



COMPETITION COMMISSION OF INDIA

Reference Case No. 02 of 2016

In Re:

**Mr. Rizwanul Haq Khan
Dy. Chief Material Manager
Office of the Controller of Stores
Southern Railway**

Informant

And

**Mersen (India) Pvt. Ltd.
No. 5, Bommasandra Industrial Area
Bengaluru- 560 099**

Opposite Party No. 1

**Assam Carbon Products Ltd.
No. 78, Victoria Road, Birkuchi
Chandrapur Road
Guwahati – 781 026**

Opposite Party No. 2

CORAM

**Mr. Ashok Kumar Gupta
Chairperson**

**Ms. Sangeeta Verma
Member**

**Mr. Bhagwant Singh Bishnoi
Member**

Present:

For the Informant

**: Mr. S. Natrajan, Dy. Chief Materials Manager,
Southern Railway**

**For Opposite Party No. 1 and
its individuals**

**: Mr. Vasanth Rajasekaran, Mr. Saurabh Babulkar,
Ms. Kripa Kathuria and Ms. Ritika Ganju,
Advocates**



सत्यमेव जयते



For Opposite Party No. 2 and its individuals : Mr. Rajeev Sharma, Sr. Advocate with Mr. Rishad A. Chowdhury, Ms. Priyanka Devgan and Mr. Rajat Krishna, Advocates

Order under Section 27 of the Competition Act, 2002

1. The present Reference has been filed by Mr. Rizwanul Haq Khan, Deputy Chief Materials Manager/Controller of Stores, Southern Railway (Informant), under Section 19(1)(b) against Mersen (India) Private Limited (Opposite Party No. 1/OP-1), and Assam Carbon Products Limited (Opposite Party No. 2/OP-2), [collectively, 'OPs'] alleging *inter alia* contravention of the provisions of Sections 3 and 4 of the Competition Act, 2002 (Act).
2. OP-1 is a subsidiary of multinational company viz. 'Mersen SA', France, which operates in 35 countries through its subsidiaries/group companies with expertise in electrical power. It is a leading company with expertise in manufacturing brushes and brush holders for industrial electric motors.
3. OP-2 is an MSME and is *inter alia* engaged in supply of carbon brushes for Hitachi Traction Motor Type HS 15250A, to Indian Railways.
4. It has been stated in the reference that Southern Railway has been procuring Carbon Brushes for Hitachi Traction Motor Type HS 15250A from the OPs. The OPs are stated to be the only two Research Designs and Standards Organisation (RDSO) approved vendors of the said product in India, and the Informant has no other option but to procure the said product from them.
5. It has been alleged that the OPs have been steadily hiking the rates of carbon brushes for the last 5 years in tandem with each other without any justification. To support the allegations, the Informant has enclosed a table containing the rates quoted by OPs during 2010 to 2015. It has been thus alleged that the various tenders, as mentioned in the reference, floated by the Informant for procurement of carbon brushes had been



सत्यमेव जयते



rigged by the OPs by way of cartelization and collusive bidding. Further, it was alleged that OP-1 had hiked its quoted rate in the latest tender (2015) by more than 18% compared to the purchase rate for the same grade in the previous year 2014, without any justification or reason.

6. The Commission, after examining the reference and the material filed therewith, was of *prima facie* view that their seemed to be a case of bid rigging in the tenders which was noted as in contravention of the provisions of Section 3(3)(d) of the Act. Accordingly, the Commission, *vide* its order dated 04.09.2017 passed under Section 26(1) of the Act, directed the Director General (DG) to cause an investigation into the matter and file an investigation report.

Investigation by DG

7. Pursuant to the directions of the Commission issued under Section 26(1) of the Act, the DG conducted investigation by issuing probe letters to the Informant, OPs and third parties, who were also examined on oath based on the evidences gathered during investigation.
8. During pendency of investigation, an application under Section 46 of the Act read with Regulation 5 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 ('LPR') was received in the Commission *vide* e-mail dated 05.07.2019 at 00:49 from OP-1 for grant of priority status under Regulation 5(2) of the LPR. Thereafter, another application under Section 46 of the Act read with Regulation 5 of the LPR was received in the Commission *vide* application dated 12.07.2019 at 03:45 PM from OP-2 for grant of priority status under Regulation 5(2) of the LPR. The Commission *vide* separate orders forwarded these leniency applications to the DG.
9. After completing investigation, the DG submitted the investigation report (*non-confidential version qua OPs*), on 27.04.2021.
10. For examining the allegations against the OPs, the DG identified various issues. The issues alongwith findings of the DG thereon, are noted below:



सत्यमेव जयते



- (i) Whether OPs are enterprises or persons under Section 3(1) of the Act?

It was concluded by the DG that as per the requirements of Section 3(1) of the Act, OP-1 and OP-2 are *enterprises* as per the definition of 'enterprise' as given in Section 2(h) of the Act.

- (ii) If the answer to Issue No. (i) is in the affirmative, whether the OPs are engaged in identical or similar trade of goods or provision of services?

It has been observed that OP-1 and OP-2 are engaged in manufacturing and supplying of the carbon brushes in India. Carbon brushes supplied in relation to tenders issued for Hitachi Traction Motor Type HS 15250A comprise both Imported Grade and Indigenous Grade. It was pleaded by OP-1 in its submission that, as the complaint of Informant is primarily about Carbon Brushes of Imported Grade and OP-1, *i.e.*, Mersen, did not supply Carbon Brush of Imported Grade to Railways during 2015 and 2016, any allegation of cartelization is outside the scope of investigation. When inquired of the Informant regarding the status and distinction between Carbon Brush of Imported Grade and Indigenous Grade, it replied that the Railways does not make any distinction between Imported *vis-a-vis* Indigenous Grade in their tender documents.

