids and they were required to supply as per L-1 rates determined after the negotiations.

vii) One bidder could quote for maximum eight States.

6. The D.G. after analyzing the bids came to the conclusion that there was not only a similarity of pattern in the price

bids submitted by the 50 bidders for making supply to the IOCL but the bids in large number of parties were exactly identical or near to identical in different States. It was also found that bidders, who belonged to same group, might have submitted identical rates. It was found that not only there was identical pricing in case of group concerns but the rates of other entities not belonging to the group were also found to be identical. The D.G. painstakingly noted the names of group companies as well as non- groups companies. He came to the conclusion in all 37 entities could not be said to be belonging to any single group and were independently controlled. The D.G. found it unusual that unrelated firms had quoted identical rates in different States. The D.G. had analyzed the bidding pattern for the various parties for all the 25 States. The D.G. found that :-

a. The orders were placed on all the 50 successful bidders.
b. The contracts were awarded to the sets of bidders who had quoted identical rates or near to identical rates in a particular pattern in almost all the States.
c. There was a common pattern for quotation depending upon the state. In case of North East the rates were highest, quoted at Rs. 1240 whereas in

case of other rates were Rs.1100, Rs.1127 and Rs. 1151.

d. It was found that only Andaman and Nicobar Islands there was a single party who had quoted the L-1 rate and got the formal contract. In other States the contracts were bagged in a group on the basis of identical or near to identical rates.

e. The similarity of the rates was found even in case of bidders whose factories and offices were not located at one and the same place in the States and where they were required to supply was far off from their factories located in different place.

7. The D.G. had found further that though the factors like market conditions, small number of companies, were different, there was a large scale collusion amongst the bidding parties.

8. In addition to this, the D.G. found that the LPG Cylinder Manufacturers had formed an Association in the name of Indian LPG Cylinders Manufacturers Association and the members were interacting through this Association and were using the same as a platform. Lastly date for submitting the bids in the case of concerned tender was 3.3.2010 and just two days prior to it, two meetings were held on 1st and 2nd

March, 2010 in Hotel Sahara Star in Mumbai. As many as 19 parties took part and discussed the tender and in all the probability, prices were fixed there in collusion with each other. The D.G. reported that the bidders had agreed for allocation of territories, e.g., the bidders who quoted the bids for Western India had not generally quoted for Eastern India and that largely the bidders who quoted the lowest in the group in Northern India, had not quoted generally in Southern India.

9. The D.G. had also concluded that this behavior created entry barrier and that there was no accrual of benefits of consumers nor were there any plus factors like improved production or distribution of the goods or the provision of services.

10. Ultimately, the D.G. came to the conclusion that there was a cartel like behavior on the part of the bidders and that the factors necessary for the formation of cartel existed in the instant case. It was also found that there was certainly a ground to hold concerted action on the part of the bidders. The D.G. had also noted that the rates quoted for the year 2009-10 and in previous years to that were also identical in some cases. Thus, he came to the conclusion that the bids for the year 2010-11 had been manipulated by 50 participating

bidders. It was thereafter the CCI decided to supply the D.G.'s investigation report to the concerned parties and invite their objections.

11. A common reply came to be filed as also the individual replies. After considering the same, the CCI formulated one issue for determination which is as under:-

- Whether there was any collusive agreement between the participating bidders which directly or indirectly resulted in bid rigging of the tender floated by IOCL in March 2010 for procurement of 14.2 kg. LPG cylinders in contravention of Section 3(3)(d) read with Section 3(1) of the Act?

12. After considering the oral as well as written submissions, the CCI on the aforementioned issue held against the Cylinders Manufacturers and inflicted the penalties against the present appellants. We must add at this very point that out of those, who are penalized excepting M/s. Hyderabad Cylinders, all the other Cylinders Manufacturers have come up in appeal before us. In its impugned order, while determining the issue, the CCI firstly considered the common replies to the DG's report filed by as many as 44 opposite parties. It was more or less pleaded that every part of LPG Cylinder is regulated by the Rules through various Notifications and that the price of steel constitutes 50% of the total manufacturing cost, so also

the price of the paint, it being an essential raw material. All these factors including the taxes which vary from State to State, determine the overall bidding pattern of the bidders. In para-5.2.3 of the common objection, it was added that these 44 parties had nominated six agents for depositing their bids on their behalf and it was a common practice amongst the bidders to direct their agents to keep close watch on the rates offered by their competitors in respect of a particular State and this led to the possibility of copying and matching of the rates quoted in the price bids by many suppliers in a particular State, who may have appointed common agents. Due to this reason, cutting and over-writing in the price bids for the tender in question was noticed by the DG.

13. It was further pointed out that there were only 62 qualified tenderers in the whole country, out of whom 12 bidders were classified as new parties, meaning thereby that they had not supplied Cylinders in last three years and were not required to bid in the tender. Out of the remaining 50 bidders, there were group companies controlled by single management. It was urged that price parallelism is a common feature in oligopolistic market and that particular conduct by itself is not prohibited, nor does it create a presumption of collusion and cartelization.

14. It was also submitted that all the tenderers were not the members of the LPG Gas Cylinders Association and they had not participated in the alleged meeting at Mumbai. It was urged that the price of LPG Cylinder is indirectly determined by the Oil Marketing Companies through forced negotiations. It was also denied in this reply that there was any meeting of mind or agreement amongst the tenderers. It was admitted that the meetings at Mumbai was attended by 12 persons representing 19 opposite parties. It was urged that mere parallelism in prices was not sufficient and there ought to be some plus factors to show the collusive behavior or as the case may be, the concerted action for bid rigging or fixation of prices. It was thus asserted in this reply that there were no plus factors available or proved for forming an opinion or coming to the conclusion of collusive behavior or bid rigging.

15. The Commission also noted the individual submissions of the 19 parties, who attended the meeting. Incidentally, it must be stated that the two meetings were held on 1st and 2nd March, 2010 that is on the two days previous to 3rd March, 2010 on which date the price bids were to be deposited with the tender documents. The CCI had neatly noted the replies of all the 19 companies. All these 19 companies have more or less in a common tone urged that they were not continuing as

the members of the Cylinder Manufacturers Association though they almost unanimously agreed that there was such a association in existence. The parties also urged that as they were not present in the so called meetings on 1st and 2nd March,2010 in Sahara Hotel, Mumbai there was no meeting of minds particularly in respect of prices to be quoted on 3rd March, 2010. Practically all the lawyers appearing for the parties before the CCI also urged that the investigation was defective as the other two manufacturing companies like BPCL and HPCL were not investigated and the investigation was limited only to IOCL. Some of the counsel also tried to urge that there was no appreciable adverse effect on the competition merely because the prices were identical. So also the parties urged before the CCI that since in spite of the identical prices having been quoted by number of parties, the prices were fixed by negotiations, there was no question of breach of Section 3(3)(d) of the Act. The parties also almost unanimously urged before the CCI that IOCL not having been joined as a party the prejudice is caused inasmuch as the stand of the IOCL in the matter would have helped the CCI as well as the parties to solve the riddle of the parallel, identical or nearly identical pricing. It was tried to be urged before CCI and also before us by few senior advocates more particularly

like Shri N. Venkataraman that even the IOCL did not think that the bid was rigged. It was urged by him, more particularly, that this was all the more true and there was a Monitoring Committee headed by one of the able officers. He states that monitoring committee was consulted by the Director General during the investigation. It was also urged that since prior to the tender supplies were made to HPCL and BPCL at higher rates, there was no point in colluding to form a cartel for low price. It was the effort on the part of the learned counsel to show that the prices at which the orders were given were even lower to the prices quoted and the prices offered to the other companies. Even during the arguments Shri Sharma appearing for 44 parties on whose behalf he had filed a common reply had relied on DG's report more particularly at page 6 that there were six common agents and under the instructions of their principals they might have known each other's prices which resulted in offering the identical pricing on number of occasions and in number of States. Shri Sharma like others also argued that the existence of the agreement was never proved.

