COMPETITION APPELLATE TRIBUNAL

APPEAL NO. 79 OF 2012

[Under Section 53B of the Competition Act, 2002 (Act 12 of 2003) against the order dated 23.4.2012 passed by the Competition Commission of India in Case No. 2/2011]

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 :

M/s. Excel Crop Care Limited … Appellant

Versus

Competition Commission of India & Ors. … Respondents

Appearances : Mr. Ramji Srinivasan, Senior Advocate with Mr. Rahul Goel, and Ms. Anu Monga, Advocates for the Appellant

Mr. Balaji Subramanian, Advocate with Dr. Shabistan Aquil, DD(Law) for CCI

Mr. Rajeev Virmani, Sr. Advocate with Mr. Ajit Pudussery, Mr. Shreyansh Mardia, Shri S. Dandra Sekhar, Shri Joanee Pudussery and Mr. M. Chandra Sekhar, Advocates for the FCI

APPEAL NO. 81 OF 2012

[Under Section 53B of the Competition Act, 2002 (Act 12 of 2003) against the order dated 23.4.2012 passed by the Competition Commission of India in Case No. 2/2011]

In the matter of :

M/s. United Phosphorous Limited … Appellant

Versus

Competition Commission of India & Ors. … Respondents

Appearances : Mr. Ravinder Narain, Advocate with Ms. Kanika, Mr. Kishan Rawat, Mr. Siddharth Banthia, Ms. Nimita Kaul, Ms. Shravani Shekhar and Ms. Prabha Mehrotra, Advocate for the Appellant

Mr. Balaji Subramanian, Advocate with Dr. Shabistan Aquil, DD(Law) for CCI

Mr. Rajeev Virmani, Sr. Advocate with Mr. Ajit Pudussery, Mr. Shreyansh Mardia, Shri S. Dandra Sekhar, Shri Joanee Pudussery and Mr. M. Chandra Sekhar, Advocates for the FCI

APPEAL NO. 80 OF 2012

[Under Section 53B of the Competition Act, 2002 (Act 12 of 2003) against the order dated 23.4.2012 passed by the Competition Commission of India in Case No. 2/2011]

In the matter of :

M/s. Sandhya Organic Chemicals (P) Limited … Appellant

Versus

Competition Commission of India & Ors. … Respondents

Appearances : Dr. V. K. Aggarwal, Advocate for the Appellant

Mr. Balaji Subramanian, Advocate with Dr. Shabistan Aquil, DD(Law) for CCI

Mr. Rajeev Virmani, Sr. Advocate with Mr. Ajit Pudussery, Mr. Shreyansh Mardia, Shri S. Dandra Sekhar, Shri Joanee Pudussery and Mr. M. Chandra Sekhar, Advocates for the FCI

ORDER

PER MR. JUSTICE V.S. SIRPURKAR, CHAIRMAN

All these Appeals will be disposed of by this common judgment, as the questions involved are almost identical and they were disposed of by a common order passed by the Competition Commission of India (hereinafter called the "CCI"). One learned Member, however wrote a separate minority judgment, however has concurred with majority, though for different reasons. In majority judgment, the CCI came to the conclusion that all the appellants had indulged in collusive bidding and had contravened the provisions of Section 3(3)(d) of the Competition Act (hereinafter called the "Act"). It is also held that all the appellants had also violated the provisions of Section 3(3)(b) of the Act. One learned Member Shri R. Prasad,

however, did not agree that these appellants had contravened the Section 3(3)(b), though he agreed that Section 3(3)(a) and 3(3)(d) of the Act was contravened. He, however, held that there was no applicability of Section 3(3)(b) in the matter and the appellants could not be penalised on that count. He, however, agreed with the quantum of penalties as ordered by the CCI, which was at 9% of the average three years' turnover of these three appellants. While in case of Excel Corp Care Limited, the penalty came to Rs.63.90 crores, in case of Sandhya Organics Chemicals Pvt. Ltd., it came to Rs.1.57 crores, while United Phosphorus Limited were awarded the penalty of Rs.252.44 croes.

2. Initially, as many as four manufacturers of Aluminium Phosphide Tablets (hereinafter "ALP") came to be proceeded against by the CCI, on the basis of a letter written to it by the Chairman and Managing Director of Food Corporation of India (FCI) dated 04.02.2011. In this letter, a request was made to the CCI alleging therein rise in the cost of procurement of ALP tablets, due to anti-competitive agreement amongst the manufacturers of ALP. This letter was treated as the information filed before the CCI and the CCI directed the enquiry by the Director General (in short the "DG"). The letter revealed that there were four known manufacturers of the ALP in India, they being the three appellants as also one M/s. Agrosynth Chemicals Limited. It was urged in the letter that for the last eight years all these opposite parties had quoted identical rates in the tenders invited by the FCI for the purchase of ALP tablets. It was, therefore, complained that by quoting identical prices in pursuance of the tender floated by the FCI, these companies have formed a cartel and it is also possible that one of the

manufacturer could be using its dominating position in the market to compel the other manufacturers to quote the same rates. It was pointed out that the price of ALP tablet was nearly doubled during the period 2007-2009 and was also likely to rise further as the manufacturers were aware that the tablets were required in large quantity by FCI, Central Warehousing Corporation and State Agencies for preservation of food grains, which they were storing in their godowns.

3. A thorough investigation was made by the DG after collecting the information by the FCI and other bodies like Central insecticides Board & Registration Committee, Faridabad as also the other government agencies dealing in warehousing and storage of food grains, as also the representatives of the FCI was examined. On the basis of these examination, the DG found that the main market of ALP in India was that of the institutional sales and majority of buyers were government agencies. There were private buyers licensed by Central Insecticide Board, however, their number was not very significant. The DG further found that ALP is sold in two or three packs; 56% in 3 gram tablets, 15% in 12 gram tablets and sachet of 10 gram powder. It was found that the sale of 3 gram tablet was restricted to the government agencies as also to the approved Pest Control Operators and it could not be sold in open market. It was found that there were only four manufacturers of ALP, three of whom were the appellants and 4th was M/s. Agrosynth Chemicals Limited, though 19 manufacturers were granted the licence to manufacture ALP. It was found that these government agencies procuring the ALP tablets worth Rs.40 crores annually. 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 (L-1) 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. The DG reported the rates at which contracts were awarded to the four manufacturers. The DG has found that right from 2002 upto 2009, all the four parties used to quote identical rates, excepting for the year 2007. In 2002 the rates quoted by all the parties was Rs.245/-, while in 2005 it was Rs.310/-, however, the tender was scrapped and the material was purchased from CWC at the rate of Rs.290/-. In November 2005, though the tenders were invited, all the parties abstained from quoting. In 2007, the United Phosphorus Limited had quoted a price, which was much below the price of other competitors. In 2008, all the parties abstained from quoting, while in 2009 only three parties barring M/s. Agrosynth participated and quoted identical rates of Rs.388/-, which was ultimately brought down to Rs.386/- after the negotiations. The DG also recorded the statements of the representatives of the appellants and on that basis reported that the tender documents are submitted in person and the rates are also normally filled in hand.

4. The first tender was floated in the year 2009 for procurement of a fixed quantity of 600 Metric Tones with the provisions of $\pm$ of 10%. There

was no foreign firm participation in the tender and again the bids were submitted only by the three Indian firms, namely the appellants and all of them quoted the identical rates of Rs.388/-. According to the DG, the tender documents were to be submitted by 02:00 P.M. on 08.05.2009 and the bid was to be open at 03:00 P.M. on the same day. The DG found that on 08.05.2009 on the last day common entries were made in the visitors' register by the representative of the three appellants. In this behalf, it was pointed out that one Shri S.K. Basu of Excel Corp Care had made these entries for other representatives of the competitors, though he made their only entry on that day. The DG held that this could not be a mere coincidence. The DG further found fault with the price quoted was identical at Rs.388/- per k.g. The DG also examined the details and found that it was a consistent practice of these parties to quote identical rates. This was all the more clear from the tenders floated either earlier from the years 2007 and even thereafter. In all these years, there was a definite tendency to quote the identical prices. The DG analyzed the bids carefully by taking into consideration the total number of 16 tenders including the tender dated 08.05.2009. The last eight tenders considered by the DG and the pricing pattern definitely showed the practice of quoting identical pricing at times by all the three appellants or at some other times by two appellants including M/s. M/s. Agrosynth Chemicals Limited. The DG found the explanation offered to be of no consequence. The analysis also showed rising prices which were mostly attributed to the increase of the price by China during the Beijing Olympics. The DG however, came to the conclusion that even when the phosphorous prices had fallen, no reflection thereof was seen in the high prices quoted by the appellants. The DG also