The DG observed that both OPs are RDSO-approved suppliers for the Railways, and the Railways procure these grades of Carbon Brushes interchangeably. Therefore, the DG noted that it would be correct to suggest that OP-1 and OP-2 are both enterprises engaged in identical or similar trade of goods, *i.e.*, Carbon Brushes for Hitachi Traction Motor Type HS 15025A, as per Section 3(3) of the Act.

Thus, the DG concluded that OP-1 and OP-2 are both enterprises engaged in identical or similar trade of goods, *i.e.*, Carbon Brushes for Hitachi Traction Motor Type HS 15250A, as per Section 3 (3) of the Act.

- (iii) If the answer to Issue No. (ii) is in the affirmative, whether the OPs entered into any agreement that directly or indirectly resulted in bid rigging or collusive



सत्यमेव जयते



bidding in contravention of Section 3(3)(d) read with Section 3(1) of the Act.

Based on the evidences collected during the investigation such as WhatsApp messages and e-mails exchanged between OPs, the DG concluded that OPs have indulged in anti-competitive practices in contravention of the provisions of Section 3(3)(d) of the Act read with Section 3(1) thereof, since 2015 onwards.

- (iv) If the answer to Issue No. (iii) is in affirmative, who are the persons/office bearers who were in charge of and responsible for the conduct of the business of OPs at the time of the alleged contravention?

The DG has identified the following persons – Mr. V. I. Perumal, MD of OP-1, and Mr. Rakesh Himatsingka, Director and Non-Executive Chairman of OP-2 – as responsible for contravention committed by the OPs.

Consideration of the DG Report by the Commission

11. The Commission considered the investigation report in its ordinary meeting held on 12.05.2021 and *vide* an order of even date, decided to forward electronic copies of the investigation report to the Parties for filing their respective objections/suggestions thereto.
12. The Commission further directed the Opposite Parties to furnish their audited balance sheets and profit & loss accounts/turnover for the financial years, *i.e.*, 2009 – 10 to 2018 – 19. The Opposite Parties were further directed to file their respective details of the revenue and profit generated from the sale of ‘Carbon Brushes’ during the aforesaid financial years by way of Affidavit supported by certificates of Chartered Accountants.
13. Further, the Commission also directed to forward electronic copy of the investigation report to the individuals of the OPs as identified by the DG, *i.e.*, Mr. V. I. Perumal, Managing Director of OP-1, and Mr. Rakesh Himatsingka, Director and Non-Executive Chairman of OP-2, for the purposes of Section 48 of the Act, with directions to file their respective objections/suggestions, and also directed them to furnish their income details, including individual Income Tax Returns (ITRs), for the financial years 2016 – 17, 2017 – 18 and 2018 – 19.



Replies/Objections/Submissions of the Parties

14. The Parties, except the Informant, filed their respective replies/objections/submissions to the investigation report of the DG in addition to making oral submissions before the Commission on 04.08.2021 when the matter was taken up for final hearing.

Replies/Objections/Submissions of the Informant:

15. The Informant has not filed any objections/suggestions to the investigation report. However, a representative of the Informant appeared before the Commission during final hearing and broadly supported the findings of the DG.

Replies/Objections/Submissions of OP-1 and Mr. V. I. Perumal:

16. OP-1 filed its objections/suggestions on 30.07.2021 to the investigation report of DG and also filed written submissions on 07.08.2021 post-making oral arguments.
17. OP-1 stated that the DG had unilaterally expanded the scope of investigation despite finding that there has been no contravention in relation to the impugned eight tenders alleged by the Informant. However, the DG proceeded to investigate a new set of eight railway tenders issued during the years 2016 – 2019 and also rendered its findings in relation to the same without any *prima facie* opinion of Commission, thereby violating the principles of natural justice.
18. OP-1 submitted that it had also made a leniency application wherein it provided disclosures on the scope of its operations in connection to the tenders for the period 2010 – 2014. OP-1 further submitted that it has made bonafide, full, true, and vital disclosures of all relevant material in its possession with respect to import grade Hitachi Carbon Brushes for the period starting from 2010 to 2014.
19. OP-1 submitted that the market with respect to Hitachi Carbon Brushes is unilaterally defined by the Railways, which decides its requirements and manner of procurement, thereby creating entry barriers. Further, as a procurer, the Railways enjoy extensive discretion and the presence of entry barriers on account of its procurement policies. It was also contended that no Appreciable Adverse Effect on Competition (AAEC) was caused.



सत्यमेव जयते



20. It was further contended that the DG's findings based on e-mails, messages, and WhatsApp chats are surmises and conjectures, and submitted that it was in discussion with OP-2 with respect to the carbon brushes of Indigenous Grade only with the intent of better understanding of market sentiments on its pricing.
21. OP-1 submitted that it has a good reputation and continuous support from Railways/Research Design and Standard Organisation (RDSO) for more than four decades, with an unblemished track record and antecedents.
22. Lastly, OP-1 submitted that, even though the discussions held earlier were limited to the prevailing market conditions, factors affecting manufacture and supply of products, and other such topics relating to business, it has been ensured that any further conversation with OP-2 on any matter has been ceased. It has been submitted that decrease in demand of Hitachi Carbon Brushes and adverse impact of the unrepresented COVID-19 pandemic affected OP-1 drastically.

Replies/Objections/Submissions of OP-2 and Mr. Rakesh Himatsingka:

23. It has been averred by OP-2 and its individual that they unequivocally and completely agree and concur with the conclusions of the DG and admit to the role and findings made against it in the investigation report of the DG. It has been submitted that OP-2 had co-operated with the DG during the investigation and added value to establish the existence of cartel in the instant matter and made vital disclosures of OP-2 which were the actual conclusions of the investigation report of the DG.
24. It has been further submitted that the primary objective of participating in the cartel was to increase the existing prices of Hitachi Carbon Brushes to a level that would be sustainable from a business perspective and try to secure orders for its manufacturing unit, which was not being utilized to its appropriate extent for a long period of time.
25. It has been submitted that the Indian Railways have immense bargaining power to pressurise suppliers to supply at lower prices and procure carbon brushes only from RDSO-approved vendors. The market is highly concentrated, with the presence of limited suppliers. It has been pointed out that tender conditions act as an entry barrier to new suppliers and result in reduced competition.