16. The CCI in its detailed and carefully written order began with considering the scope of constructed bid rigging agreement and cartel. In that the CCI also considered the

famous observation by Lord Denning in case of ***RRTA vs. W. H. Smith & Sons Limited*** regarding the quiet and secret nature of the agreement between the parties. The CCI then went on to record its inference holding that there was element of agreement and considered the following factors in coming to the conclusion. They being:-

1. Market conditions
2. Small number of suppliers
3. Few new entrants'
4. Active trade association
5. Repetitive bidding
6. Identical products
7. Few or no substitutes
8. No significant technological changes
9. Meeting of bidders in Mumbai and its agenda.
10. Appointing common agents
11. Identical bids despite varying cost.

17. After consideration of these factors, CCI came to the conclusion that it did suggest collusive bidding. Thereafter, the CCI analyzed these bids for each States carefully and found that all 50 participating bidders had secured the order; that the orders were placed on the said so bidders who had quoted identical rates or near to identical rates in a particular pattern common to all the parties. CCI also highlighted the facts of absence of business justification. It also went on to

show that supplies were made at the higher cost. After discussing the concepts of standards of proof and appreciable adverse effect on competition, the CCI considered the various arguments at time repeating itself. All the arguments came to be refuted. CCI then went on to consider the case law more particularly the Supreme Court Judgment in ***Union of India vs. Hindustan Development Corporation - (1993) 3 SCC 499***. It also took into consideration the arguments raised by the individual parties and then came to record that cases of M/s. JBM Industries and Punjab Cylinders, however, were exceptional ones and they could be exonerated. After this the CCI went on to decide the penalty factor under Section 27 of the Act.

18. It must be stated here that admittedly no party had addressed the CCI on the question of penalty which exercise was done before us extensively by almost all the parties.

19. Be that as it may. After considering the overall average turnover factor the CCI passed the order. The CCI ordered penalty of 7% of the average of the last three years turn over. Where such turn over was not available, the CCI considered the other factors like turn over for the last two years. Two parties namely M/s. JBM Industries Ltd. and M/s. Punjab Cylinders Ltd. were exonerated and were let off. Though we

are not satisfied at all with the reasons given by the CCI for their exoneration, we cannot consider their case as there is no appeal against the verdict of the CCI is before us. A very strong argument was addressed on the basis of exoneration of those two parties to the effect that the case of some appellants were similar or almost identical to the case of M/s. JBM Industries Ltd. and M/s. Punjab Cylinders Ltd. and, therefore, they should also be given the same treatment by us. The argument is *per se* incorrect. Wrong exoneration of some of the parties does not entitle the others who are decidedly guilty of the breach of the provisions and incorrect exoneration of some does not create any right to others particularly, if firstly the exoneration is incorrect and secondly the party claiming such treatment is proved to be guilty. We, therefore, proceed to reject that argument.

20. We must, at this juncture, discuss some admitted facts. It is an admitted fact that the tender offers were to be made at Mumbai on 3rd March, 2010. Admittedly there were meetings in Hotel Sahara Star, Mumbai on 1st and 2nd March, 2010 which was attended by some of the appellants. The D.G. has held that 19 appellants were represented by various persons in that meeting. The fact of the meeting, having been held was not disputed before us. However, all the appellants

accepting some were competing with each other to claim that they did not attend the meeting. However, the fact that such meetings were held being an admitted fact. It was up to at least those persons who attended the meeting or even others to explain as to what transpired in the meeting and also to prove that the prices were not discussed in that meeting. After all, if the industries who were manufacturing the cylinders an all-India tender consisting of 25 States was at stake, these persons could not have expected to discuss weather and health in that meeting. All that is to be deduced is that these meetings did relate to the tender offers, which were to be made on 3rd March, 2010. Again there is absolutely no material presented by any of the appellants regarding the minutes of the meeting or the purpose of these meetings. It will, therefore, be reasonable to deduce that the meetings did relate to the tenders in question.

21. There is one more very significant fact which is also an admitted position and it is that there is an association of the cylinder manufacturers. All the parties except few competing with each other, stated that they were not the members of that association. A feeble argument was also raised by some appellants that though they were the members but they were not the active members thereof. Some of the appellants also

argued that they had abandoned the membership by not contributing the subscription in the later years. However, the appellants could not deny the position that there was an association called Indian LPG Cylinder Manufacturers Association. This association seems to have been registered in the State of Tamil Nadu and the date of registration appears to be 29.6.2004. It is registered under Section 10 of the Tamil Nadu Act, 1975 (Tamil Nadu Act 27 of 1975). There is a certificate of registration on the record. A glance at the Memorandum of Association and more particularly to the objects listed in clause 3 of this Memorandum would suggest that it had the object to protect common interest and welfare of LPG cylinder manufacturers. The association had also provided a platform for expressing the feelings, grievances, requirements and commercial concerns to the public through all relevant measures. It also served the purpose of mediating, negotiating and arbitrating the grievances of the LPG cylinder manufacturers. All this goes to suggest that there was a definite platform available for all the cylinder manufacturers. There is a list of 76 members and practically all the appellants appear to be the members of that association.

22. The third significant factor, which we must consider at this juncture, is a common written reply submitted by as many as 44 parties. It is also to be noted that the appellants filed individual affidavits supporting this reply. It is apparent from that the appellants had nominated six agents for depositing their bids on their behalf and that it was a common practice amongst the bidders to direct their agents to keep close watch on the rates offered by their competitors in respect of a particular State. In fact, it was urged that this led to the possibility of copying and matching of the rates quoted in the price bids by many suppliers in a particular State, who may have appointed common agents. It was admitted that because of this, there was cutting and overwriting also in the price bids for at least one tender. Thus, it appears to be an admitted fact that the appellants had appointed six common agents and these common agents were instructed to keep a close watch on the price quoted by the competitors in a particular State. At the Bar, it was vociferously argued by some of the appellants that they had not appointed the common agents. In the wake of the affidavits supporting the common reply, it is difficult to hold that the parties had not appointed any agents or that the agents were not instructed to keep a watch on the price offered or quoted by the other

manufacturers. We have, therefore, to proceed on the common and admitted grounds that, firstly, there was an association of the cylinder manufacturers. As per list provided by the association of their members almost all the appellants were the members; secondly, this association was an active association and the activities included holding of the meetings on the eve of any tender obviously for discussing the tenders, its conditions etc. and, in fact, for this tender two meetings were held in Hotel Sahara Star in Mumbai on the two immediately preceding days of the last date, when the offers were to be made and that these meetings were attended by the representatives of at least 19 appellants; and that these appellants had six common agents at Mumbai who were instructed to watch the prices offered by the others.