examined the costs structure of each company and found that there was nothing common in the cost structure of the appellants. The DG did not stop at that and also found that at the tender dated 08.05.2009 and also in the earlier tenders, there was a joint boycott at the instance of the appellants. The DG found that during the course of enquiry, the parties boycotted the e-tender issued by the FCI, which was invited in the March 2011 and was to be closed on 27.05.2011. The DG found that though M/s. Excel Corp Care Ltd. and M/s. Sandhya Organics Chemicals Pvt. Ltd. had explained their non-participation by writing letters, M/s. United Phosphorous and M/s. Agrosynth Chemicals Ltd. did not show even that courtesy. The DG came to the conclusion that the letters written belatedly by design and it was merely a poor attempt to create a defence to the charge of boycotting of tender. The DG also rejected the defence of M/s. Excel Corp Care Ltd. that the conditions of tender floated in March 2011 were stringent. The DG found that the conditions could have been discussed in good time before 27.05.2011, which was not done. The DG also found that these conditions were not seem to be stringent considering the installed capacity and financial strength of M/s. United Phosphorus and M/s. Excel Corp Care. The DG has made an objective observation that these conditions could not be said to be stringent. On that basis, the DG concluded that the appellants had contravened Section 3(3)(a), 3(3)(b) and Section 3(3)(d) read with Section 3(1) of the Act.

5. The report of the DG was sent to the four manufacturers for their objections. M/s. Agrosynth Chemicals Limited who was ultimately exonerated by the CCI pointed out that they could not be held liable for

forming cartel as they were not quoting in the tenders of FCI since 2007 and their name was unnecessarily dragged. Though they had quoted in the other tenders, they claimed that they had ample evidence and explanations as to why they had abstained from the tenders of FCI, which they have consistently denied from 2007. They refuted the allegation of charging exorbitant prices and pointed out their difficulties including high costing of red phosphorous used by them as raw material. Interestingly enough, in response to the other tenders and quoting identical prices therein, they call it a mere coincidence. They pointed out that M/s. Excel Corp and M/s. United Phosphorus Limited had the desire to take over the company and M/s. United Phosphorus Limited had deliberately quoted lower prices of Rs.200/- per kg in 2008, in which the United Phosphorus Limited had incurred heavy losses and M/s. United Phosphorus Limited was even penalized by the FCI as they were not able to complete the supplies. In short M/s. Agrosynth Chemicals Limited denied any agreement with other company and refuted its violating of any section of the Act much less Section 3(1).

6. We need not deliberate in terms of the replies of M/s. Agrosynth Chemicals since M/s. Agrosynth Chemicals have been exonerated and there is no appeal against them. However, we may use some facts of their response to support our conclusions.

7. M/s. Excel Corp Care Ltd. urged that the tenders floated earlier to 20th of May, 2009 (the day when Section 3 and 4 were activated) could not be taken into consideration. They also objected that in the letter dated 4th February, 2011 by FCI which was treated to be the information, there was

no mention of 2011 tender and therefore, all the enquiry in respect of the boycott of that tender by the DG was without jurisdiction.

8. It was also urged by M/s. Excel Corp Care Ltd., opponent No. 2, that the supplies under the tender were already completed by May, 2010 and therefore by getting an enquiry instituted on the basis of such tender FCI was abusing its dominant position. It was further urged by them that the Director General by himself could not have investigated into the facts which were not directed by the Commission under Section 26(1) and that is what the DG has done by inquiring into the tender of 2011. The increase in price was also tried to be justified on the basis of the increase in the price of 'Yellow Phosphorous' which was to be procured from China. It was also urged that there was no question of any bid rigging in 2009 of global tender and that mere identical pricing quoted could not lead to an inference of cartel. It was also urged that the statement of receptionist about common entry having been made by Shri Bose was of no consequence and could not be the factor corroborating the inference of cartel. The price quoted was also justified by the opponent No. 2. As regards the tender of May, 2011, it was stated that it was always willing to participate in that tender but due to the unreasonable conditions prescribed in the tender, it could not do so for which an explanation was already sent in time. As regards the meeting of minds, the opponent No. 2 contended that it was a normal practice at FCI that if more than one person arrived for meeting with the same official, the receptionist would not request each one of them to separately make an entry and instead she would request only one person to make an entry on others behalf and all others merely put their signatures

to confirm. It was urged that though the DG had investigated only four parties, there were about 19 companies registered with the CIB for the manufacture of ALP and their non-examination by the DG was fatal to the whole enquiry. The enquiry by the DG was severely criticised as being casual under sporadic nature. It was also urged that if FCI was of the opinion that there was cartel, then it could have forfeited the EMD. Instead it had chosen to place orders on 21.7.2009 for 200 MT in terms of the tender conditions. It also relied on the tender of 2007 where four producers of ALP have quoted different prices. They also submitted about 2005 tender and 2007 tender. They relied on letter dated 12.8.2008 for not participating in the 2008 tender. They justified the price increase in 2009 tender as the cost of raw-material had increased since 2009. The OP also objected to the allegations that it had quoted identical rate in case of tenders issued by various other State Corporations and Regional Offices of FCI. They refuted the over pricing issue with reference to the tender of FCI, Hyderabad. They also relied on the tenders issued by the FCI, Thiruanantapuram in 2008 and 2009 where different rates were quoted. The reliance of the DG on circumstantial evidence for inferring the cartel was also criticised and objected to.

9. Almost similar was the reply of OP-3, United Phosphorous Limited, on the question of 2011 tender and its consideration by the DG. It was pleaded that no opportunity was made available to it for inspecting the investigation records. It was urged that since the other ones like Excel Crop Core Limited and Sandhya Organic Chemicals Pvt. Limited were the competitors and therefore there was no question of any agreement with

them. OP-3 had justified the identical pricing by pleading that the rate finalized in the tender of CWC in the beginning of the particular year is considered to be the bench mark for the other tenders for that year and therefore there is likelihood of identical pricing. The charge of entry barrier was also refuted on the ground that there were rigid and strict conditions of licensing and the entry barrier was therefore attributed to the legislative acts. It was tried to justify in the others tenders, UPL- OP -3 had quoted different rates, for example for the tender floated in the year 2006, UPL had quoted the price of Rs. 200 per kg. The price rise was also for the same reason given by OP No. 2. Similar objections were also recorded by OP No. 3 regarding the common entry made by one of the persons in the register in the office of FCI. It was urged that the time of their entry in the office of the FCI would just be a coincidence and merely on the basis of the timing of entry, meeting of mind or conspiracy could not be inferred. The non-participation in 2011 was justified that even if it was a global tender, no foreign companies participated and that the DG had not tired to find out any reason for the non-participation of the foreign firms. It was also urged that the DG had not examined the structure of the industry nor had he conducted any economic analysis and that the inference was presumptive. They also attributed the abuse of dominant position to FCI.

10. The reply of Sandhya Organic Chemicals Pvt. Ltd. in respect of 2009 global tender was almost identical with the replies and objections raised by OP Nos. 2 and 3. However, about 2011 tender, it was submitted that non-participation was on account of the fact that M/s. Sandhya Organic Chemicals did not have the capacity to supply the 75 MT per month. It had

the quantitative capacity only 25 MT in a single shift and therefore it could not even participate in the tender due to the tender conditions. It pointed out that the prescribed deposit of Rs. 30 lakh as EMD was the most onerous condition as earlier EMDs were only for Rs.10 lakh and Rs. 8.25 lakh and therefore Sandhya Organic Chemicals had reasons to not to take part in the 2011 tender apart from the fact that it was not qualified in that tender due to its limited capacity. The other common issues raised by the other two opponents like the lack of jurisdiction in DG to enquire about 2011 tender were also reiterated by OP-4. It was also pointed out that it had clarified its position for not taking part in 2011 tender by a separate letter. The allegation of earlier identical price quotation was also refuted and all the other common issues like rise in the price of 'Yellow Phosphorous' was also reiterated.

11. However, the FCI also took part into the enquiry and supported the observations made by the DG. As regards 2011 tender, it suggested that there was nothing in the information which limited the same to the tender floated in the year 2009 and in any case the language itself suggests that the investigation included the further tenders as well. It was pointed out that the tenders floated during 2007 and 2009 decided in the information as evidence to the fact that the opposite parties had been acting as a cartel even on earlier occasion due to which informant-FCI had to pay unusually higher prices. The reliance by the opponents on the judgment of Hon'ble Supreme Court in All-India Organisation of Chemists and Druggists Association reported in (2002) 2 CTJ 4 (SC) (MRTP) was also criticised on the ground that the facts was different and so was the scope. The FCI also

objected to the reliance to the note-sheets of the FCI which were reflected on pages 268-272 of the DG's report and urged that note-sheet could not be looked by the Courts since that is the views expressed by the individuals and nothing to do with the legal submissions. It was urged that in this case the issue was not merely parallel pricing but the issue of identical pricing and concerted bidding which was evident from the fact that in certain years all the manufacturers have chosen not to bid. It was urged that besides this there were other factors to draw a conclusion of cartel by the opponent parties. The FCI specifically refuted the contention that there were no higher pricing by the opponents.