सत्यमेव जयते



26. Lastly, it was pointed out that OP-2 has made leniency application explaining the functioning of the cartel, revealed the role of the parties operating the cartel, reasons for formulating the cartel, mode and manner for deciding prices to be quoted for forthcoming tenders, and mode of deciding the winner of such forthcoming tenders, and fully co-operated with the DG during the investigation. It has been submitted that the evidence submitted by OP-2 completed the links to the investigation and provided clinching evidence about the design of the cartel.

Analysis

27. The Commission has carefully perused the reference filed, the investigation report, and evidences in support thereof submitted by the DG, the submissions made by the Opposite Parties and the Informant, and the other material available on record and has also heard in detail the arguments put forth by the Parties during oral hearings. On the basis of the same, the Commission outlines the following two issues for consideration and determination in the matter:

- (i) Whether the Opposite Parties had acted in a manner in contravention of the provisions of Section 3(3) of the Act in the tenders floated for procuring Hitachi Carbon Brushes by collusive bidding/bid rigging in terms of Section 3(3)(d) of the Act.
- (ii) In case the answer to the above issue is in the affirmative, who are the individuals/persons/officials of the Opposite Parties who are liable in terms of Section 48 of the Act?

28. Prior to analyzing the issues on merits, the Commission deems it appropriate to dispose of a preliminary objection raised by the OP-1 with regard to the time period of the cartel. In this regard, the Commission notes that the DG has divided the analysis into two time periods: (a) 2010 till November 2014 and (b) after November 2014 till 2019. The DG has examined the following e-mails in respect of the first time period, *i.e.*, 2010 till November 2014: (i) e-mail dated 20.12.2010 exchanged between Mr. Basak and other employees of OP-1; (ii) e-mails dated 03.11.2011: three e-mails exchanged between Mr. Krishna Kumar and Mr. Lokre, employees of OP-2; (iii) e-mails dated



सत्यमेव जयते



29.07.2013: two emails exchanged between Mr. Krishna Kumar and Mr. Lokre, employees of OP-2; (iv) e-mail dated 14.11.2014 exchanged between Mr. Rakesh Himatsingka and Mr. K K Bhattacharya, employees of OP-2, and (v) e-mail dated 20.11.2014 exchanged between Mr. K. K. Bhattacharya and Mr. P. H. Krishnakumar, employees of OP-2.

29. Based on the aforesaid internal communications amongst the OPs, the DG has concluded that the investigation could not find any evidence which establishes that there was any collusion between the OPs regarding the bids in Railway tenders during the period 2010 to November 2014. However, with regard to the time period after November 2014, the DG has concluded that OPs were indulging in anti-competitive practices in contravention of Section 3 from the year 2015 onwards.
30. OP-1, however, as noted earlier, has raised an objection regarding the purported *suo motu* investigation by the DG against the OPs for the time period after November 2014 till 2019, which were not specifically directed to be investigated in the *prima facie* order of the Commission. It was argued that the DG ought to have sought the approval of the Commission before proceeding with investigation for this period.
31. In this regard, at the outset, the Commission notes that while directing the DG to investigate into the matter, it has not circumscribed the period for investigation. It is neither feasible nor otherwise possible to order investigation into a specific time frame with any exactitude as at the stage of forming *prima facie* administrative opinion based on limited material, the Commission cannot predicate the extent of anti-competitive conduct, the duration thereof and the parties involved. It is rather presumptuous to delineate any perimeter for the purposes of investigation in cartel matters beforehand. No infirmity can be attributed to such a course which is in comport with the various judicial pronouncements, as detailed in the succeeding paras in this order.
32. The issue is no longer *res integra* and stands squarely covered by the decision of the Hon'ble Supreme Court of India in the case of *Excel Crop Care Limited v. Competition Commission of India* (2017) 8 SCC 47 which makes it abundantly clear that, while the initial complaint may be on a limited aspect, the DG can investigate other violations that emerged during the investigation of such a complaint. Further, one of the issues



सत्यमेव जयते



that arose in this case was whether the DG was barred from investigating the matter pertaining to the tender floated by the Food Corporation of India (FCI) in March 2011, which obviously did not form part of the Information submitted by FCI made on 04.02.2011. In this regard, it was observed in paragraph 45 of the order to the following effect as under:

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

33. Further, the Hon'ble Supreme Court in the aforesaid case held that the language of the order passed by the CCI was broad enough to enable the DG to look into “all the facts till the investigation was completed”, and, thus concluded that the DG was not prevented from examining any anti-competitive practice adopted by Excel Crop in the



सत्यमेव जयते



2011 tender as well, which was not part of Section 26(1) order passed by the Commission.

34. Further, in *Cadila Healthcare Limited v. Competition Commission of India* 2018 SSC OnLine Del 11229, in dismissing Cadila's Appeal, the Division Bench of the Hon'ble Delhi High Court, after analyzing the decision in *Competition Commission of India v. Steel Authority of India Limited (2010) 10 SCC 744* and *Excel Crop Care Limited v. Competition Commission of India (supra)*, held as under:

"Cadila's argument, that in Excel Crop Care the issue was inclusion of more than one instance or incident within the ambit of investigation (given that the complaint was in respect of one tender only) is distinguishable, is in this court's opinion, insubstantial and needs to be rejected. Its reliance on Grasim Industries, is no longer apt. At the stage when the CCI takes cognizance of information, based on a complaint, and requires investigation, it does not necessarily have complete information or facts relating to the pattern of behaviour that infects the marketplace. Its only window is the information given to it. Based on it, the DG is asked to look into the matter. During the course of that inquiry, based on that solitary complaint or information, facts leading to pervasive practises that amount to abuse of dominant position on the part of one or more individuals or entities might unfold. At this stage, the investigation is quasi inquisitorial, to the extent that the report given is inconclusive of the rights of the parties; however, to the extent that evidence is gathered, the material can be final. Neither is the DG's power limited by a remand or restricted to the matters that fall within the complaint and nothing else. Or else, the Excel Crop Care would not have explained the DG's powers in broad terms: (if other facts also get revealed and are brought to light, revealing that the 'persons' or 'enterprises' had entered into an agreement that is prohibited by Section 3 which had appreciable adverse effect on the competition, the DG would be well within his powers to include those as well in his report....If the investigation process is to be restricted in the manner projected by the Appellants, it would defeat the very purpose of the Act which is to prevent