23. Both the D.G. as well as the CCI found that 19 companies which attended the meeting at Mumbai where M/s. Haldia Precision Engineering Ltd. through their representatives Mr. Chandi Prasad Bhartia, Mr. Sandeep Bhartia and Mr. Raj Kumar Bhartia. A dinner meeting as also a lunch were held and Mr. Chandi Prasad Bhartia paid the bill for the same. M/s. Carbac Holdings also attended the meeting. It is a group company of M/s. Haldia Precision Engineering Pvt. Ltd. The others who attended the meeting were M/s. North India Wires,

M/s. Bhiwadi Cylinders, M/s. Surya Shakti Vessels Pvt. Ltd., M/s. Tirupati LPG Industries Ltd., M/s. Tirupati Cylinders and M/s. International Cylinders (P) Ltd. These three appear to be the group companies. The others were M/s. Om Containers Pvt. Ltd., M/s. Super Industries, M/s. Tee Kay Metals Pvt. Ltd., M/s. Krishna Cylinders, M/s. Shri Ram Cylinders, M/s. Him Cylinders Ltd., M/s. Omid Engineering Pvt. Ltd., M/s. Lite Containers Pvt. Ltd., M/s. Rajasthan Cylinders & Containers Ltd., M/s. S.M. Cylinders and M/s. Sahuwala Cylinders Pvt. Ltd. There are clear admissions on the record which have been noted both by the DG as well as CCI that all those who attended the meetings were the Members of the Association and owners of these parties participated in the meeting held at Mumbai. The other 24 parties claimed not to have attended the meeting were M/s. Khara Gas Equipment Pvt. Ltd., M/s. Confidence Petroleum India Ltd., M/s. Andhra Cylinders and M/s. Hans Gas Appliances Pvt. Ltd. They are managed by Mr. Yatin Khara. The other parties taking similar stand about meeting are M/s. Faridabad Metal Udyog Pvt. Ltd., M/s ECP Industries, M/s. Mahaveer Cylinder, M/s. Punjab Gas Cylinder Ltd., M/s. Konark Cylinders & Containers, M/s. JBM Industries, M/s. Universal Cylinders, M/s. Asian Fab Tec Ltd., M/s. BTP Structural (I) Pvt. Ltd., M/s. G.D.R. Cylinders (P) Ltd., M/s.

Gopal Cylinders, M/s. Sanghavi Cylinders Pvt. Ltd., M/s. RM Cylinders Pvt. Ltd., M/s. Jesmajo Industries Pvt. Ltd., M/s. Kurnool Cylinders Pvt. Ltd., M/s. M.M. Cylinders Pvt. Ltd., M/s. Sarthak Industries Ltd., M/s. Sunrays Engineers Pvt. Ltd., M/s. SKN Industries Ltd. and M/s. AKMN Cylinders (P) Ltd.. They also reiterated that they were not the members of the association.

24. It has come on record that the dinner and lunch held in the Sahara hotel was attended by about 50 persons in all. Thus, we have no reason to disbelieve that the parties had an access to each other through their association and the association was an active association, holding the meeting two days prior to the opening of the bids. It is also clear that the parties admitted by their common reply and independent affidavits that they had the common agents, who were instructed to mark the prices of the competitors.

25. We have noted from the order of the CCI that the CCI has considered each case separately by referring to the defences raised by all the parties. The CCI has clearly noted the contentions raised in the replies as also contended during the oral submissions. We must appreciate the labour taken by the CCI in considering the stand taken by the parties.

26. What is important is not whether a particular appellant was a member of the association or not. The existence of an association is by itself sufficient, as it gives opportunity to the competitors to interact with each other and discuss the trade problems. There will be no necessity to prove that any party actually discussed the prices by actively taking part in the meeting. If there is a direct evidence to that effect that is certainly a pointer towards the fact that such party had a tacit agreement with its competitors. However, the existence of an association and further holding of the meetings just one or two days prior to the last date of making offers and further admission that the parties had appointed common agents with the instructions to keep watch on the prices quoted by the competitors would go a long way in providing plus factors in favour of the agreement between the parties. All these factors would form a back drop, in the light of which, the further evidence about agreement would have to be appreciated. We have seen the comments of Director General as also the findings of the CCI. We are convinced that CCI has not committed any error in considering all these factors as plus factors to come to the conclusion that there was a concerted agreement between the parties on the basis of which the identical or near identical prices came to be quoted in tenders

for the supply of cylinders to the 25 States. In view of this, we need not dilate on the individual claims by some of the appellants that they were not the members of the association or that they were only the dormant members or that they had abdicated their membership. We also need not go on the claim that while the meeting was attended by the 19 parties as held by the D.G. and confirmed by the CCI, it was not attended by the rest of the appellants because that would be of no consequence. Once there was a meeting, there was every opportunity to discuss or to communicate to each other whatever transpired in the meeting.

27. We have seen the order of the CCI and while commenting about the meeting, the CCI has painstakingly noted the details of that meeting. The CCI has referred to the evidence of Mr. Dinesh Goyal, who was an active member of the Indian LPG Cylinder Manufacturers' Association and noted that he had attended the meeting. He has also referred to the statement of Mr. Sandeep Bhartia of Carbac Group though initially he denied to have organized the conference, he later on had confirmed about such a conference having been held along with Mr. Sandeep Bhartia of Carbac Group. The CCI also noted that he admitted that in such meetings there were discussions on pre-bid issues. He also admitted that though

there are about 50 competitors, in fact about 25 persons control the whole affairs. From this evidence, the CCI correctly deduced that pre-bid issues were discussed in that meeting. The CCI has then referred to the evidence of Mr. Manvinder Singh of Bhiwadi Cylinders Limited, Mr. Chandi Prasad Bhartia of Haldia Precision Engineering P. Ltd., Mr. Vijay Kumar Agarwal of SM Sugar Pvt. Ltd., Mr. S. Kulandhaiswamy, MD of Lite Containers Pvt. Ltd. and Secretary of the Association, Mr. Ramesh Kumar Batra, Director of Surya Shakti Vessels Pvt. Ltd. and on that basis came to the correct conclusion that not only was the meetings held on 1st and 2nd March, but thorough discussions went on in those meeting on the pre-bid issue of the concerned tender. The CCI has also correctly noted about the agenda of the meeting and has also referred to an admission made by one of the witnesses that the matching of the quotation was a matter of co-incidence and telephonic discussions do take place amongst the parties regarding the trends. We are thus thoroughly convinced about holding of the meeting, the discussion held therein and also the discussion regarding the pre-bid issue having been taken place in that meeting.

28. We must also at this stage consider the argument that the CCI should have enquired IOCL also. It was also argued

that the tender of IOCL alone should not have been considered but the tenders of BPCL and HPCL should have also been considered and investigated by the D.G. and further considered by the CCI. Both the arguments are obviously incorrect. Firstly, it was the behavior on the part of the tenderers which was being investigated and that was a clear mandate by the CCI. That was felt necessary as on the basis of D.G. Report in some other matters namely in case No. 10 of 2010 of M/s. Pankaj Gas Cylinder, the CCI decided to proceed *suo-motu*. The CCI had not decided to proceed against the IOCL. Since, it found from the report in case No. 10 of 2010 that there was an element of identical pricing and that there was a peculiar pattern of quoting for the particular State and hence ordered a thorough investigation. The tenders of HPCL and BPCL did not fall for its consideration nor did it have any material to proceed against any of the tenders floated by those companies. Case No.10 of 2010 against M/s. Pankaj Gas Cylinder had altogether a different factual background. That was a case where M/s. Pankaj Gas Cylinder was complaining against the conditions in the tender perhaps because it was not allowed to compete. That was entirely a different matter. The CCI on the basis of the investigation report, in that case, found out the element of identical and

patternised pricing and hence ordered thorough investigation into the matter. The CCI had nothing to do against the IOCL. It was on account of the anti-competitive behavior on the part of the tenderers-appellants in this case, that the CCI ordered and in our opinion rightly an investigation. Therefore, not joining the IOCL in the investigation or not investigating into the BPCL and HPCL tenders is obviously irrelevant insofar as the present matter is concerned. We reject the argument to that effect made by some of the appellants.