12. The CCI noted that the only issue was as to whether the four parties mentioned in the information had entered into an agreement or understanding and had indulged in anti-competitive activities in offering bids to the tenders of FCI.

13. The three learned counsel appearing on behalf of the appellants raised various issues. Some of the submissions are the common submissions while some others are individual submissions. We would consider the common submissions first.

14. All the learned counsel firstly attacked the finding of the CCI in respect of the tender in which the bids were submitted on 8.5.2009 for supply of 360 MT of Aluminium Phosphide 3 gram tablet at Rs. 388/- per kg. According to the learned counsel on that date Section 3 though was on the Statute Book but was not notified. The learned counsel very strongly argued that the complained *actus reus* was giving identical price

bids on the last day i.e. on 8.5.2009 and therefore there was no question of the parties committing any illegality while offering the bids like giving identical pricing in their bids. In short, the argument is that due to non-Notification of Section 3 which was notified only on 20th May, 2009 the so called act of collusive bidding was already over much before that date i.e. 12 days before that date and therefore it could not come within the jurisdiction of the CCI. There could be no dispute about the date nor about the fact that all the three bidders on that date offered the prices of Rs. 388/- though their cost of production did differ. However, since retrospectivity issue would go to the jurisdictional question, we would consider it at this juncture before going into the merits of the arguments regarding the parallel pricing.

15. All the three counsel namely Shri Ramji Srinivasan, Shri Ravinder Narain and Dr. V.K. Aggarwal urged before us that on 8.5.2009 the act of putting the bids with the parallel pricing was complete and nothing remained in the same and since on that date Section 3 was not available, the CCI would have no jurisdiction to inquire into the bids. The learned counsel also urged that the date of offering the bid i.e. 8.5.2009 was the only crucial date and since that was prior to the advent of Section 3 of the legal scenario, there was no question of any jurisdiction being with the CCI to enquire into the so called collusive bidding. A reliance was placed on the reported ruling in the case of M/s. Gulf Oil Corporation Ltd. Vs. Competition Commission of India & Ors. reported in [2013 CompLR 0409 (CompAT)] where it was observed that their pre-Act behaviour could not be taken into consideration even for the purpose of penalty. This argument was opposed

by the Senior Counsel Shri Virmani appearing for the FCI and also by Shri Balaji Subramanian, learned counsel appearing for the CCI. The first contention raised by Shri Virmani was that it was not as if the provision of Section 3 was not known to the appellants on 8.5.2009 when the bids were submitted. The learned Senior counsel was at pains to point out that the Section was very much there on the Statute Book but had only not been notified. The learned counsel, however, carried his argument further that the gravamen of the allegation against the appellants as was found by the CCI was the agreement amongst the appellants which directly or indirectly resulted in the bid rigging or collusive bidding. In that, the learned counsel argues that, therefore, it is not only the date of offering the bids which is relevant but in fact as per the first explanation of Section 3 the allegation was for manipulating the process for bidding. The learned counsel takes his argument further and submits the process for bidding starts from the floating of the tender and continues till the award of contract. According to the learned counsel therefore when the appellants admittedly participated on 1.6.2009 for opening of the price bids and offered the negotiated price on 17.6.2009, the process of bidding was still on which was manipulated by the appellants. The learned Senior Counsel, therefore, argues that the process which had begun with the notice inviting tenders which was on 28.03.2009 was full in progress, firstly on 8.5.2009 and then continued till the tenders were finalized after the negotiations. It was pointed out that all the appellants were present for opening of the tenders on 1.6.2009 and all of them appeared for the negotiations and offered the identical price again after the negotiations which was Rs. 386/- i.e. two rupees lesser than their offered price in the bids. The learned counsel, therefore, urges that this

was also nothing but a strong evidence to support that there was an agreement between the appellants firstly to quote identical price and then to offer identical price after negotiations. The learned counsel further argues that since these dates i.e. 1.6.2009 and 17.6.2009 were after Section 3 was notified the appellants would certainly be answerable and the CCI would have the jurisdiction to inquire into the matter. The learned counsel argues that it was no co-incidence though that the prices were offered by all the appellants quoted exactly the identical sum of Rs.2/- and offering the negotiated price of Rs. 386/-.

16. There can be no dispute on the correctness of these facts. Indeed the appellants had quoted the identical prices of Rs.388/- on 8.5.2009, indeed all of them were present when the bids were opened on 1.6.2009 and indeed all of them offered to lower their prices identically by Rs.2/- quoting Rs.386/- which was also an identical price. Shri Balaji Subramanian, learned counsel appearing for the CCI also reiterated these contentions. First explanation to Section 3 is as under :-

> "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."**

Therefore, the words 'manipulating the process for bidding' assume a very great importance. Its not only the act of offering an identical price which is complained of. What is complained of, is the act of bid rigging or the act of collusive bidding, which understood in the light of the language of

explanation, has resulted firstly in eliminating or reducing competition for bids or secondly adversely affecting or manipulating the process for bidding. The argument put forth by Shri Virmani as also Shri Bala Subramanian is undoubtedly correct. 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**

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.

18. It was seriously canvassed by the learned counsel appearing for the appellants that the Competition Act is not retrospective in operation and therefore, only the facts after 20th May, 2009 when Section 3 and 4 were

notified could be considered. It was very seriously argued that unless there are words in the statute sufficient to show the intention of the legislature to affect the existing rights, it is deemed to be prospective on the principle "*nova constitution futuris formam imponere debet non-praeteitis".* A long list of Hon'ble Supreme Court cases relied upon by the learned counsel were cited, which are :-

(a) Keshvan v. State of Bombay, AIR 1951 SC 128
(b) Janardan Reddy v. State, AIR 1951 SC 124
(c) Mahadeolal Kanodia v. Administrator General of West Bengal, AIR 1960 SC 936
(d) State of Bombay v. Vishnu Ram Chandra, AIR 1961 SC 307
(e) Rafiquennessa (MST) v Lal Bahadur Chetri AIR 1964 SC 1511
(f) Arjan Singh v. State of Punjab, AIR 1970 SC 703
(g) KC Arora v State of Haryana, AIR 1984 SC 1
(h) Mithilesh Kumarai v Prem Bahadur Khare, AIR 1989 SC 1247
(i) State of Madhya Pradesh v. Rameshwar Rathod, AIR 1990 SC 1849.
(j) Doolubdass Pettambardass v. Ramloll Thackoorseydass (1850) 5 MIA 109
(k) KS Paripoorman v State of Kerala, AIR 1995 SC 1012
(l) Delhi Cloth Mills and General Company Ltd. v CIT Delhi AIR 1927 PC 242.
(m) Jose De Costa V Bascora Sadasiva Sinai Narcormim AIR 1975 SC 1843.
(n) Amireddy Raja gopala Rao v Amireddy Sitharamamma, AIR 1965 SC 1970
(o) Shri Vijaylakshmi Rice Mills v State of Andhra Pradesh, AIR 1976 SC 1471
(p) K. Eapin chako v Provident Investment Company Pvt. Ltd., AIR 1976 SC 2610
(q) Govinddas v Income Tax Officer, AIR 1977 SC 552
(r) Punjab Tin Supply Company v Central Government, AIR 1984 SC 87
(s) Pearce v Secretary of State for Defence 1988 (2) All E R 833
(t) R Rajagopal Reddy v Padminichandra 1995 (2) SCC 630
(u) K Gopinathan nair v State of Kerala, AIR 1997 SC 1925

19. We have absolutely no reservations about the law settled by the Hon'ble Supreme Court in all these cases regarding the retrospectivity and we also say that the aforementioned Sections 3 and 4 are not retrospective in operation. However, in all these cases, the specific language of Section

3 explanation had not fallen for consideration. We have already shown that the user of the term manipulating process for bidding, would apply with its full force to the facts in hand and the net result would be that tender process which was started on 08.05.2009, continued in so far as the bidding is concerned and therefore, the act on 17.06.2009 would also be covered. What was done by the appellants was to manipulate the whole process for bidding. We have already accepted the argument raised by the learned counsel for the FCI and CCI to the effect that this allegation was not event specific and it was about the whole tendering and bidding process.