सत्यमेव जयते



practices having appreciable adverse effect on the competition). The trigger for assumption of jurisdiction of the CCI is receipt of complaint or information, (when the Commission is of the opinion that there exists a prima facie case exists (per Section 26 (1)). The succeeding order is administrative (per SAIL); however, that order should disclose application of mind and should be reasoned (per SAIL). Up to this stage, with that enunciation of law, no doubt arguably Cadila could have said that absent a specific order as regards its role, by CCI, the DG could not have inquired into its conduct. However, with Excel Crop Care specifically dealing with the question of alleged "subject matter" expansion (in the absence of any specific order under Section 26(1)) and the Supreme Court clarifying that the subject matter included not only the one alleged, but other allied and unremunerated ones, involving others (i.e. third parties), the issue is no longer untouched; Cadila, in the opinion of this court, is precluded from stating that a specific order authorizing transactions by it, was a necessary condition for DG's inquiry into its conduct. This court is further reinforced in its conclusion in this regard by the express terms of the statute: Section 26 (1) talks of action by CCI directing the DG to inquire into "the matter". At this stage, there is no individual; the scope of inquiry is the tendency of market behaviour, of the kind frowned upon in Sections 3 and 4. The stage at which it CCI can call upon parties to react is when it receives a report from DG stating there is no material calling for action, it has to issue notice to the concerned parties (i.e. the complainant) before it proceeds to close the case (Sections 26 (5) and (6)). On the other hand, if the DG's report recommends otherwise, it is obliged to proceed and investigate further (Sections 26 (7) and (8)). Again Section 27 talks of different "parties" [enterprise or association of enterprises or person or association of persons]- per Section 27 (a)]. Likewise, the steps outlined in Section 26 are amplified in the procedure mandated by Regulation 20 and 21, which requires participation by "the parties" in the event a report after DG's inquiry, which is likely to result in an adverse order, under Sections 27-34 of the Act. Consequently, Cadila's argument that a specific order by



सत्यमेव जयते



CCI applying its mind into the role played by it was essential before the DG could have proceeded with the inquiry, is rejected." (emphasis Added)

35. It needs no reiteration that proceedings before the Commission are inquisitorial in nature and the remedies issued are *in rem*. In this statutory scheme and considering the dicta laid down by the constitutional courts, it is axiomatic that the DG need not be restricted to or hidebound by the specific facts or specific parties or time period stated in the Information/ Reference or the *prima facie* directions of the Commission.
36. In view of the above, no fault can be found with the DG investigating the conduct of the OPs for the time period after November 2014 till 2019 in respect of other tenders. The contention of OP-1 that the DG has expanded the scope of investigation is accordingly rejected.
37. Having disposed of the preliminary jurisdictional issue, the Commission proceeds to examine the matter on merits. In this regard, it is observed that the DG did not find evidence of cartelization in respect of the period between 2010 to 2014 and accordingly, the Commission proceeds to examine the conduct and the evidence collected by the DG in respect of the period post November 2014 till 2019 to ascertain as to whether the same fall foul of the provisions of the Act.
38. The instant Reference emanates out of the allegations made by the Informant against the OPs alleging bid rigging in the various tenders floated by Indian Railways for procurement of carbon brushes. It was alleged in the Reference that in the tenders floated by the Informant, OP-1 and OP-2 have rigged the bids in the impugned tenders. However, as noted, the investigation could not find conclusive evidence to suggest that OP-1 and OP-2 rigged the tendering process during the period up to November 2014. The DG, however, found evidence against OPs for the period post November 2014 till 2019.
39. To begin with, the Commission notes that OP-2 has not disputed any findings made by the DG in the investigation report and during the oral hearing also, reiterated that it had co-operated with the DG during the investigation and made vital disclosures which were the actual conclusions of the investigation report of the DG. In this backdrop, the



सत्यमेव जयते



Commission finds it appropriate to analyse the evidence collected during investigation by the DG against OP-1 and OP-2 and their respective individuals identified under Section 48 of the Act.

40. The Commission observes that OPs are two RDSO-certified sources for manufacturing and supplying *carbon brushes for Hitachi Traction Motor Type HS 15250A*. Carbon brush is one of the components used in the Hitachi Traction Motor Type HS 15250A, which acts as an electrical contact, conducts current between stationary wires and moving parts, most commonly in a rotating shaft of the traction motor. Brushes provide connection between rotating parts and external circuitry, and plays a major role in satisfactory commutation of DC machines. Hitachi Traction Motor Type HS 15250A was specially developed by Hitachi for the Indian Railways and used for the propulsion of locomotives or electric roadway vehicles and is an equipment used in an electric locomotive.
41. At this stage, it would be appropriate to consider the submissions of OP-1 that it was in discussions with OP-2 with respect to the Hitachi Carbon Brushes of *Indigenous Grade* whereas the instant reference is primarily about Carbon Brushes of Imported Grade. In this regard, the Commission notes that OP-1 had previously raised this issue of distinction between Imported Grade and Indigenous Grade before the DG also. During investigation, when the DG sought a clarification from the Informant about the status and distinction of *Hitachi Carbon Brushes of Imported Grade and Indigenous Grade*, the Informant replied that the Railways does not make any distinction of *Imported Grade vis-a-vis Indigenous Grade* in their tender documents. This remains unrebutted.
42. Further, the Commission observes that the Informant, *vide* a letter dated 04.03.2020, clarified that the description of Hitachi Carbon Brushes does not specifically mention as to whether the supply should be *Indigenous/Imported*. It has been stated that Hitachi Carbon Brushes have to be purchased from RDSO-approved sources only for the following three grades: EG105(S) (Imported & Indigenous Grade) of OP-2; EG9049 (Imported Grade) and EG8220 (Indigenous Grade) of OP-1. Moreover, OP-1 has neither refuted the aforesaid contention of the Informant nor placed any record to show



सत्यमेव जयते



that there exists a distinction between Imported Grade and Indigenous Grade Hitachi Carbon Brushes.