29. Amongst the other plea raised by the parties before the Commission as well as before us, we must take note of some submissions, which were almost common in nature. It is urged that it was an oligopolistic market where there were only 62 qualified vendors in whole India and therefore, it was urged that there was a likelihood of each player being aware of the actions of the others. It was then urged that price parallelism is a common phenomenon in such an oligopolistic market and therefore, mere price parallelism cannot lead to the conclusion of price fixing or bid rigging, as the case may be. It was urged that conscious price parallelism should not necessarily be construed as evidence of collusion and that there would have to be a plus factor beyond mere parallel behavior.

30. The burden in this behalf cannot be equated with the burden in the criminal cases where the prosecution has to prove the allegation beyond the reasonable doubt. A strong probability would be enough to come to the conclusion about the breach of the provisions of the Competition Act. Some of the learned counsel argued that their participation or the pre-concerted agreement would have to be proved beyond doubt. We do not think so. It is obvious that an agreement cannot be easily proved because it may be a wink or a nod or even a telephone call. What is required to be proved is a strong probability in favour of a pre-concerted agreement and the factors which we have highlighted go a long way in that direction and as plus factors.

31. While considering the question of collusive agreement, the CCI took into consideration various factors, firstly, it considered the prevailing market conditions and deduced that there was a constant demand for cylinders, not only by IOCL, but also by the other oil manufacturing companies. It was, therefore, deduced by the CCI that this aspect of constant need for the cylinders by the companies, was a facilitating factor for collusion.

The CCI also considered as a relevant factor the small number of suppliers. It found that amongst the 50

participating companies, only 37 companies could be said to be independent bidding companies as there were 7 groups consisting of 20 participating companies. Thus, it held that the small number of suppliers could be a facilitating factor. The CCI also considered the factor of very few new entrants. Fourthly, it took into consideration the existence of active trade association. We have already endorsed the finding of CCI on the active trade association. It was noted that except seven companies, all the bidders were the members of the association. They being – Asian Fab Tech Ltd., Faridabad Metal Udyog Pvt. Ltd., Gopal Cylinders, Krishna Cylinders, JBM Industries and Shri Ram Cylinders. It was noted by the CCI that out of these, Asian Fab Tech Ltd., which was previously Avatar Asian Cylinder, could be said to be a member, as Avatar Asian Cylinder was shown in the list of the members, which was supplied by the association. Thus, it concluded that this was a facilitating factor. The CCI also noted few other factors like repetitive bidding, identical products, few or no substitutes and no significant technological changes as additional factors. In so far as, factor of identical products is concerned, in fact, it was the defence of the appellants that the cylinder of 14.2 KG, which was the product, had the standardized norms for its production. Number of the learned

counsel argued before us that since the components required for the manufacture of cylinder were standardized, there could be a possibility of the identical or nearly identical pricing policy. It was urged that in fact, the manufacturing cost of all the appellants could be same or nearly same, because of the standardization of the manufacturing process as well as the standardization of the components of the cylinder. We do not think that there could be such possibility of the identical manufacturing cost. After all these manufacturing companies had their factories at different places in India, where the costs of the components would differ from State to State, even the taxing structure, the labour conditions and other factors like cost of electricity etc. were bound to be different. Therefore, this defence would be of no consequence and we reject the same. We, however, endorse the factors considered by the CCI. The CCI also took into consideration the lunch and dinner meetings held on 1st and 2nd March 2010. In fact the CCI has considered it in great details, referring to the evidence of various persons, who attended the lunch and the dinner meeting and we have already endorsed the finding of the CCI in this behalf. The CCI also considered some other factors like the agenda of the meeting and the appointment of common agents, as the other factors in support of collusive nature of

bids. We have already given our comments on the factors like appointment of common agents and have endorsed the finding that as many as 44 parties by separate affidavits admitted the appointment of common agents, who were instructed to watch the prices quoted by the competitors.

32. Last but not the least, the CCI has in great details considered the identical or nearly identical prices offered in the bids by various companies. It was noted that this was a huge order, as IOC required 105 lakhs LPG cylinders for 25 States. The CCI also noted the tender conditions that the rates were to be fixed after negotiation only with L-1 bidders and in case the L-1 bidders were not in a position to supply, then the orders for supply were to go to L-2 or also to L-3 bidders or likewise, depending upon the requirements in that State as per fixed formula announced in the bid documents. The CCI painstakingly considered the report of the Director General of the Investigation and noted that bids of large number of parties were exactly identical or mere to identical in different States. It also fond that not only rates of group concerns were common, but the rates of other concerns belonging to other and unrelated groups were also identical. The CCI has noted that despite being located in different places and having varied manufacturing cost, the appellants had quoted identical rates

across the length and breadth of the country. The CCI then painstakingly did the analysis of the bids for 25 States. The result of the analysis was quite shocking.

33. In case of Punjab, where there were five bidders, four bidders had quoted identical rates of Rs.1080.5 and one party only had quoted the rate of Rs.1080. In case of Rajasthan, there were ten bidders and nine out of them had quoted identical rates of Rs.1130.50 and only one had quoted the rate of Rs.1130. In State of Haryana, where there were three parties, who were awarded the tender, two had quoted identical rates of Rs.1085.5 and one had quoted Rs.1085. Similar was the situation in the State of Chhattisgarh, where out of the four bidders, two quoted the price of 1095, while two others had quoted Rs.1100 that is with a difference of Rs.5. In the State of Uttranchal also four successful parties had quoted identical rates of Rs.1081 and only one party had quoted the rate of Rs.1080, with the difference of Rs.1. In case of Delhi, seven successful bidders had quoted identical rate of Rs.1088.5 or Rs.1088. The story in Himachal Pradesh was no different, where three bidders had quoted the rate of Rs.1090, while Punjab Gas Cyls. Ltd. had quoted the rate of Rs.1090.50. The same is the pathetic story in other States like Gujarat, where three of the successful bidders had quoted

the identical rate of Rs.1096. In Madhya Pradesh, three parties had quoted identical rates of Rs.1097. In the State of Orissa, two industries that is ECP Industries and Konark Cylinders had quoted the rate of Rs.1240.73 and Rs.1245.34 respectively. In Uttar Pradesh also, it was found that the nine parties had quoted the identical rate of Rs.1106.5 and two had quoted the rate of Rs.1106. In Andhra Pradesh, it was found that four parties had quoted the identical rate of Rs.1100, three had quoted the rate of Rs.1101.49, and two had quoted the identical rate of Rs.1103.15 and the remaining one had quoted Rs.1103. In case of State of Karnataka, three parties had quoted the rate of Rs.1103.6, one quoted Rs.1103, four parties had quoted Rs.1105 while one other quoted Rs.1110. In case of West Bengal, out of six parties, four parties had quoted identical rate of Rs.1105.99 and one each quoted Rs.1105 and Rs.1150 respectively. As regards the State of J&K, out of two parties, one quoted the rate of Rs.1115 and the other Rs.1116 with the difference of merely Rs.1. In Jharkhand the story was no different, two parties had quoted the rate of Rs.1125, one quoted Rs.1120 and another for Rs.1117. In the State of Bihar, out of ten parties, four parties quoted the common rate of Rs.1117.5, while some others gave different rates like Rs.1130, Rs.1125, Rs.1117 and