20. It was also sought to be argued that once there were negotiations between FCI on the one side and the three appellants on the other. It had the effect of wiping out the original identical pricing offer made by the three appellants on 8.5.2009. The learned counsel argued, therefore the negotiation was independent of the original offer and had effect of wiping out the identical pricing offered by the three appellants. The argument is clearly incorrect for the simple reason that firstly it has to be held that there was no hiatus after 8.5.2009 and the bidding process did continue even after 8.5.2009. If that interpretation is given to the term bidding process appearing in Section 3(3) explanation then the rigour of the argument goes away. The negotiations were undoubtedly pursuant to the tender floated by the FCI and in terms of the NIT conditions. It could not be held that the reduction in rates wiped out the tender and that it amounted to an independent transaction. The negotiations were undoubtedly the part of the bidding process as would be clear from the tender notice and therefore

nothing depended upon the negotiations during which also the appellants offered identical prices of Rs. 386/- per kg.

21. It was tried to be suggested that FCI got them to reduce their bids uniformly by Rs.2/- and therefore there was a uniform price after negotiations. This argument is clearly incorrect and is not borne out from the letters submitted by the three appellants after negotiations. Photo-copies of the letters were submitted on the record during the hearing of the appeal and we are convinced that the FCI had not dictated the letters to be submitted by the three parties. The letters undoubtedly contained an offer made to the FCI and does not reflect the prior agreement reached with FCI for reduction of prices.

22. We are also not impressed by the argument raised by Senior Advocate Shri Ravinder Narain to the effect that since the price was negotiated and was brought down from offered price of Rs.388/- to Rs.366/-, the whole contract came to an end. The argument is that since the price bids stood rejected on account of negotiated price, there was no question of reconsideration of the common offer dated 17.06.2009. The learned senior counsel also relied on the observations in **Pollock & Mulla (14th Edition, vol.-1 at page 163)**, which is to the following effect :-

> "*an original proposal stands rejected and gets superseded by the counter – proposal made by the other party, and will not revive even if the maker of the proposal rejects the counter-proposal. The offeree cannot revert to the original offer and purport to accept it.*"

23. Reliance was also placed on the decision of **England & Wales High**

Court (Chancery Division) in the case of **Hyde vs. Wrench**. In our opinion, the observations made in Pollock & Mulla as also the observations made in the case cited supra, would be of no consequence as therein efficacy of the Contract Act was being considered. The specific wording in the explanation of Section 3 had not fallen for consideration there. Again, even if the price offered by the appellants stood rejected, that does not absolve the appellants, if it is found that the appellants were guilty of manipulating the process for bidding. We have found the appellants guilty of such manipulation. The argument is, therefore, rejected.

24. An argument was also raised by the appellants that in fact the information led before the FCI by letter dated 4.2.2011 was hopelessly belated and should not have taken note of particularly because the supplies under the disputed tender were already over. For this purpose, reliance was sought to be placed on the judgment of the Hon'ble Supreme Court in the matter of ***All India Chemists and Druggists Association*** reported in ***(2002) 2 CTJ 4 (SC) (MRTP)*** wherein the Hon'ble Supreme Court dropped the proceedings because the agreement complained of had come to an end. We do not see how the ratio in the above case is applicable to the present facts. It is obvious that even up to 4.2.2011 the appellants had been continuing their anti-competitive activities with regard to the dealings with the FCI and other State Corporations. It must be stated that the complaint by the FCI from its very language in the letter dated 4.2.2011 is not even specific to any transaction. The contention raised in this behalf must be rejected.

25. It was also urged that the Director General as well as the CCI had

ignored the fact that the officer of the FCI had themselves made noting in their internal files and had justified the price and had also specifically noted that there was no cartel activity amongst the three appellants. In the first place the notings in the files hardly impress us, for those notings were the individual opinions of the officer making them. We have gone through those notings at the instance of the learned counsel appearing for the appellants and we have the clear opinion that those notings would be inconsequential inasmuch as it was not for the particular officer to decide whether the activities of the three appellants amounted to the cartel. The concerned officer was only justifying the acceptance of the offers made by the three appellants and we also cannot ignore the situation that three appellants along with one other are the only four manufacturers of ALP and at the relevant time there was dearth of the supply of ALP which would have affected the grains stored by the FCI. If that had happened that would have seriously affected the common man who depended upon the public distribution system for rations. We cannot imagine that the FCI as well as other State Corporations could have allowed the grains to be rotten after all these grains were to reach to the poor. The argument, therefore, does not impress us and we reject the same.

26. Another argument was seriously raised that, in coming to the conclusion that there was an agreement in contravention of Section 3(3)(a) and (d), the CCI as well as DG had considered the earlier offers made to FCI right from 2007 onwards as also the offers made to other State Corporations. According to the learned counsel this was not permissible as it was beyond the mandate given by the CCI to the DG. The learned

counsel seriously urged that the DG if his investigation gone beyond the directions issued to him under Section 26(1) by the CCI, this argument was more particularly pressed as the CCI has found that all the three appellants were also guilty of boycotting the tender floated in 2011. It was urged that on the date when the order was passed by the CCI which is on 23.4.2012 that tender in 2011 was nowhere to be seen. It came later and as such the Director General had exceeded his brief in investigating and recording the finding of the boycott tender floated on 28.04.2011.

27. Firstly we will consider about the prices quoted in the previous tenders as also in the tenders floated by some other Corporations. In this behalf our attention was invited to the report of the Director General which report referred by the CCI in paragraph 4.14 of the impugned order. This table is as under :-

Sl. No.	Tendering agency	Tender opening date	Rates quoted (Rs. Per kg.)			
			Excel	United	Sandhya	Agro
1.	UP State Warehousing Corp	14/03/2007	225	225	--	--
2.	Punjab State Civil Supplies Corp.	28.4.2008	260	260	--	--
3.	Central Warehousing Corp.	6.8.2008	450	--	450	
4.	UP 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 Corp.	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.	MP State Warehousing Corp.	15/07/2010	436	--	436	--
15.	Punjab State Co-op SS & Mktg. Fed.	14/02/2011	415	415	--	--
16.	Punjab State Civil Supplies Corp.	15/03/2011	--	415	--	415

From this table it was sought to be urged by Shri Virmani and Shri Balaji Subramaniam that right from 2007 there has been identical pricing between Excel Crop care Ltd and United Phosphorous Ltd. in respect of the tenders floated by UP State Warehousing Corp and Punjab State Civil Supplies Corp. It is then pointed out in the table that even in 2008 tender floated by Central Warehousing Corp. there has been identical pricing of Rs.450 between Excel Crop Care Ltd. and Sandhya Organics. Same thing has happened in the tender floated by UP State Warehousing Corp and Punjab State Civil Supplies Corp as also Central Warehousing Corp. where the prices quoted by Excel Crop Care and United Phosphorous are identical. At Sl. No. 9 it is seen that there was identical pricing in the case of tender floated on 15.6.2009 between Excel Crop and Agrosynth Chemicals Ltd. So far so good however in as many as 7 tenders thereafter also, there is a clear cut example of identical pricing by the three appellants as also in case of Agrosynth. In tender of the Central Warehousing dated 13.7.2010 all the three appellants have quoted identical pricing. It is reported by the DG in

his report that when all these things were put to the three representatives they had no sufficient and satisfactory answer to the aspect of identical pricing which not only started from the pre Act period of 2007 but continued with impunity right upto 2011 that is even after Section 3 and Section 4 were notified and thus activated. In our opinion even if we may have some reservations about the pre Act quotations, still the practice continued between the four manufacturers even after 20th May, 2009, and it was the actually a pattern of quotations. We do not think anything wrong had been done in referring to the tenders floated by other organisations. Shri Balaji Subramanian as well as Shri Virmani have rightly argued that even after the Act came into force the appellants' conduct of offering identical offers continued in respect of the other tenders to which we have just now made the reference. We do not think any jurisdictional error was committed by the CCI in considering the identical offers made to the other organizations. It was also argued that in fact the three appellants had given reasonable offer in comparison to the earlier offers which were in the range of Rs.400/-. We do not think that there was anything reasonable in the offer of Rs.386/- and even if an earlier offers were made in the range of Rs.400/-. Firstly it has been explained in the DG's report as well as in the CCI order that the price during 2008 had arisen because of the crisis in China of an essential ingredient in ALP. Therefore we may chose to ignore those prices but thereafter the prices have consistently risen and have gone much beyond the Rs.400/- per kg. We do not think that this argument is of any consequence to the appellants. The argument that the DG and the CCI could not have looked at the offers made in the other tenders floated by some other organisation has no basis and has to be rejected for

the simple reason that, that would be giving credence to the theory that all the three appellants were acting in pursuance of same agreement.