43. Now, the Commission proceeds to examine as to whether there was an agreement between the OPs to rig the bids in respect of the tenders floated by the Railways for procurement of Hitachi Carbon Brushes.
44. Before examining this issue, it is apposite to note that the definition of ‘agreement’ as given in Section 2(b) of the Act requires, *inter alia*, any arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings. The definition, being inclusive and not exhaustive, is a wide one. An understanding may be tacit and the definition under Section 2(b) of the Act covers even those situations where parties act on the basis of a nod or a wink. The Commission notes that the Act envisages civil liability. Thus, the standard of proof required to prove an understanding or an agreement would be on the basis of ‘preponderance of probabilities’ and not ‘beyond reasonable doubt’. There is rarely any direct evidence of action in concert and in such situations, the Commission has to determine whether those involved in such dealings had some form of understanding and were acting in cooperation with each other. In light of the definition of the term ‘agreement’, the Commission has to assess the evidence on the basis of benchmark of preponderance of probabilities.
45. Further, in terms of the provisions contained in Section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 3(2) of the Act declares that any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void. Further, by virtue of the presumption contained in sub-section (3), any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-
- (a) directly or indirectly determines purchase or sale prices; (b) limits or controls



सत्यमेव जयते



production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; or (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

46. As per the explanation appended to Sub-Section (3) of Section 3 of the Act, “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.
47. In case of agreements as listed in Section 3(3)(a) to (d) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition; the onus to rebut the presumption would lie upon the parties.
48. In the aforesaid statutory backdrop, the Commission proceeds to examine the evidence collected by the DG to assess whether there was an “agreement” between the OPs of the nature which is prohibited in terms of the provisions contain in Section 3(1) of the Act read with Section 3(3)(d) thereof.

WhatsApp Messages Exchanged Between OP-1 and OP-2

49. During the course of investigation, certain exchange of communication between Mr. V. I. Perumal, Managing Director (MD) of OP-1, and Mr. Rakesh Himatsingka, Chairman of OP-2, through WhatsApp were collected and analysed by the DG. The relevant WhatsApp chats were from 01.07.2016 till 08.11.2018. In the said chats, Mr. V. I. Perumal (OP-1) is often referred as ‘Perumal’ and Mr. Rakesh Himatsingka of OP-2 is often referred as ‘RH’ indicating the abbreviated form of their names respectively. It is further mentioned that, though the relevant product is Carbon Brushes for Hitachi Traction Motor Type HS 15250A, OPs, in their communications referred to them as ‘tender for Brushes’ or ‘Hitachi’ tenders.



सत्यमेव जयते



Message exchanged on 01 .07.2016 by OP-2

Dear Mr. Perumal. A quick message. Please whatsapp me as to what was our final understanding as regards the present DMW tender, especially which are the items where we wrongly quoted as a result of which we became L2. I'm presently in South Africa n very difficult to connect. Tried to call u earlier but ur no, was no reply. Thanks n Regards. RH.

Message replied on 01.07.2016 by OP-1

Dear Mr. Himatsingka, what value we got excess, we allow you to take in hitachi and 253 BX. When u r back, we can share the numbers. Regards, Perumal

Sorry, what excess we get, as we still not got.

Message sent on 01 .07.2016 by OP-2

Dear Mr. Perumal, I don't think I was able to clarify to you. What I'm talking about is the tender from DMW, Patiala for which you'd recall that our guys quoted wrongly. What was our final understanding for that, Thanks RH

Message replied on 01 .07.2016 by OP-1

Dear Mr Himatsingka, I am talking about same. Let us talk when you are back.

Regards, Perumal

Message exchanged on 28.03.2017 by OP-2

Hello Mr. Perumal, it's been ages since we corresponded or met. Expect alls well at your end.



As you'd have observed for the last Hitachi tender last week we quoted 2 prices, one for 17-18 n the other for 18 -19, whereas you quoted just one price?

Trow is tender for 55121 Hitachi. What do you propose. We are very short n wud like this.

Message replied on 29.03.2017 by OP-I

Dear Mr. Himatsinka, sorry for late response. We are having a holiday in Bangalore to day. Our Marketing Manager is not in India. We quoted similar to earlier for this tender. Will revert to you before next tender. Regards, Perumal.

Message exchanged on 23.04.2018 by OP-2

You may be aware that DMW has called us for negotiations tomorrow 24th. Their proposal is to accept last year's price, in which case they shall divide the Tender 50: 50. We are ok with this. Await your confirmation n

Message replied on 23.04.2018 by OP-1

It is okay. We agree to maintain last tender prices

50. Further, the Commission notes that the details of the discussion regarding the various tenders for the Carbon Brushes have been unearthed by the DG, and the same is reproduced below:

S. No	Tender	Date	Price by OP -1	Price by OP-2	WhatsApp
1.	40161138	27.07.16	331	332	"You can take NCR and EGOR at Rs. 321 and we Taje Rs 320 for WCR"