Rs.1180. In case of Tamil Nadu, it is interesting to note that out of twenty three parties, fifteen parties quoted the rate of Rs.1127, while the others quoted the rate of Rs.1126, Rs.1250, three quoted the rate of Rs.1126, five quoted the rate of Rs.1250 and some other rates like Rs.1130, Rs.1128, Rs.1125 and Rs.1175. In Pondicherry also out of ten parties, four parties quoted the identical rate of Rs.1130 and the other three quoted Rs.1125, two quoted Rs.1131. In State of Maharashtra, out of eight parties, five quoted identical rates of Rs.1100, while one quoted Rs.1110 and the two quoted Rs.1150. In case of Sikkim, both the parties quoted identical rate of Rs.1150. In state of Kerala, out of eighteen, ten parties quoted the rate of Rs.1151, two parties had quoted Rs.1160, two quoted rate of Rs.1170 and four others quoted Rs.1152, Rs.1153, Rs.1154 and Rs.1150.5 each. As far as State of Assam was concerned, out of four parties, two parties quoted Rs.1175 and two others Rs.1166 and Rs.1165 respectively. For North East, there were eight parties, seven parties quoted the rate of Rs.1240 and remaining one party quoted Rs.1250. Lastly, in case of Andaman and Nicobar, only one party quoted the rate and won the contract.

34. The DG had deduced on the basis of these findings that all the 50 participating bidders had secured the orders. That

the tender was awarded and the orders were placed on the sets of bidders, who have quoted the identical rates and near to identical rates in a particular pattern in almost all the States. That successful bid rates were quoted by different bidder in a group collectively. For example rate of Rs.1240 was quoted for North East and similar pattern was in respect of State of Kerala, Tamil Nadu and Maharashtra. The DG had also deduced that there was identity in the rates quoted by the bidders, even when the factories and offices of these parties were not located in one and the same State and they had to make supplies to locations far off from their factories located at different places.

35. The CCI endorsed these findings of the DG and further went on to hold that even where the factories location of successful bidder were not the same and the freight component of the bids were definitely different, the rates quoted were identical. This was more in case of Delhi. The CCI deduced that this trend was uniformly applicable across the States and therefore, it came to the conclusion that bidders were not competing at all and were acting against the normal course of business. The identical rates quoted by 14 or 15 parties at the rate of Rs.1127 was seen to be a stark example of the price fixing and collusive bidding. The CCI also noted

that though there were group companies, who had quoted identical rates, still there were 13 other different companies, whose factories were located in different parts of the countries, had also quoted the identical rates. Thus, CCI has inferred that rates were quoted by 12 different group concerns were also identical. It therefore, held that this was possible only when the bidders had agreed on the rates. Commenting on the State of Rajasthan, it was found that out of sixteen concerns, nine had quoted identical bids of Rs.1130.5, even where the factories are located in different States. Out of these nine parties who quoted identical bids, three concerns were located in Rajasthan, while factories of six others located in other States like Himachal Pradesh, Uttar Pradesh and Haryana, yet they had quoted the identical price to the last decimal. It was in this fashion that the CCI considered the identity or near identity of the prices by the concerns, who had different considerations like the location of factories, electricity rates and labour rates etc.

36. We are thoroughly convinced by this analysis that all this could not have been possible unless there were internal agreements between the concerns. What shocks us is that the quotations of the price did match to the last decimal and the quotations in some cases were in odd figures like Rs.1127 in

the State of Tamil Nadu. The record is replete with such odd figures. It was strange that in some of the oral statements of the representatives of these parties, who were examined by the DG, some of them could not even justify these identical prices and tried to say that it was a mere coincidence. We cannot accept the argument of coincidence as was rightly rejected by CCI. There can be no explanation for this kind of identical or near identical pricing. The CCI has rightly considered that the manufacturing cost of per cylinder varies in a wide spectrum ranging from Rs.870 to Rs.1095.89. If this was the case, the prices had to be different, if they had been offered in a competitive spirit. Either before the CCI or before us no material was produced, which would be able to rebut the presumption arising from the identity of rates. The CCI, therefore, rightly concluded that this identity of prices was sinister and anti-competitive in nature.

37. The CCI had also noted the factor of supply at higher cost. It pointed out from the DG's report that owing to collusion, the IOCL could not get lower or as the case may be competitive prices. It also found that the rates quoted in 2010-11 were higher as compared to the rates quoted in 2009-10. It was also found by the DG and the CCI that from the year 2006-07 the prices had collectively been raised on an

average of 36% for making supplies in different States. It was argued before us by few counsel that the price index had increased and therefore such increase in the prices was natural. It will not be possible to accept this argument, for the simple reason that there is no standard price fixed by anyone. Nobody had pointed out, as to what was the standard manufacturing price of a cylinder. No analysis was provided to us by the appellants explaining the rise of the prices for procuring the cylinders.

38. The CCI also considered the aspect of appreciable adverse effect on competition, as it was argued before the CCI and also before us that there was in fact no appreciable adverse effect on competition. This argument was raised specially by Shri Srinivasan, Shri Venkat Raman and Shri Pradeep Aggarwal, who tried to point out that there was no appreciable adverse effect on the competition. The CCI very painstakingly took into consideration all the six factors enumerated in Section 19(3) and in that it held that the conduct of LPG cylinder manufacturers in coming together on a common platform and fixing the bid prices, ensures that no new player could enter the relevant market and quote the prices independently and thus, these manufacturers would make entry of a new player into the relevant market difficult,

because such new player would necessarily have to first negotiate with the existing players to get the business profitably. The other factors like driving existing competitors out of the market and foreclosure of competition by hindering entry into the market are also properly discussed by the CCI and we accept the same, though much was argued against this aspect. As regards the last three aspects of accrual of benefits, improvements in production or distribution of good or provision of services and promotion of technical, scientific and economic development, the CCI has rightly concluded that nothing has been shown so as to answer these three aspects in favour of the appellants.

39. It is argued before us, like CCI, that where the allocation is made by the IOCL on the basis of installed capacity and on the basis of the negotiated rates, there could be no possibility of incentive to collude. We have already pointed out earlier that even where the rates are fixed by negotiations, the bid-rigging can still take place, if the bidders collude and keep the bid amounts to a pre-determined level. It will be seen that such pre-determination can be by way of intentional manipulation by members of the bidding group and where the L-1 rates themselves get fixed like this at higher level, even if there are negotiations, the negotiator would have to take into

consideration the benchmark rates. Even if, such benchmark rates are not accepted because of the negotiations, there is always a possibility that such benchmark rates could go higher in the subsequent tender. The CCI had rightly called it as a 'ripple' effect in long term.

40. It was very seriously argued before us that mere price parallelism will be of no consequence, because, it is a common phenomenon in a oligopolistic markets. It was contended by the learned counsel that where the market is dominated by small number of players, there is strong likelihood that each player would be aware of the actions of the others, and that the price parallelism by itself cannot be considered sufficient to establish cartelization, and some plus factors would be required in addition to the price parallelism. This was not a case of mere price parallelism or quoting identical prices. The pattern of price bids in itself shocking that the prices were matched to the last decimal and not only this but the prices matched at some odd figure of which we have already spoken earlier. All this took place in all the 25 States and all the parties are guilty of identical pricing or mere identical pricing. There is absolutely no plausible economical rationale offered by the appellants explaining such strange phenomenon. We have also pointed out that there were plus factors like the

existence of an active association of manufacturers and the further evidence that they did conduct the meetings on 1st and 2nd March, that is only two days prior to the day when the bids were to be offered. There can be also no dispute that all the bidders got something or the other. Therefore, this was not only a case of identical pricing, but was supported with plus factors also. This is apart from the fact as already stated, the establishment for such agreements. The standard of proof is not beyond the reasonable doubt, but a strong probability. Some of the parties did rely on the judgment of the Hon'ble Supreme court of India, reported in (1993) 3 SCC 499, Union of India vs. Hindustan Development Corporation and others. We must hasten to add that the Supreme Court had not absolved the parties who had offered identical prices, on the other hand in that judgment the Hon'ble Supreme Court has noted that there was a strong possibility of carteling behaviour. However, there was other evidence available, because of which the Hon'ble Supreme Court did not proceed against the carteling parties. In our case, there is substantial evidence available and if all the circumstances proved like the existence of an association, holding of meeting, appointing of common agents in Bombay along with the identical pricing

aspect, the only conclusion is that there was a carteling behaviour.