28. At this juncture, we must take into account the other argument of all the learned counsel to the effect that the DG could not have investigated into the tender floated in 2011, as the CCI had not authorized the DG to investigate into that matter. The learned counsel, then contended that the DG had no jurisdiction, therefore, to investigate and the whole investigation thus has been rendered *non-est* because of the lack of jurisdiction. The learned counsel took us through the provisions of Section 26(1) as also the various Regulations in that behalf. 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,

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

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 anti-competitive 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

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.

30. This takes us to the special feature about the 2011 tender in which no appellants offered its bid. It must be noted that the argument by Shri Ramji Srinivasan in this behalf was that M/s. Excel Crop had considered the tender conditions and since those tender conditions were totally unacceptable and an independent decision was taken and a letter was specifically written by M/s. Excel Crop to the FCI, intimating their decision, not to take part in the tender. Shri Srinivasan pointed out that in this tender, the earnest money required to be deposited was raised from Rs.10 lakhs to Rs.3 lakhs. There are some other conditions which will be reflected from the letter, which is placed on the record on behest of M/s. Excel Corp. We have gone through the letter. Shri Virmani was, however, at pains to point out that this letter had never reached till the last date of price bids. There is some controversy as to on what date the said letter was received by the FCI, but there is no dispute that even as per M/s. Excel Corp it reached precisely on the last date when the bids were to be offered. Now, it has to be appreciated here that the notice inviting tender was published on 28th April, 2011, under which the price bids were to be offered within 1 month and the last date was 27th May, 2011. It is also argued by Shri Srinivasan that M/s. Excel Corp was initially willing to participate in the May 2011 tender and therefore, had a meeting with one Sandeep Sharma, DGM (Purchase) to discuss the tender terms and conditions, which were unreasonable, arbitrary and unconscionable as well as unacceptable to

M/s. Excel Corp. Shri Srinivasan argued before us that apart from the raised EMD, other unreasonable condition was the per month supply of 75 MT of ALP 3 gram tablet. It is the contention of the learned counsel that since these conditions were not changed, therefore, ultimately a letter dated 26th May, 2011 came to be served on FCI conveying the inability on the part of M/s. Excel Corp to take part in that tender. According to the learned counsel the decision not to take part in the tender was a valid business decision and not a result of pre-concerted agreement along with the other manufacturers who are the appellants before us.

31. Similar was the plea raised by Dr. Vijay Aggarwal on behalf of M/s. Sandhya Organics Chemicals Pvt. Ltd. He pointed out that even M/s. Sandhya Organics Chemicals Pvt. Ltd. had made it clear to FCI by a letter that it could not take part in the tender by offering its price bids. Dr. Vijay Kr. Aggarwal raised a novel plea that in fact as per the tender conditions M/s. Sandhya Organics Chemicals Pvt. Ltd. did not qualify to take part in the tender as it did not have the capacity to produce and supply 75MTs of ALP every month. Dr. Aggarwal pressed in service a certificate issued by the authorities certifying that the monthly capacity of M/s. Sandhya Organics Chemicals Pvt. Ltd. was only 25 tones. On this basis Dr. Aggarwal seriously contends that M/s. Sandhya Organics Chemicals Pvt. Ltd., appellant in Appeal No. 80 of 2012 cannot be faulted for not taking part in the tender.

32. Firstly considering the dates of alleged letters written by M/s. Excel Crop and M/s. Sandhya Organics Chemicals Pvt. Ltd. one wonders as to how is it that it dawned upon the appellant M/s. Excel Crop to write a letter

only on the last day. Nothing has been brought before us about as to what transpired between the so called meeting between M/s. Excel Crop official and Shri Sandip Sharma, DGM (Purchase). M/s. Excel Crop is happily silent even about the date of that meeting. In so far as the appellant, M/s. Sandhya Organics Chemicals Pvt. Ltd., is concerned the appellant never approached the FCI in time when it had all the opportunities to do so. In fact considering that there are only three or four manufacturers of ALP one would have expected M/s. Sandhya Organics Chemicals Pvt. Ltd. to approach the FCI authorities earlier if not for anything for getting an opportunity to make the supply of ALP tablet in this tender in which the parties were to supply a huge quantity of 600 MTs to FCI. Certainly M/s. Sandhya Organics Chemicals Pvt. Ltd. would have lost the opportunity and therefore they were expected to be more vigilant about the issue of the so called dis-qualification. That did not happen. In our opinion, the subsequent letter of M/s. Sandhya Organics Chemicals Pvt. Ltd. and the last minute effort on the part of M/s. Excel Crop was nothing but damage control exercise by these two concerns. The efforts made by M/s. Excel Crop and M/s. Sandhya Organics Chemicals Pvt. Ltd. do not appear to have *bona fides* at least on the basis of the timing on the letter.

33. In so far as the plea of M/s. Sandhya Organics Chemicals Pvt. Ltd. about their being dis-qualified bid take part in the tender is concerned the certificates were issued somewhere in the mid 90s and that is about 15-20 years back. M/s. Sandhya Organics Chemicals Pvt. Ltd. have not produced anything about their current production capacity in 2013. The appellant - M/s. Sandhya Organics Chemicals Pvt. Ltd. has also taken part

in 2009 tender where also there was requirement of the supply of more than 25 MT of ALP. Strangely enough, M/s. Sandhya Organics Chemicals Pvt. Ltd. did not object to that condition of 2009 tender. Shri Virmani pointed out that the certificate issued was getting back to 1996 and it could not be believed that the production capacity remained limited to the one mentioned in the certificate and yet they survived in the market. In short, we do not find any merit in this plea on behalf of M/s. Sandhya Organics Chemicals Pvt. Ltd. of their dis-qualification. We have already held that by sending the letters afterwards (even that plea is to be believed) M/s. Sandhya Organics Chemicals Pvt. Ltd. displayed serious lack of bonafides. At this juncture we must note that M/s. United Phosphorous Limited, another appellant did not even bother to make any representation. Once these facts are established the only irresistible conclusion is that all the three appellants engaged themselves in boycotting the tenders though they were the only manufacturers besides M/s. Agrosynth Chemicals Limited in India of ALP and were constantly supplying the ALP over the years. This is nothing but bid rigging prohibited under Section 3(3)(d) of the Act. In our opinion, the Director General and CCI were absolutely correct in that behalf.

34. We were taken through the conditions of 2011 tender. Shri Srinivasan complained against some of the conditions, but we do not think those conditions could be such as would be enough to take a decision to forsake the tender for the supply of 600 metric tones. After all, all these concerns were engaged in the business of supply of ALP tablets and were the only manufacturers in the country. They were also aware of the acute

need on the part of FCI for safeguarding the stored food-grains. It could have been the matter of simple calculation that a total boycott would bring FCI on their knees and the FIC being helpless in the matter, would give the orders for supply to all the concerned manufacturers at the negotiated price as dictated by them.

35. However, the discussion will not be complete unless we consider another serious argument by the three appellants that mere identical pricing in pursuance of the 2009 tender could not the result of a pre-concerted agreement. All the three counsel seriously argued that mere identical pricing was not enough and that by itself could not show any prior agreement. All the three learned counsel were at pains to point out that there was no other evidence like internal correspondence, cell phone or telephone records, their being any association of the manufacturers or their having held a meeting amongst themselves for fixing the pricing or as the case may be boycotting the tender.

36. We have already held that the boycotting of the tender was a proved affair. It could not be a mere coincidence that a tender was boycotted by all the manufacturers. In so far as, the previous tender of 2009 is concerned, all the three appellants offered identical price bids of Rs.388/-, which was an odd figure. From the table to which we have already referred in the earlier part of the judgment. It was seen that right from 2007, this was the practice upto 2009 and after Sections 3 and 4 were notified, there was no change in the attitude. In number of other tenders, the identical pricing went on. There could be a coincidence, if the identical price bids were offered in one or two tenders, but it is obvious that the identical prices of

odd figures were offered consistently right upto 2011. This cannot be a coincidence and has to be viewed as an action done with pre-concerted mind. As if that was not sufficient, it was followed by a boycott on 2011 tender, for which there was no explanation or at the most lame explanation. Considering that the number of manufacturers of ALP tablets in India is only 3 or 4, as the situation was then, such identical pricing and such boycott viewed on the backdrop of consistent practice of offering identical price bids, only confirms that all this was made with a common design, which amounts to an agreement. All the learned counsel could not explain the odd figure of Rs.388/-, which was the price bid offered. The learned counsel also could not meet the argument of Shri Virmani and Shri Balaji Subramanian that all the three factories were located at different places and there was no way that the cost prices could be identical. Considering the different distances and locations, for the supplies to be made, there was absolutely no explanation on identical pricing. The identical pricing on one or two occasions though raises strong suspicion, may not be enough to draw the inference of the concerted agreement, but when is repeated constantly with odd figures and without any reasonable explanation for the same, would only draw an inference of a pre-concerted agreement.