सत्यमेव जयते



2.	40162502	02.08.16	319.4	326	<i>WhatsApp: "No problem. Last u had mentioned that we should stay at 321 n u wud quote 318. Now we shall quote 326"</i>
3.	2161391	22.08.16	303	299	<i>WhatsApp: "Hello Mr. Perumal, Greetings from China. As you'd be aware t'row is EGOR tender for 2743 7 Hitachi. We'd like this n propose to quote 2991- for this year's supply n 321 for next year's. Hope this is ok with you. Rgds."</i>
4.	25161282	26.09.16	0	321	<i>WhatsApp: "Now that Rs. 321 price is 7 known thorough previous tenders, we will quote a price to be equal to your final price, (including taxes) and try for split. You may quote Rs.321. Regards, perumal"</i>
5.	6163456	29.03.17	320.47	321	<i>WhatsApp: "T'row is tender for Hitachi. What do you propose. We are very short n wud like this"</i>
6.	25164582	06.04.17	333	321	<i>WhatsApp: "Today's tender at SCR, we will quote high at Rs 333. U can quote lower than us."</i>



सत्यमेव जयते



					<i>Regards, Perumal</i>
7.	06173456	11.12.17	321	321	<i>WhatsApp: "This msg is in respect of Hitachi w Rly tender for 72,165 nos. This year we are short on orders. Already we are over Rs.90 Lakhs behind you and so we'd like this full quantity and need your support."</i>
8.	25181261A	08.11.18	346	348	<i>WhatsApp: "Dear Mr. Himatzingka, hitachi tender about 43 K is due on 8th Nov. we propose to quote Rs.346.-, You can quote+/- Rs 2. Regards Perumal</i>

51. The Commission observes that the relevant WhatsApp chats are from 01.07.2016 till 08.11.2018, and the analysis of the above exchanges between Managing Director of the OP-1 and Chairman of OP-2 since July 2016 leaves no scope for doubt that there is a clear exchange of thoughts and 'meeting of minds' to the extent of entering into an understanding and agreement between the two regarding the prices to be quoted and discussion regarding an increase in price before filing of bids across different tenders floated by the various Divisions of Indian Railways. This clearly exhibits the manipulation of the process of bidding and eliminating the process of competitive pricing by quoting prices and distribution of tenders among them.

E-mails Exchanged Between OP-1 and OP-2

52. The Commission further observes that, in addition to the above evidence displaying the exchange of communication between the OPs through WhatsApp, the DG also



सत्यमेव जयते



found e-mails exchanged between OP-1 and OP-2. The relevant excerpts of e-mails are reproduced below:

Email dated 10.05.2017 from Rakesh Himatsingka to V I Perumal

"Subject: Fwd: Proposal DMW Tender No 011820420 Due 23.05.2017 (10.05.2017).xlsx"

Dear Mr. Perumal,

As discussed please find attached the proposed distribution. As regards CB 21 RF, where we have proposed to be L I this year. We shall offer only 60 % of the quantity, so there is no confusion.

Regards, RH."

Email dated 11.05.2017 from V I Perumal (viperumal@ymail.com) —MD of Mersen (OP-1) to Rakesh Himatsingka, Chairman of OP-2

"Just to avoid any confusion, We will follow prices mentioned in "option" sheet, will be followed. You should get Rs, 4.27 Cr and we get Rs. 4.20 Cos. Modified prices are based on your proposal, and we get about Rs.50 lacs less. Please confirm."

On 11 May 2017, at 15:17, V I Perumal <viperumal@ymail.com> wrote:

Just to avoid any confusion we will follow prices mentioned in "option" sheet, will be followed. You should get Rs. 4.27 Cr. And we get Rs. 4.20 Cos.

Modified prices are based on your proposal, and we get about Rs. 50 lacs less. Please confirm.

V I perumal

viperumal@ymail.com



सत्यमेव जयते



Email dated 11.05.2017 from Rakesh Himatsingka to V I Perumal
(viperumal@ymail.com)

"I'm on board the flight. Shall look at the Options sheet and revert back tomorrow or within a day or two, as we have sufficient time.

Regards,

RH"

From: Rakesh Himatsingka

<rakesh.himatsingka@gmail.com>

Date 11 May 2017 at 19:04:07 GMT+5:30

To: V I PERUMAL <viperumal@ymail.com>

Subject: Re:work sheet

I'm on board the flight. Shall look at the options Sheet and revert back tomorrow or within a day or two, as we have sufficient time.

Regards,

RH."

53. A bare perusal of the above e-mails exchanged between OP-1 and OP-2, clearly indicates that both OPs discussed amongst themselves prospective bid prices to enable either the sharing of tenders between them based on split provisions or rotation of bids among themselves.
54. Moreover, vide a response dated 02.12.2020 before the DG, OP-1 had admitted that he had been communicating with OP-2. The relevant excerpt is reproduced below:

“(ii) Have you ever communicated by way of emails / WhatsApp/ Messages/ calls with any person of M/s Assam Carbon Pvt. Ltd. in regard to the railway tenders for Hitachi Carbon Brushes/ if yes, have you ever discussed prices to be quoted in the tender bids? If Yes, since when?”



सत्यमेव जयते



Ans....

However, there has been communication by way of whatsapp between me and Mr Rakesh Himatsingka of ACPL during the period between 2016 and 2018 on pricing for certain Railway tenders for supply of Hitachi Carbon Brushes ...”

55. Based on the above, the Commission notes that there is clear admission by OP-1 in its submission dated 02.12.2020 that it was communicating regarding prices with OP-2 with respect to the product in question.