41. Some counsel pointed out that the factors enumerated in Clause a, b and c of Section 19(3) were absent in the present matter and therefore, there was no appreciable adverse effect on competition. We are thoroughly convinced by the discussion by the CCI in this behalf and we have already endorsed the finding on that basis. Some counsel painstakingly pointed out to us that this very product was earlier supplied at higher rate to BPCL and HPCL and therefore, ultimate consumers were beneficial because of the lower price fixed in case of IOCL. The CCI has rightly rejected this argument and we also propose to do the same. Merely because in some other tender the OMCs did secure the cylinders at higher cost that by itself is not sufficient to rebut the presumption raised under Section 3(3). This is apart from the fact that before the CCI parties did not furnish any material to show that the supplies were made to other OMCs at higher cost in all the 25 States, involved in the tender under enquiry. In fact it is an established fact that the supply to the IOCL in the present tender is made at higher prices than the earlier ones.

42. Some other arguments were raised that some parties specially ECP Industries and Mauria Udhyog had received very small order. In our opinion, that fact is irrelevant, as it does not justify the collusive conduct of the bidders. Further, these concerns could not have known earlier the quantity that they would be asked to supply. In our view, the CCI was, therefore, right to decide issue No.1 against the appellants.

43. We will now take into consideration some specific arguments by various counsel. Shri Pradeep Aggarwal arguing for some concerns firstly tried to argue that the rates offered by negotiated price over and above rates offered in 2009-10 showed miniscule growth. He also urged that the cost increased on account of the factors like price of body steel and brass, where in fact absorbed by the bidders post-negotiation and this had in terms benefitted the buyer IOCL. We do not agree that the increase was miniscule or insignificant. The fact that there was increase in the prices cannot be denied. Shri Aggarwal also vehemently argued that the presumption about the appreciable adverse effect on competition was a rebuttable presumption and in fact there was no appreciable adverse effect on competition. He urged that the finding by the DG and the CCI on this aspect was incorrect as some basic facts were not proved such as the past formula, PWC Report,

price of steel, RBI indices of various inputs, average freight and averaging other factors including profit etc., price bid submitted by the appellant and the other manufacturers in the last tender, negotiated price by OMCs, price at which orders were placed in a particular State by OMCs in the last tender, price band introduced by BPCL which factors were in public domain. According to him unless these factors were considered by the D.G. and the CCI, the presumption could not be raised under Section 3(3) of the Act. He urged that the CCI had to independently determine whether any such alleged agreement had resulted into appreciable adverse effect on competition.

44. In our opinion, this is wholly unnecessary because once the agreement is proved under Section 3, then the burden automatically shifts to prove otherwise. There is a presumption about appreciable adverse effect on competition in the wake of the mere proof of the agreement under Section 3. The argument that by proving the agreement such presumption cannot be raised and that the authorities have to independently come to the finding on appreciable adverse effect on competition is incorrect in law. The moment agreement is proved the presumption is raised and the burden shifts to the other side. In the present case, no efforts have

been made to dispel or to rebut the presumption raised. The argument is, therefore, clearly incorrect. While arguing for Supreme Technofabs Pvt. Ltd., Krishna Cylinders, Shriram Cylinders, Gopal Cylinders and Faridabad Metal Udyog Pvt. Ltd., Shri Pradeep Aggarwal by way of its additional written submissions reiterated his earlier arguments and tried to prove that these concerns were not the part of 44 concerns which had given the common reply. He also reiterated that these concerns were not the members of the Association and did not attend the Sahara meeting. We have already considered these arguments in the earlier part of the judgment and for the reasons given therein we are of the opinion that the arguments are inconsequential. Shri Aggarwal also relied on some so called admissions of Mr. Y.V. Ramana Rao in his questioning done by the D.G. in Pankaj Cylinders in Case No. 10 of 2010. He wanted to point out the exercise by the IOC for determination of final price on which the negotiations were based. Some questions to this witness were also put in that case on the aspects like the tender Committee. We feel that such approach is not possible and it is not possible to look into the facts in the case of Pankaj Cylinders. This is apart from the fact that the inference drawn by the learned counsel is also incorrect from the questions put to Shri Ramana Rao. The

learned counsel urged that the procurement of the cylinders by IOC was not dependent upon quotation of rates by bidders but was on the basis of the pre-determined estimates of IOC and as such identity of rates by manufacturers had no bearing on the determination of the price of cylinders. The inference is clearly incorrect. We have already in the earlier paragraphs discussed the effect of the collusion amongst the parties for fixing the price. Shri Aggarwal urged that not examining IOC to ascertain evidence was fatal and vitiated the DG report as well as the impugned order of IOC. We do not agree. There was no necessity of examining the IOC and we have already held so. A detailed exercise was taken by Shri Aggarwal to suggest that the price at which the tenders were granted was reasonable. Shri Aggarwal also quoted some judgments like *Franz Volk vs. SPRL est j Vervaecke* ***[Case 5/69 ECJ (1969) ECR 295 (1969) CMLR 273];*** *Langnese-Iglo GmbH Vs Commission* ***[Case T-7/93 CFI (1995) ECR-II-1533(1995)5 CMLR 602 and*** *European Night Services Ltd. and others Vs. Commission* ***[Joined Case T-374,375,384, 388/94 ECJ (1998) ECR II-3141 (1998) 5 CMLR 718]***. All the three judgments are about the negligible effect on the trade between the Members States or insignificant effect on the markets, taking into account the weak position which the

persons concerned have on the market of the product in question. We are not in a position to hold that the raise in the prices was insignificant as alleged by the counsel. The contention is, therefore, rejected. Vehement arguments were addressed that these concerns were at par with JBM and Punjab Cylinders and therefore they should be treated equally like them and in effect they should be exonerated. We have already given our reasons as to why that is not possible and we reiterate those reasons. Reliance was also placed on a case of ***Orissa Concrete & Allied Industries Ltd.*** (Case No.5 of 2011). The learned counsel tried to stress on the observations of paragraph 13 where the Commission had observed that "*the quotation of identical rates by large number of firms is no doubt suggestive of and indicative of formation of a cartel but the same in itself is not conclusive and determinative of the issue."* We have no doubt about the correctness of this but we have pointed out the plus factors and the enormous evidence in this case in favour of the agreement in breach of Section 3(3) of the Act. The argument in that behalf is, therefore, rejected.