37. It was also urged by the learned counsel that in some of the tenders, these three appellants had not offered identical price bids. That may be so, however, on several occasions, the three appellants had quoted identical rates and their bids given to some other organisations. Therefore, that argument must fail.

38. Shri R. Srinivasan also relied on a judgment of European Court of

Justice ("ECJ") in **A. Ahistrom Osakeyhito v Commission, ([1993] ECR 1-1307) ("Wood Pulp")**. The observation relied upon was "*where parallel behaviour can be explained by nature of the market, conscious parallelism is not sufficient evidence to justify a charge of cartelization".* In our opinion, the reliance is wholly uncalled for, for the reason that the parallel behaviour of the appellants in this case, cannot be explained by the nature of the market. Nothing is brought on record to show that the market conditions were such as would require the three competing appellants to quote identical prices. On this short ground, the contention is rejected.

39. Dr. Aggarwal, the learned counsel appearing for Sandhya Organic Chemicals Pvt. Ltd. also urged that there was no direct evidence of cartelization and mere price parallelism was not sufficient to sustain the charge of concert or cartelization. He has relied on three decisions, namely:-

(i) Delhi Development Authority v. Shree Cements Ltd., 2010 CTJ 17 (COMPAT)(MRTP).

(ii) Alkali and Chemical Corporation of India Ltd, Calcutta and Anr., reported at (1993) CTJ 7 (MRTPC).

(iii) Director General (I&R) vs. Caprihans India Ltd. & Ors. reported at 2001 CTJ 377 (MRTP).

40. We do not think that this is a case of mere price parallelism. We have already made observation that price parallelism on one or two occasions though might raise strong suspicion, it may not be enough for drawing the inference of cartelization. We reiterate that observation. However, in this case it was not a sweet coincidence and in fact it is shown that this was not

only a common pattern or practice, but this continued in case of tenders floated by other corporations. This consistent practice and common pattern when continues for a long time, there could be no other inference excepting that of cartelization. The three decisions relied upon by Dr. Aggarwal, pertains to the old MRTP Act and would not be germane to the controversy, where we are called upon to interpret Section 3, which was conspicuously absent in the old Act. Those decisions would be of no consequence.

41. In short, we are of the clear opinion that the CCI was correct in holding the appellants guilty of contravention of Section 3(3)(d).

42. At this juncture we must also take the note of the concurring but separate order by one of the learned Member Shri R. Prasad and in his order. He has firstly taken the stock of the reported decision in Hindustan Lever Ltd. ***1993 (3) SCC 499*** where the Supreme Court had held that a mere price parallelism does not lead to a conclusion of existence of a cartel. The learned Member has then considered the language of Section 3 as well as Section 2(b) of the Act. After considering and examining the concept of trade practice as elaborated by the Supreme Court in ***Hindustan Lever Ltd. vs. MRTP AIR1977 SC 1285*** the learned Member has come to a correct finding that submitting identical price bids amounted to a practice for the purpose of Section 3(3) of the Act and that the appellant not having discharge their onus. It could be deduced that there was consultation *inter se* between the appellant before quoting the identical price. We, therefore, approve the separate order passed by Shri Prasad. However, we do not agree that in this case the provisions of Section 3(3(b) would not be attracted. In boycotting the tender in 2011, the appellants

clearly created limitation on supply. The finding given by the CCI is correct in that behalf. We also approve the order of Shri Prasad that there was a contravention of Section 3(3)(a) of the Act inasmuch as there was certainly an activity of determining the sale price of ALP tablets.

43. This takes us to the question of the penalty which was very seriously argued by the appellants. The first criticism against the order regarding the penalty was that there was no discussion whatsoever nor any justification as to why the Commission was imposing the penalty @ 9% on average of three years' turn over of the three appellants. We have seen the order and indeed there does not appear to be any reason justifying the penalty @ 9% of the three years average turn over. We have time and again insisted for the reasons. The CCI is not only Regulatory Authority that is only one limb. It has been reiterated in Brahm Dutt's case (reported in AIR [2005] SC 730) as well as SAIL India's case (reported in {2010} SCC 744) that the CCI has an adjudicatory role also. There can be no doubt under Section 27(b) there is discretion on the part of the CCI of ordering the penalty upto 10% of the three years average turn over. The Act also provides that where such agreement referred to in Section 3 has entered into by a cartel the Commission could impose upon each producer, seller, distributor, trader or service provider included in that cartel a penalty up to three times of its profit for each year of the continuance of such agreement, whichever is higher. Though there is a clear cut finding that the appellants were acting as a members of the cartel, the CCI has not chosen to look into the proviso of Section 27(b) of the Act and has chosen to go by the main provision. It has undoubtedly ascertained the turn over of the three companies and

have come to the conclusion that Excel Crop Care Limited had the average turn over of Rs.710.09 Crores while Sandhya Organics Chemicals Pvt. Ltd. and United Phosphorus Limited had average turn over of Rs.17.52 crores and Rs.2804.95 crores of turn over respectively. It has then proceeded to inflict the penalty of 9% of such average turn over. It was argued by all the learned counsel that in the absence of any reason justifying the inflicting of 9% of average turn over by way of penalty the CCI had acted arbitrarily. Lengthy arguments were advanced on this question. The learned counsel and more particularly Shri Ravinder Narain for United Phosphorus Limited argued that the CCI at least in its case should not have considered the over all turn over and should have restricted itself to the relevant turn over. Meaning thereby that the CCI should have only considered the turn over of the business of manufacturing ALP tablets. Shri Ravinder Narain pointed out that the appellant, United Phosphorous Ltd., is a multi product company where the turn over of ALP tablets was insignificant. He points out that while the total turn over for the year 2009 was Rs. 2,738.98 Crores and the total turnover of ALP tablets including all domestic and export sales was Rs. 84.99 crores and the total turn over of ALP in that year for the domestic market was a mere Rs. 23.33 crores. He also asserts that insofar as the total amount of supplies of ALP to FCI in the year 2009-10 was concerned it was merely Rs. 8.49 crores which was merely 0.3% of the total turnover of the company. He wonders as to how the exorbitant penalty of Rs.252.44 crores be imposed against the appellant in respect of the supply of ALP tablets to FCI for a total price of Rs. 8.49 crores in the year 2009-10. Shri Ravinder Narain also brought to our notice a decision of the Competition Appeal Court of South Africa in the case of ***Southern Pipeline***

Contractors & anr. vs. The Competition Commission and pointed out that Section 59 of the Competition Act of 1998 of South Africa provided for maximum penalty of 10% of the annual turn over in that. He relied on sub-section (2) of the Act. He then invited our attention to paragraphs 51 to 53 of the judgment which dealt with the question as to what should be the relevant turnover to determine the appropriate amount of penalty to be imposed. It was held by that Tribunal 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 Tribunal had used the words 'affected turnover' in these paragraphs. It is pointed out by Shri Ravinder Narain that the Tribunal determined the amount of penalty on the basis of these guidelines issued by the European Union (EU) and The Office of Fair Trade (OFT). He pointed out that the concerned company Southern Pipeline contractors was a multi-product company and the affected turnover was comparatively small. He, therefore, urged that the CCI should have also adopted the same policy. The learned counsel also pointed out that Section 27(b) of the Act is completely silent regarding any specific factors to be taken into consideration or the methodology to be adopted for imposition of penalty. He, therefore, urged that the guidelines issued by the EU in relation to old Article 81 and the new Article 101 should have been kept in mind by the CCI and the CCI have not given any reason should be mindful of the guidelines. The learned counsel also points out that the maximum limit of 101 of the total turn over was available vide Article 23(2) of the Regulations under TFEU (Treaty on the Functioning of the European Union). We were extensively taken through the various features of EU guidelines as well as

OFT guidelines.

44. As regards the EU guidelines, point 5 of the guidelines prescribes the basis for setting the fine wherein it is provided that is appropriate for the Commission to refer to the value of the sales of goods or services to which the infringement relates.

45. In point 8 of the guidelines set out the principles which would guide the Commission where it order fines in terms of Article 23(a) of Regulation No. 1/2003. Thereafter the method of setting of fines is prescribed. In that under Section A it is provided at point 13 that in determining the basic amount of the find, the Commission will take the value of the undertakings sale of goods to which the infringement directly or indirectly relates. In this case it would be the supplies to FCI under the tender of 2009.