E-mails Exchanged Between the employees of OP-2

56. Additionally, the Commission notes that there was an exchange between Mr. Rakesh Himatsingka, Chairman of OP-2, and Mr. Jayant Kumar of OP-2, wherein there is a clear conversation regarding the options and plans for quoting in the tender bids. The DG examined various e-mails which are as follows:

S. No.	Date	E-mail
1.	25.06.2015	e-mails between Mr. Jayant Kumar and Mr. Rakesh Himatsingka
2.	27.10.2015	Four e-mails between Mr. Rakesh Himatsingka and Mr. Jayant Kumar
3.	20.10.2016	An e-mail between Mr. Jayant Kumar and Mr. Rakesh Himatsingka
4.	21.10.2016	An e-mail between Mr. Rakesh Himatsingka and Mr. Jayant Kumar
5.	05.12.2016 & 06.12.2016	e-mails between Mr. Jayant Kumar and Mr. Rakesh Himatsingka
6.	27.03.2017	An e-mail between Mr. Jayant Kumar and Mr. Rakesh Himatsingka
7.	12.05.2017	Two e-mails between Mr. Rakesh Himatsingka and Mr. Jayant Kumar
8.	17.05.2017	An e-mail between Mr. Jayant Kumar and Mr. Rakesh Himatsingka



सत्यमेव जयते



9.	04.08.2017	An e-mail between Mr. Jayant Kumar and Mr. Rakesh Himatsingka
10.	05.08.2017	Two e-mails between Mr. Rakesh Himatsingka to Mr. Jayant Kumar
11.	11.09.2017	An e-mail between Mr. Jayant Kumar and Mr. Rakesh Himatsingka
12.	08.12.2017	An e-mail between Mr. Jayant Kumar and Mr. Rakesh Himatsingka
13.	09.12.2017	An e-mail between Mr. Jayant Kumar and Mr. Rakesh Himatsingka
14.	16.02.2018	An e-mail between Mr. Jayant Kumar and Mr. Rakesh Himatsingka

57. The Commission further notes that an analysis of the above emails indicates that there was an agreement between the OP-1 and OP-2 and this was communicated by the Chairman of OP-2 to its employee Mr. Jayant Kumar for the price to be quoted in the forthcoming tenders. The relevant excerpts of an e-mail dated 09.12.2017 exchanged between Mr. Jayant Kumar and Mr. Rakesh Himatsingka is reproduced below:

Email dated 09.12.2017 from Mr. Jayant Kumar to Mr. Rakesh Himatsingka

“Dear Sir,

Even if part qty from total qty shift in April' 18. We may approach the concern railway for prepornment and may supply in March' 18 end to meet forecast.

*Otherwise if both the party quote single price of Rs.333/- which is close to 3.7% increase may not be any issue or may ask supporting to justify the price, which we have documentary evident but may delayed the order finalization. **In my opinion for this tender we quote @ Rs321/- & M also quote the same then, WR may finalize the LOT/Order fast as this rate is already existing price. Next tender onward we quote Rs.333/-.***



Seek your advice.”

(emphasis added)

Emails exchanged between the employees of OP-1

58. The Commission also notes that the DG has found an e-mail dated 01.09.2017 which was exchanged between the employees of OP-1, regarding a meeting in Hyderabad to discuss about the prices in the bids. The same is noted below:

Email dated 01.09.2017 from Mr. Sanjeev Kumar to Mr. Vijaya Kanthu

“Subject: SK-29081 7-DS-ASSAM CARBON-HYDERABAD WITH MR. HEMANTH KUMAR Meeting with Mr. Jayanth Kumar of Assam Carbon-Hyderabad-along with Mr. Hemanth Kumar Date of Meeting: 29.08.2017.”

Discussion

We have informed him to check the price with us when they are quoting for a bid tender”

Statement of Mr. Vallakalilpe Perumal, Managing Director of OP-1

59. The Commission notes that Mr. Vallakalilpe Perumal, MD of OP-1, in his deposition before the DG on 04.07.2019 admitted that his company discussed with its competitor, *i.e.*, OP-2 and decided the prices to be quoted in certain tenders floated by the Railways so that both companies are able to share the quantity. Further, he also admitted that, broadly, there was an informal agreement on prices to be quoted with OP-2.

Statement of Mr. Debashish Basak, General Manager, OP-1

60. Based on the statements of Mr. Basak, the Commission observes that he has also confessed that his company, *i.e.*, OP-1, had quoted the rates after discussions with OP-2 in various Railway tenders since 2015. The relevant excerpt is reproduced below:



सत्यमेव जयते



“I would also like to disclose that my company had quoted the price after consulting with Assam Carbon in tender nos. 26141699-B opened on 07.07.2015, 26141699-C opened on 28.10.2015 and 26151699 opened on 16.04.2016.”

61. From the aforesaid statements, it has been clearly brought that there were exchanges between the OPs regarding price discussion.
62. The Commission notes that the DG had also found evidence in the nature of e-mails and messages, wherein the increase in price has been discussed and implemented by the OPs. The relevant excerpt of message exchanged on 26.07.2019 between Mr. V. I. Perumal, OP-1, and Mr Rakesh Himatsingka, OP-2, is reproduced below:

“Your giving current Prices, which are all of last tenders issued in the previous financial year is very helpful. If you compare the prices that we propose to quote as given by me in the last column you will see that excerpt for item 7 being CB 64 where the proposed price of Rs 421 is 10.8 % higher; otherwise it is between 4-6% only, and in fact for item no. 5 it is lower and we need to increase it.

We know need to discuss what we quote individually for each item as you mentioned about the other matter we need to take a call on who takes what so that the other party quotes at least 5-6% higher.

I'm free to talk once you've gone through this and formed your thoughts. Regards. RH”

...(emphasis added)

63. From the above, the Commission notes that OPs through concerted conduct increased the prices of Hitachi Carbon Brushes. In the given market condition where there are only two approved vendors for supply of the relevant product to the Railways, and if they collude and quote an inflated price, the Railways has no option but to procure the material at an inflated price and getting a competitive price is not possible. In the



सत्यमेव जयते



present case, it is abundantly clear that OPs manipulated the tender in such a way between themselves that it resulted in an increase in price as well as distribution of the tenders between them as per collusive arrangement.