45. Shri Ramji Srinivasan appearing for Carbac Holdings Limited submitted that the Carbac's bid prices were not matching with any of the other bidders in any of the three

States where it submitted its bids. We have already shown that insofar as the State of West Bengal is concerned Carbac bid prices did match with others. It was suggested that there was justification for the price of Rs.1105. This was stated by Shri Srinivasan on the basis of the prices in the last tender of BPCL and HPCL. It was, therefore, urged that because of repetitive tenders by IOCL, BPCL and HPCL, the range of prices were known to all the bidders and, therefore, the CCI was factually incorrect to hold that the quoted prices of the bidders cannot be near about the same. We do not agree with this proposition. The matching prices in the State of West Bengal by Carbac could not be a matter of co-incidence. The other argument that the Carbac did not win the tender in Orissa and Jharkhand since its prices were higher and could win the tender only in the State of West Bengal would also be of no consequence. He also urged that the appellants did not appoint any common agent and the Director Mr. C.P. Bhartia himself submitted the bids in Mumbai. He also urged that the bid documents of Carbac was signed by Ms. Aradhana Bhartia on 28.2.2010 in Kolkata and thereafter the same had been sealed and that Ms. Aradhana Bhartia was not present in Mumbai till the submission of the tender during the dinner on 1st March, 2010. It is an admitted position that the appellant

did attend the dinner on 1.3.2010 and there is voluminous evidence against the Carbac. He also urged that all the parties could not be painted with the same brush irrespective of the facts that the appellants prices were not matching with any other bidders in any of the States. We have already taken into consideration these arguments and we reject the same. In as much as in State of West Bengal this price of Rs. 1105 was nearly the same inasmuch as NIW, M/s. Haldia, ECP Industries and Konark had quoted the price of 1105.99. Therefore, it was clear example that Carbac had quoted merely identical price with the difference of 99 paisa. Same is the case with Haldia who had quoted the price of Rs. 1105.99. Its prices were near to the prices in the State of West Bengal as also in State of Sikkim and Assam also. A note was supplied by Shri Srinivasan on the subject of "Standards of Proof and Standards of Judicial Review in European Commission Merger Law". In our opinion, this note and more particularly an article by Tony Reeves and Ninette Dodoo will be of no consequence in the present matter. We do, however, agree with the deduction to the following effect:-

> "At the end of the day, what is required for a Commission decision to stand in court depends on both the quantity and quality of evidence adduced by the Commission in

support of its case (i.e., whether the standard of proof has been met)."

In our opinion this condition was complete in the present matter. This is apart from the fact that the U.K. Competition Appeal Tribunal had recently confirmed that the appropriate standard is a civil standard and that case is, therefore, required to be proved on the balance of probabilities. It is true that this does not mean that U.K. applies a bare balance probabilities. In our opinion, there is very strong probability on the basis of the evidence led before the CCI. It is true that the application of the proof would differ from case to case and in accordance with the well established principle the unlikely and/or particularly serious events would require more convincing proof. In our opinion, in this case such proof is available. We, therefore, reject the argument of Shri Srinivasan.

46. The arguments of Shri P.S. Narsimhan, Shri Kuljeet Rawal, Shri Jacob Mathew, Shri P.K. Bhalla, for Vaish Associates, Shri Anshuman Jain and Shri Atul Nanda are more or the less on the same grounds which we have already appreciated earlier. All the arguments are in the nature that the prices were arrived at by way of an independent decision and had justification. We have already rejected those

arguments. It was tried to urge by some of the counsel that firstly there was no appreciable adverse effect on competition and even if the presumption is raised in that behalf it would stand rebutted. We have already given our reasons to hold as to why there was no rebuttal of presumption.

47. Shri Venkat Raman while reiterating that the presumption stood rebutted has relied on as many as 20 factors. He has complained that the contracts are awarded based on tendering process. This can hardly be a factor to rebut the presumption. The learned counsel urges that the tendering conditions are so heavily loaded in favour of IOC and it gives unilateral rights. That also is a irrelevant factor in rebutting the presumption. Similar comments can be made about point No. 3, 4, 5, 6, 7, 8, 9, 10 to 20. We do not find any of the factors given by Shri Venkat Raman by way of his submissions can result into a rebuttal of the presumption raised.

48. Shri O.P. Gaggar also more or the less raised the points on merits which we have already considered.

49. Shri P.K. Bhalla argued on behalf of Allampally Brothers Ltd. In his oral as well as written submissions he contended that the appellant in this case was not a member of the Association. It had not engaged any agent or common agent

to submit its bids, that the appellant did not attend any meeting and the identical prices quoted by the other bidders from the State of Kerala could be the result of leakage of appellant's price quotation or corporate espionage by the other bidders. He also relied on the statement made on oath by the appellant's representative before the DG recorded on 18.4.2011. It was urged by Shri Bhalla that the appellant was a small manufacture and have installed capacity of producing three lakhs LPG cylinders per annum and that it was his only business. There can be no dispute that insofar as the State of Kerala was concerned, there were six other bidders including two groups of three parties and two individual parties who quoted the identical prices as that of others. It was also urged that all other nine bidders who had quoted the identical price as that of the appellant for the State of Kerala had also quoted the identical price for supply for the State of Tamil Nadu while the appellant had not done so. We are not impressed by this argument at all. We had already held that whether a particular party was a Member of the association or not or whether the particular party attended the meeting or not, the existence of an association, holding of the meeting and engaging of common agents would be the plus factors in

addition to the identical prices quoted by the appellant. We, therefore, reject the argument of Shri Bhalla.

50. These are the only contentions raised before us by the learned counsel. We, therefore, proceed to confirm the order of the CCI insofar as its finding on issue No. 1 is concerned.

51. Shri Prasad has written a separate order, where he has concurred with the majority, that the appellants had acted in breach of Section 3(3)(d) of the Act. He, however, held that he was unable to agree with the findings of the Commission in case of JBM Industries and Punjab Cylinders. According to him, both these parties were guilty of breach of Section 3(3). The learned Member has held that the cylinder manufacturers had an association and that the manufacturers used to hold meetings prior to the opening of the tenders. According to him, the case of JBM Industries and Punjab Cylinders were not different. The learned Member then discussed the case of JBM Industries, which claimed that the LPG business constituted only 4.8% of the total turnover. The learned Member, however, rejected their argument that for this reason, there was no necessity for the company to be a part of any cartel. The learned Member held that about 29 concerns had not participated in the dinner on 1st March, however, they were

held to have committed the breach on the basis of their having quoted identical rates and therefore, the case of JBM Industries was not different. The learned Member has also rejected the theory raised by JBM Industries of industrial espionage. The learned Member has also accepted the factor of six common brokers acting for almost all the appellants, including JBM Industries. Same is the case with Punjab Cylinders. The Learned Member has shown that the quotation of Punjab Cylinders nearly matched with Krishna Cylinders. We are quite in agreement with the learned Member about the complexity of both these concerns. However, as explained earlier, we are unable to institute any proceedings on account of the majority judgment having become final, in so far as those two concerns are concerned. It is unfortunate that the said two concerns got away without there being any valid reason.

52. The learned Member then went on to comment on the aspect of bid rigging for which the appellants had been held guilty. He has rightly commented that the case of 3(3)(d) was fully made out. He, however, has gone on to hold that these concerns were also guilty of Section 3(3)(a). He has gone on to hold that the appellants did the exercise of bid rigging by way of a practice and that resulted into determining the

purchase or sale prices. We are not in agreement with this logic of the learned Member, for the simple reason that we are taking into consideration only one tender and the prices quoted in the same. We cannot, therefore, view it as a practice adopted by the appellants. We also cannot accept that this amounts to determining purchase or sale price. That would be an entirely different scenario. But we leave the matter without going into the details of the aspect.