46. It is pointed out that the value of sales to be determined should be before the VAT and in other taxes.

47. In point 22 of the guidelines provides that it should be determined whether or not the infringement is implemented.

48. In point 36, it is provided that in certain cases the Commission may even imposes symbolic fine.

49. Now speaking about the OFT Guidelines. In paragraph 1.3 speaks about the guidance as to the circumstances in which in determining a penalty the OFT may taken into account the effect of an infringement in another member State.

50. In paragraph 1.6, it is provided that firstly it would be the task to determine whether the financial penalty should be imposed at all. In Chapter 2 the steps for determining the level of a penalty is set out in which paragraph 2.7 defines the relevant turn over. It is defined that "as the turnover of the undertaking in the relevant product market and the relevant geographic market affected by the infringement in the undertaking last business year".

51. Like Section 27(b) paragraph 2.8 provides that the starting point for determination should not exceed 10% of the relevant turnover . In step 2 reference is made to the duration of the infringement as a relevant factor to adjust the amount determined in Step 1.

52. In Step 3 the relevant factors for adjusting the amount of starting point are mentioned. It is provided that "consideration at this stage may include, for example, the OFT's objective estimate of any economic or financial benefit made or likely to be made by the infringing undertaking from the infringement".

53. On this basis, it is pointed out by Shri Ravinder Narain that it firstly quoted the price of Rs. 388/- per kg. was not accepted and the contract was give at Rs. 386/- per kg. and therefore there was no undue gain on account of the alleged infringement and this would be a mitigating factor. It is also urged that insofar as the boycott of the tender in 2011 was concerned the appellant was not obliged to make any supplies to FCI and in fact it could export the quantities at a much higher average price of Rs. 450/- per kg. However, at the request of the FCI the requirements were

duly supplied for the entire year 2011-12 by the appellant at the running contract rate applicable to CWC at Rs. 399/-. It is pointed out by him that there was no supply made by any party to anyone in 2011 at a price lower than Rs. 399/- per kg. and therefore there was no undue gain on account of the so called conduct of boycotting the tender.

54. The learned counsel also urged that all these factors should have been taken into consideration by the CCI which it had failed to take into consideration. The learned counsel also urged in addition to this that at the time when bids were to be offered Section 3 was not even notified and it was a nascent jurisdiction amongst the other mitigating factors. It was urged by the learned counsel that the CCI did not consider that this was a first offence. The learned counsel presented us with a chart, which is as under :-

Total turnover of the company for the year 2009 (multi-product company)	Rs.2,738.98 crores
Total turnover of ALP (including all domestic and export sales) for the year 2009-10 (Major production of ALP tablets was exported)	Rs. 84.99 crores (about 3% of the total turnover of the Co.)
Total turnover of ALP for the year 2009-10 in the domestic market	Rs.23.33 crores
Total turnover of supplies of ALP to FCI during the year 2009-10 (being the subject matter of the alleged infringement – 220 MT)	Rs. 8.49 crores (about 0.3% of the total turnover of the company)

55. Shri Ramji Srinivasan also reiterated all these points of the guidelines of EU and OFT. A table was presented before us which is as under:-

Total annual turnover of Aluminium Phosphide of all the manufacturers (all grades and kinds)	Rs.175.00 crores [pg 187 para 4.3]
Annual procurement of Aluminium Phosphide 3 gram tablet (relevant product) by FCI and other government agencies	Rs.40.00 crores [pg 187 para 4.3]

Penalty imposed on all the 3 parties	Rs.317.91 crores
Penaltyimposed on Excel Corp Care	Rs.63.90 crores
Total Average Profit before Tax of Excel Corp (entire company)	Rs.32.20 crore [page 158]

The learned counsel, however, very seriously argued the question of relevant turn over which concept is to be found in the EU guidelines. He also relied on the decision in the case of Southern Pipeline Contractors Conrite Walls (Pty) Ltd. and the Competition Commission (Case No.105/CAC/Dec 10) (106/CAC/Dec 10) – Page 27

> *[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' 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 section59 (30, 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 caliberated."*

56. He pointed out that the OFT guidelines also pertains to the relevant

turnover. He argued that the deduction by the CCI to the fact that Excel Crop has earned high profit margin on sale of ALP 3 gram tablet was not correct and pointed out that the profit margin was only Rs. 94. He pointed out that in the year 2007-2008 Excel Crop had incurred a loss of 3.57% on the sale of ALP 3 gram tablet and in the financial year 2008-2009 the appellant had earned a meagre profit 0.32% from sales of ALP 3 gram tablet. The following table was given explaining the price structure of ALP 3 gram tablet :-

Cost price for Aluminium Phosphide 3 gram tablet (2008-09)	Rs.344.50/ kg
Effective Price of Aluminium Phosphide 3 gram tablet (net of excise tax)	Rs.358/ kg
Quoted price at 2009 tender of Aluminium Phosphide 3 gram tablet (including excise)	Rs.388/ kg
% Profit on sale of Aluminium Phosphide 3 gram tablet @ Rs.388 / kg	4%
Final Price of supply of Aluminium Phosphide 3 gram tablet to Food Corporation of India	Rs.386 / kg
Actual % profit made by Excel Crop on sale of Aluminium Phosphide 3 gram tablet to Food Corporation of India in 2009 FCI Tender	Even less than 4%

57. It was reiterated that Excel Crop was a multi product company and its primary revenue is earned from the sale of Agro Chemicals including insecticides, herbicides, fungicides, bio-pesticides and pesticides used for a post harvest like fumigation. The following tabular representation was presented to us :-

	2008-09	2009-10	2010-11
% Sales of Agro Chemicals and other insecticides used for crop protection & other products in total sales (turnover) Excluding Aluminium Phosphide 3 gm tablets	95.16%	94.00%	95.78%

On the basis of this the learned counsel presented us the figures of the total turn over of Excel Crop as well as relevant turn over :-

	2008-09	2009-10	2010-11	Average
Total turnover of Excel Crop (in Rs.Crores)	730.43	650.83	749.02	710.00
Turnover from sales of Aluminium Phosphide to all parties including government (in Rs. Crores)	26.74	38.88	31.61	32.41
Sales of Aluminium Phosphide 3 gram tablet to FIC (in Rs)	67.50 lacs	8.12 crores	77.20 lacs	3.19 crores

Turn over of Excel Crop "Net of Excise"

	2008-09	2009-10	2010-11	Average
Total turnover of Excel Crop (in Rs. Crores)	685.10	620.41	702.28	669.28
Turnover from sales of Aluminium Phosphide to all parties including government (in Rs. Crores)	24.81	36.86	29.71	30.46
Sales of Aluminium Phosphide 3 gram tablet to FIC (in Rs)	61 lacs	7.63 crores	71 lcas	2.98 crores

58. Lastly, the learned counsel argued that imposition of penalty of 63.90 crores on Excel Crop will not only wipe out two years of profits earned by the entire company but may lead to closure of the unit manufacturing ALP. He pointed out that the object of the Competition Act could not be to close down the business.

59. Dr. Vijay Kr. Aggarwal appearing for Sandhya Organic Chemicals Pvt. Ltd. also argued more or less on the same lines. Insofar as the penalty is concerned Dr. Aggarwal argued that the turn over was insignificant as compared to the other two appellants. All the three learned advocates very candidly submitted before us that they had not argued elaborately on the question of penalties though according to them the material statistics was available to the CCI. It was tried to be argued that the CCI should have given them the opportunity to argue on the question of penalty.

60. The arguments put forward by Shri Ravinder Narain, Shri Ramji Srinivasan as also by Dr. V. K. Aggarwal are more or the less correct when they point out the total absence of reasons as to why the CCI decided to inflict the penalty @ 9% of the average turn over. Time and again we have been reiterating the necessity of the reasons while ordering the penalty. We hope that the CCI take serious note of that factor. This is particularly true as the CCI is an adjudicatory body as declared by two Supreme Court judgments. The role as an adjudicatory body would cover all the aspects of hearing and deciding.

61. There can be no dispute that where harsh financial penalties are inflicted the reasons become all the more necessary.