64. The Commission is of the view that WhatsApp chats, e-mails, communications and the statements of individuals are direct evidence of the involvement of the Opposite Parties, and nothing can be more incriminating than these. OP-1 and OP-2 had discussed every detail of the tenders and the process to rig the bid. They had even discussed how they would be compensated if they did not win the previous or earlier tenders. Further, the Commission examined the statements given by the officials of OP-1 on 04.07.2019. In the opinion of the Commission, such admissions are sufficient to hold the Opposite Parties liable for contravention of the provisions of the Act.
65. In view of the above, taking into account all the aforesaid evidences collected by the DG, the Commission concludes that OP-1 and OP-2 had indulged in cartelization in the Hitachi Carbon Brushes market in India, at least from November 2014 till 2019, by means of co-ordinating bid response and manipulating the bidding process, which had an AAEC within India. The exchange of communication is direct evidence displaying the anti-competitive conduct of the OPs and sufficient to hold that OPs have contravened the provisions of Section 3(3)(d) of the Act. The Commission therefore, finds OP-1 and OP-2 to be in contravention of the provisions of Section 3(3)(d) read with Section 3(1) of the Act.
66. At this stage, it would be appropriate to consider the contention of the OPs that there was no Appreciable Adverse Effect on Competition (AAEC) in the market for Hitachi Carbon Brushes in India; and the Indian Railways, being a monopolistic buyer, unilaterally defines and controls the market through its procurement policies and procedures, and thus, the OPs do not have any control or say in the process.
67. In this regard, the Commission notes that the pleas are misdirected. Suffice to observe that from a bare reading of the provisions of Section 3 (1) of the Act, it is evident that these provisions not only proscribe the agreements which cause AAEC but the same also forbid the agreements which are *likely* to cause AAEC. Hence, the plea that there is no contravention of the provisions of the Act in the present matter because allegedly



सत्यमेव जयते



no AAEC has been caused as a result of the alleged cartel between the parties, is misdirected and untenable in the face of clear legislative intent whereby even the conduct which can potentially cause AAEC, is prohibited. Furthermore, once an agreement of the types specified under Section 3(3) of the Act is established, the same is presumed to have an AAEC within India. Therefore, it follows that once an 'agreement' of the types as specified in Section 3(3) of the Act, is shown to be established, the same falls within the presumptive rule of AAEC as provided thereunder. The parties, however, can rebut such statutory presumption in light of the factors provided under Section 19(3) of the Act.

68. Further, the parties have failed to show as to how their impugned conduct resulted into any accrual of benefits to consumers; improvements in production or distribution of goods or provision of services; or promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services, in terms of Section 19(3) of the Act. On a holistic evaluation of the replies filed by the parties in light of the factors enumerated in Section 19(3) of the Act, the Commission is satisfied that the parties have not been able to dislodge the statutory presumption by adducing cogent evidence, as required.
69. Once contravention by the Opposite Parties, which are companies, is established, the Commission now proceeds to analyse the conduct of the Opposite Parties' directors, officers, and employees who would be liable for such anti-competitive acts of the Opposite Parties in terms of Section 48 of the Act. As per the investigation report, the following persons; (i) *Mr. V. I. Perumal, Managing Director of OP-1, and Mr. Rakesh Himatsingka, Director of OP-2*, have been found to be liable under Section 48(1) and 48(2) of the Act by the DG.
70. Before the Commission, neither of the above individuals have been able to prove that the contravention committed by their respective companies was without their knowledge or that they had exercised all due diligence to prevent the commission of such contravention. The Commission notes that Mr. V. I. Perumal and Mr. Rakesh Himatsingka were actively communicating through multiple modes of communication as noted in this order.



सत्यमेव जयते



71. None of the above individuals has been able to rebut or deny before the Commission the specific roles played by them in the cartel for which the DG has gathered cogent evidences. Therefore, the Commission finds the aforesaid individuals of OP-1 and OP-2 liable in terms of the provisions of Section 48(1) as well as Section 48(2) of the Act.

ORDER

72. In view of the above analysis, the Commission holds OP-1 and OP-2 to have contravened the provisions of Section 3(1) of the Act read with Section 3(3)(d) thereof during the period from November 2014 to 2019, as detailed in this order.
73. Further, the Commission, in terms of Section 27(a) of the Act, directs OP-1 and OP-2 and their respective officials who have been held liable in terms of the provisions of Section 48 of the Act, to cease and desist in the future from indulging in practices which have been found in the present order to be in contravention of the provisions of the Act.
74. The Commission has bestowed its thoughtful consideration on the issue of imposition of penalty upon the OPs and respective officials keeping in view the market structure, nature of the firms, their relevant revenues & profits from supply of carbon brushes. In this regard, the Commission notes that both the OPs are medium enterprises and from the financials provided by the OPs, it appears that OP-2 was incurring losses from sale of carbon brushes during the financial years 2014-15 to 2018-19. OP-1 also appears to have suffered losses from supply of carbon brushes during some of the years. The Commission is also not oblivious to the fact that both the OPs have filed lesser penalty application and have acknowledged their conduct. The Commission is also conscious of the fact that the MSME sector in India is already under stress and bearing the impact of the economic situation arising from the outbreak of the pandemic (COVID-19). The Government of India has undertaken various measures to support the liquidity and credit needs of viable MSMEs to help them withstand the impact of economic shock. In such a situation, if any penalty were to be imposed on these firms, it may render these firms economically unviable and may even result in exit from the market, which would further reduce competition in a market already characterised by the presence of



सत्यमेव जयते



few players due to the policy of the Indian Railways to procure items from RDSO-approved vendors. Thus, considering the matter holistically, the Commission decides not to impose any monetary penalty on the OPs and their respective officials. Further, the Commission is of the considered opinion that the objectives of the Act would be met if the parties in the present matter cease such cartel behaviour and desist from indulging in similar behaviour in the future, as directed earlier.

75. The parties are, however, cautioned to ensure that their future conduct is strictly in accord with the provisions of the Act, failing which, any such future behaviour would be viewed seriously as constituting recidivism, with attendant consequences.
76. It is made clear that nothing contained in this order shall be deemed confidential, as the same has been used in the terms of provisions of Section 57 of the Act
77. The Secretary is directed to communicate with the Parties accordingly.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Sangeeta Verma)
Member

Sd/-
(Bhagwant Singh Bishnoi)
Member

Date: 01/11/2021

Place: New Delhi