53. This takes us to the next question about the penalty under Section 27 of the Act. The CCI has observed in paragraph 15.2 that all the bidding companies who had infringed the provision of Section 3(3) are responsible in equal measure and no mitigating circumstances are available to any of them. The CCI has, therefore, fixed the liability at the rate of 7% of the average turnover of the companies. In paragraph 15.3 the CCI has also explained the methodology for calculating the fines shown in the chart. In that the CCI has held that some companies had given the financial details and some others had not. Those who had not furnished the financial details, the details were taken from the website of the companies. It was held that in some cases the financial details could be available only for two years. The CCI decided to use the information assuming it to reflect the position in

regard to the third year also. We find from this list that in the case of Konark Cylinders & Containers Pvt. Ltd., Tee Kay Metals Pvt. Ltd., Sahuwala Cylinders, M/s. Universal Cylinders, Mahaveer Cylinders Ltd., Omid Engineers Pvt. Ltd., Bhiwadi Cylinders Pvt. Ltd., Shri Ram Cylinders, International Cylinders, Tripuati LPG Industries Ltd., Surya Shakti Vessels Pvt. Ltd., Faridabad Metal Udyog Pvt. Ltd., S.M. Cylinders Pvt. Ltd., M.M. Cylinders Pvt. Ltd., GDR Cylinders Pvt. Ltd., Kurnool Cylinders Pvt. Ltd., Triputi Cylinders Ltd., SKN Industries Ltd., M/s. Supreme Technofabs P. Ltd., Balaji Pressure Vessels Ltd. are the companies where only last two years' of average turnover was considered.

54. However, in the following cases, three years' turnover was taken into consideration for fixing the penalties. They were the ECP Industries Ltd., Sunrays Engineers Pvt. Ltd., Jesmajo Industrial Fabrications Karnataka Ltd., Him Cylinders Ltd., Krishna Cylinders, Rajasthan Cylinders, Haldia Precision Engineering Pvt. Ltd., Carbac Holdings Ltd., Andhra Cylinders, Confidence Petroleum India Ltd., Sarthak Industries Ltd., R.M. Cylinders Pvt. Ltd., Sanghvi Cylinders Pvt. Ltd., North India Wires Ltd., BTP Structural (I) Ltd., Allampally Brothers Ltd., Shri Shakti Cylinders Pvt. Ltd., Vidhya Cylinders Pvt. Ltd., Mauria Udyog Ltd. and Hyderabad Cylinders Ltd.

55. However, in all these cases the turnover of immediate three years' was not considered in number of concerns, on the ground that the companies had not provided the financial details of the last year. The third category is that of Super Industries, Om Containers and Lite Containers, where only one year's turnover was considered and the penalties was inflicted at the rate of 7% of the said average turnover of either two years' or three years' or even one year. The CCI has undoubtedly acted under Section 27(b) the first part.

56. Under Section 27(b), the only rider is that penalty should not be more than 10% of the average turnover for the last three preceding financial years. That is a maximum limit. In effect, the CCI has chosen to inflict 7% of average turnover on all the appellants without doing any comparative study. The CCI also applied the rule of 7% penalty to all the appellants without considering that in case of some only two years' or one year's turnover was available. We do not agree with this exercise. This would amount to an arbitrary approach.

57. We also do not find any reason, why the CCI has chosen to inflict the penalty at 7%. We have considered question of necessity of reasons in MDD Medical Systems India Pvt. Ltd. vs. Foundation for Common Cause & Ors. (Appeal No.93 of

2012). In the aforementioned decision of MDD's case, where the CCI fixed the penalty at 5% of the average turnover, relying on a reported decision in ***Hindustan Steel Ltd. vs. State of Orissa reported in AIR 1970 SC 253*** wherein it was observed ***"if there is discretion, authority is bound to take into account aggravating or mitigating circumstances and exercise discretion laid down under the law, judicially",*** we had held that the Hon'ble Supreme Court has always insisted upon the reason and that in the absence of reason, the discretion tends to become arbitrary. We had also relied on the judgment of the Hon'ble Supreme Court in **Kranti Associates Pvt. Ltd. & Anr. Vs. Sh. Masood Ahmed Khan & Ors.** reported in **(2010) 9 SCC 496.** MDD was also a case of cartelization. In another judgment dated 29.10.2013 in M/s. Excel Crop Care Limited vs. Competition Commission of India & Ors. (Appeal No.79 of 2012), we had relied on some observations made in ***Southern Pipeline Contractors & Anr. vs. The Competition Commission***. We had also referred to the guidelines by the European Union (EU) and Office of the Fair Trade (OFT). We had quoted the five EU guidelines, where it was provided that is appropriate for the Commission to refer to the value of the sales of goods or services to which the infringement related. We had also referred to the OFT guidelines to the same effect

and we had commented upon the factor of a relevant turnover. Ultimately, we had held that where a particular concern is a multi-commodity company, the relevant turnover should be considered and not the total turnover.

58. We find that in this case, no such effort has been made by the CCI. This may be due to the reason that the question of penalty was not addressed by the learned counsel. Long and protracted arguments were made before us on the question of penalty. It was suggested that number of companies were smaller companies and would be wiped out, if the hefty penalty is inflicted against them. Some other counsel argued that they were the multi-commodities companies and manufacturer of the cylinders was merely one of the activities conducted. It was also argued by some of the learned counsel that the doctrine of proportionality was ignored and that the penalty ordered was excessive. There are number of other factors, which the learned counsel argued about the penalty, such as the mitigating factors. This being a nascent jurisdiction, the companies were first time offenders and the possibility of industrial activity being chocked because of the hefty penalties ordered.

59. Ordinarily, it was for the learned counsel appearing for the CCI to address the question of penalties. It is unfortunate, that the learned counsel did not choose to argue that question, as some of the learned counsel candidly admitted that they did not address the CCI on the question of penalty. Some other counsel canvassed the argument that CCI should have separately heard them on the question of penalty after the conclusion of the verdict of guilty. We do not think such a course was possible particularly in view of the latest position in the regulation on the question of penalty. We would not ordinarily permit the question of penalty to be raised for the first time before us, however, in this case, there are as many as 44 parties involved. Considering the number of parties and stakes involved and all the other relevant considerations, we feel it will be better, if the parties are given one more opportunity to address on the question about penalties to the CCI, so that the CCI could give an active consideration, while deciding the penalties. It would be, therefore, better if the matter is remanded to the CCI on the question of penalties. The parties are therefore, directed to report to the CCI on or before 1st February, 2014, where after the CCI will proceed to hear the parties and decide upon the penalties within three months that is before 1st May, 2014.

60. Before parting, we must express our deep sense of appreciation for the tremendous labour and industry by all the counsel appearing for the appellants. We record our special appreciation for Ms. Anupam Sanghi appearing for CCI, who by her methodical approach assisted the Tribunal to a great extent.

61. We pass the following order:-

(1) That the findings of the CCI in respect of the breach of Section 3(3)(d) are confirmed against all the appellants.

(2) The penalties ordered by the CCI shall stand stayed till such time that the CCI takes the final decision in the matter after hearing the parties. For this purpose, the matter is remanded to the CCI.

62. While issuing the interim order, we had directed that the order of the CCI would be stayed if the parties deposit 10% of the penalty amount and furnish security for the rest of 90% of the penalty amount, to the satisfaction to the Registrar, Competition Appellate Tribunal. This order shall prevail till the CCI finally decides upon the penalties.

63. All appeals are disposed of in above terms.

Pronounced in open Court on 20th day of December, 2013

(V.S. Sirpurkar)
Chairman

(Rahul Sarin)
Member

(Pravin Tripathi)
Member