62. All the learned counsels very seriously canvass the question of "relevant turn over". The argument that the appellants, United Phosphorous Ltd. and M/s. Excel Crop Limited, are the multi product companies was not seriously disputed by Shri Balaji Subramanian, learned counsel for the CCI. We have no reason not to accept that factor. As

regards the arguments based on EU and OFT guidelines, we are of the opinion that those guidelines are undoubtedly relevant in arriving at the issue of deciding upon the turn over. However, those guidelines cannot be treated as be all and end all in the matter and would have to be considered in the light of the facts of each case. We, however, accept the contention that in the circumstances of this case the relevant turn over should be considered in case of the two appellants who are multi product companies. To that extent we generally agree with the sentiment expressed in the relied upon judgment of the South African Tribunal in the case of ***Southern Pipeline Contractors & anr. vs. The Competition Commission.***

We must, at this stage, take into consideration the argument by Shri Balaji Subramanian. The learned counsel who supported the penalty on the basis of the average turn over. The learned counsel invited our attention to our judgment in the matter of ***MDD Medical Systems India Pvt. Ltd. vs. Foundation for Common Cause & Ors.*** (Appeal No. 93 of 2012) and more particularly to paragraph 23. Relying on those observations, the learned counsel argues that in that judgment we had rejected the concept of relevant turn over. We must explain that firstly the companies which we were dealing with in that case were not multi-product companies. Secondly, we had specifically pointed out that the restricted turn over could not be taken into consideration. A restricted turn over is different from the relevant turn over. In that case the argument was that we must only consider the turn over generated in the supplies made only to the Government Hospitals. We had pointed out that the business of supply of the materials could not be any different from the supplies to the other Hospitals. It was on that basis that we had rejected the argument. We

must repeat that we had not rejected the total concept of relevant turn over. We are accepting the argument regarding the relevant turn over in the peculiar circumstances of this case where the two appellant companies have clearly indicated that the other products of those companies have no connection and do not depend upon the product involved in this matter, that is ALP Tablets. We, therefore reject the argument of Shri Balaji Subramanian.

63. Shri Ravinder Narain pointed out that the turn over of United Phosphorous Ltd. in the domestic market was mere Rs.23.33 crorers while the total turn over regarding the manufacturing of ALP tablets was Rs. 84.99 crores in one year. In our opinion, it would not be reasonable to hold the total turn over of the United Phosphorous Ltd. as the relevant turn over and it would have to be restricted to the turn over regarding the ALP Tablets. Unfortunately for us the United Phosphorous Ltd. have not given any details about its other products. In our opinion, unless those details are supplied, it would be very difficult to arrive at a definite finding regarding the turn over of ALP tablets. However, we do not agree with Shri Ravinder Narain who insists on restricting the relevant turn over to the sale only in the domestic market. In fact, it is the whole turnover regarding the ALP Tablets, which will be liable to be considered. Similar is the case of M/s. Excel Crop. It is only at the appellate stage M/s. Excel Crop has chosen to give the figures regarding their turn over relating to the production of ALP Tablets. While arriving at a conclusion about the relevant turn over it would be open to the authorities like CCI to rely on the general principles expressed in those guidelines regarding the method of calculation etc.

However, it should be an endeavour of the authorities to apply those principles not mechanically or blindly but after carefully considering the factual aspects. Such factual aspects could include the financial health of the company, the necessity of the product, the likelihood of the company being closed down on account of unreasonable harsh penalty etc. At the same time the authorities would be well advised in considering the general reputation and the other mitigating factors like the first time breaches as also the attitude of the company. This list is certainly not exhaustive and the authority can and should consider all the relevant factors while considering the relevant turn over as also considering the extent of penalty on that basis. It should also be reiterated at this stage that there should be proportionality in the award of penalty, which principle has been enshrined in several judgments of the Apex Court. It cannot be forgotten that Supreme Court has time and again relied on the doctrine of proportionality while at the same time emphasizing on the aspect of deterrence. Generally the award of penalty should be in proportion to the wrong done. While considering the wrong done, of course the authority would be justified in taking into consideration all the aspects including mitigating and aggravating circumstances. It is to this extent that EU and OFT Guidelines would be relevant.

64. We do not agree with Shri Ravinder Narain that the boycott of 2011 tender did not make any difference. We must take into account the facts that while in the earlier tender the price at which the appellants agreed to sell the ALP Tablets at Rs 386/- per kilo after the boycott when they agreed to sell the ALP at Rs. 399/- getting a hefty raise of Rs13/- per kilo. Though

the figure of Rs. 13/- appears to be insignificant in the language of Shri Ravinder Narain, when it is considered that the price was increased by Rs.13/- per kilo and the total supply was to the extent of several hundred tonnes the financial implication can be well realized. We are also not impressed by the argument that the export price of ALP Tablets was Rs. 450/- in the case of United Phosphorous Ltd. and as such the price of Rs. 386/- agreed to in the earlier tender and the price of Rs. 399/- at which they were supplied was a very reasonable price.

65. We do not accept the argument that there was no appreciable adverse effect on competition as the rates were reasonable and all the competitors took part in the first tender. There is a great confusion about this term. We must at this stage point out that the term has to be interpreted with the aid of the words that it contains. Meaning thereby that the appreciable adverse effect should be on the aspect of 'competition' itself and not restricted to the 'competitors' or rates. It is trite that with the healthy and higher competition ultimate consumer would be benefitted. In the second tender which was boycotted, considering the necessity of the product, FCI had to purchase the product at the increased rate of 499/- per kg. from all the appellants. Considering the volume of requirement of several hundreds tonnes, this was a huge increase resulting in adversely affecting the competition substantially. A collective and deliberate boycott always affects the competition, same is the case of identical prices. If the parallel prices had not been offered or if the second tender was not boycotted (undoubtedly as a result of the concerted agreement) there could have been much lower prices ultimately benefitting the have nots of the

society.

66. We have to take into account also the factor that these tablets were for the preservation of the food-grains which usually go up to the consumers through Public Distribution System. We need not stress upon the fact that it is the have-nots of the society who are the beneficiaries of the Public Distribution System. If no timely supply is made of these tablets the millions of tonnes of the stored food-grains could be destroyed or become unfit for human consumption. This aspect ought to have been considered by the appellants. It is really a matter of indignation that for profiteering, the poor men in the society are held to ransom. This was undoubtedly an aggravating factor in this matter.

67. Considering all these aspects we are of the opinion that the penalty @9% of three years average turn over was not unreasonable. However, the said turn over would have to be a "relevant turn over".

Now speaking about the actual penalty, we must point out that the appellants were found guilty of forming a cartel. Therefore, under Section 27(b) of the Act maximum penalty could be 10% of the turn over of each year during which the cartel existed. In our opinion, though this was a serious breach which is abhorred in the international jurisdiction, we would chose to restrict ourselves to the first part of Section 27(b). We have already ordered 9% of the penalty in case of all the appellants. M/s. Excel Crop has shown the average of the turn over of the three years at Rs. 32.41 crores. Shri Srinivasan argues that we must consider the average of the supply by Excel Crop to FCI which is Rs. 3.19 crores for the three years. We reject that argument as all the sale of Aluminium Phosphide

3 gram tablets would have to be taken into consideration including the supplies made to the Government. We cannot restrict the turn over by taking into consideration the supply made only to the FCI. In that view, the penalty would be 9% of Rs. 32.41 crores which comes to Rs. 2,91,69,000 In case of M/s. United Phosphorus Ltd. the figure given to us is only for one year that is 2009-10.

68. Later on, after the conclusion of the arguments, the figures of total relevant turnover were provided to us by M/s. United Phosphorous Limited. On the basis of the figures supplied to us, it is seen that the total turnover of the ALP Tablets including all domestic and export sales, the average of three years comes to Rs.77.14/- crores. Therefore, their penalty @ 9% of this figure would come to Rs.6,94,26,000/-. That will be a penalty against M/s. United Phosphorous Limited.

69. In so far as the M/s. Sandhya Organic Chemicals (P) Ltd. is concerned, there is no question of the relevant turnover, as it was not urged before us that they have any other product, than the ALP Tablets. The CCI has calculated their penalty at Rs.1.57/- crores, on the basis of their total turnover. M/s. Sandhya Organic Chemicals (P) Ltd. is relatively a small enterprise. We also noted that M/s. Sandhya Organic Chemicals (P) Ltd. had raised a plea that they could not have taken part in the second tender since their production capacity was only 25 metric tonnes a month as per the certificate issued on November 29, 1995 by National Small Industries Corporation Limited (A Government of India Enterprises). Though, we had not accepted that plea, it will have to be considered that their production capacity is also not comparable to the production capacity and the size of

the other two appellants. We would, therefore, chose to reduce their penalty to the 1/10th of the penalty awarded by the CCI. Their penalty would therefore come to Rs.15.70/- lakhs.

70. In the result, therefore, the finding by the CCI in respect of breach of the provisions of Competition Act is confirmed and the appeals are dismissed. However, the penalties would be modified to the extent we have ordered in the earlier paragraphs. All the three appeals are disposed of on these lines.

Pronounced in open Court on 29th day of October, 2013

(V.S. Sirpurkar)
Chairman

(Rahul Sarin)
Member

(Pravin Tripathi)
Member