



COMPETITION COMMISSION OF INDIA

Suo Moto Case No. 04 of 2013

In Re:

1. **M/s Sheth & Co.**
309, Centre Square, Andheri (West), Mumbai **Opposite Party No. 1**
2. **M/s Veekay Enterprises**
A/3 Ajanta, C. D. Barfivala Marg,
Andheri (West), Mumbai **Opposite Party No. 2**
3. **M/s Sai Trading**
R-913, T.T.C. Industrial Area, Thane **Opposite Party No. 3**
4. **M/s Sai Industries**
112/8, 'S' Block, M.I.D.C. Bhosari, Pune **Opposite Party No. 4**
5. **M/s Shree Polymers**
W-4 'S' Block, M.I.D.C. Bhosari, Pune **Opposite Party No. 5**
6. **M/s Sai Enterprises**
W-5, S Block M.I.D.C. Bhosari, Pune **Opposite Party No. 6**
7. **M/s Mac Polymer**
191/C, Aher Industrial Estate Station Road, Pune **Opposite Party No. 7**
8. **M/s Miltech Industrial Pvt. Ltd.**
M.I.D.C., Hingna, Nagpur **Opposite Party No. 8**



9. **M/s Nityanand Udyog**
6-A, M.I.D.C. Industrial Area,
Hingana Road, Nagpur **Opposite Party No. 9**
10. **M/s Interplas (India) Pvt. Ltd.**
16, Netaji Subhas Road, Kolkata **Opposite Party No. 10**
11. **M/s. Baijnath Plastic Products Pvt. Ltd.**
R-904, TTC Industrial Area, Thane **Opposite Party No. 11**
12. **M/s Narendra Explosive Ltd.**
59 Gandhi Road, Dehradun **Opposite Party No. 12**
13. **M/s Narendra & Company**
59 Gandhi Road, Dehradun **Opposite Party No. 13**

CORAM

Mr. Ashok Chawla
Chairperson

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member



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Appearances: Ms. Payel Chatterjee and Shri M.S. Ananth, Advocates for the Opposite Party No. 1 and the Opposite Party No. 2

Shri Anuj Puri, Advocate for the Opposite Party No. 3 and the Opposite Party No. 11

Shri Ankur Ved Tuli, Advocate for the Opposite Party No. 4

Shri Arjun Minocha, Advocate for the Opposite Party No. 5

Shri Deepak Biswas, Advocate for the Opposite Party No. 6

Shri Dhruv Gupta, Advocate for the Opposite Party No. 7

Shri Srijan Singh and Ms. Proma Mukhopadhyay, Advocates for the Opposite Party No. 8 and the Opposite Party No. 9

Shri Adiya Narain and Shri Arnav Narain, Advocates and Shri Rahul Mehrotra, G.M. for the Opposite Party No. 12

Shri Rahul Jain, Shri Adiya Narain and Shri Arnav Narain, Advocates for the Opposite Party No. 13

Order under Section 27 of the Competition Act, 2002

1. The present case relates to *suo-moto* cognizance taken by the Commission against allegations of suspected cartelization by thirteen manufacturers/ suppliers of 'CN container' *i.e.*, 'containers with disc required for 81 mm bomb' (hereinafter, the '**Product**') to the three ordnance factories namely, Ammunition Factory, Khadki,



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Pune (hereinafter, 'AFK'); Ordnance Factory Dehu Road, Pune (hereinafter, 'OFDR'); and Ordnance Factory, Chanda, Chandrapur, Maharashtra (hereinafter, 'OFCH'). The manufacturers/ suppliers which were suspected to be acting in a cartel like manner, are as under: -

- i) Sheth & Company (hereinafter **Opposite Party No. 1/ OP1**)
- ii) Veekay Enterprises (hereinafter **Opposite Party No. 2/ OP2**)
- iii) Sai Trading (hereinafter **Opposite Party No. 3/ OP3**)
- iv) Sai Industries (hereinafter **Opposite Party No. 4/ OP4**)
- v) Shree Polymers (hereinafter **Opposite Party No. 5/ OP5**)
- vi) Sai Enterprises (hereinafter **Opposite Party No. 6/ OP6**)
- vii) Mac Polymer (hereinafter **Opposite Party No. 7/ OP7**)
- viii) Miltech Industrial Pvt. Limited (hereinafter **Opposite Party No. 8/ OP8**)
- ix) Nityanand Udyog (hereinafter **Opposite Party No. 9/ OP9**)
- x) Interplas (India) Private Limited (hereinafter **Opposite Party No. 10/ OP10**)
- xi) M/s. Baijnath Plastic Products Private Limited (hereinafter **Opposite Party No. 11/OP11**)
- xii) Narendra Explosive Limited (hereinafter **Opposite Party No. 12/ OP12**)
- xiii) Narendra & Company (hereinafter **Opposite Party No. 13/ OP13**)

The above manufacturers/suppliers are hereinafter collectively referred to as the '**Opposite Parties**'.

Facts of the Case

2. The Commission took *suo-moto* cognizance in the present matter under section 19(1) of the Competition Act, 2002 (hereinafter, the '**Act**') on the basis of a report of the Comptroller and Auditor General (hereinafter, '**CAG**') on Defence Sector,



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i.e., report number 15 of 2010-2011, 'Chapter VI - Price Discovery Process for Procurement'.

3. Inquiry letters under section 36(4) of the Act were issued by the Commission to the ordnance factories, seeking factory wise and tender wise information. Information sought by the Commission was duly provided by all the three ordnance factories.
4. The tender wise information as supplied by the ordnance factories is briefly discussed hereunder:-

Ammunition Factory, Khadki

5. AFK replied that in response to tender enquiry at serial no. 1, order for the Product was placed on OP1, OP2, OP3, OP7, OP8, OP9 and OP10, @ Rs. 14.47 per set. For tender enquiry at serial no. 2, only one firm *i.e.*, OP11 was found to be eligible and after negotiations, the order was placed on it @ Rs. 9.50 per set. For tender enquiry at serial no. 3, OP12 quoted a rate of Rs. 9.50 per set and accordingly the order was placed on it. For tender enquiry at serial no. 4, the order was placed on OP12 @ Rs. 10.50 per set. AFK further informed the Commission that two enterprises OP1 and OP2 shared a common fax no. 022-26237710.

Ordnance Factory, Chanda

6. In response to the Commission's inquiry, OFCH replied that for tender enquiry at serial no. 1, two entities submitted bids. Both of them could not qualify in capacity verification and accordingly, the bid was not finalized. Another bid received from M/s Aurangabad Auto Ancillary Pvt. Ltd. was not opened. For tender enquiry at serial no. 2, OFCH replied that five out of ten Opposite Parties, *i.e.* OP1, OP3, OP5, OP7 and OP9 quoted identical rate of Rs. 14.47 per set. It



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was further brought to the notice of the Commission that OP3 and OP7 used the same Fax No. 022-26237710 which is also the same Fax No. used by OP1 and OP2 as has been mentioned in the reply of AFK. The tender enquiry at serial no. 2 was dropped as OP1, OP3, OP5, OP7 and OP9 did not accept the counter offer of Rs. 9.50 per set. Tender enquiry at serial no. 3 was re-tendered *vide* Tender No. 200900970 dated 17.02.2010 as five L1 parties *i.e.*, OP1, OP3, OP4, OP7 and OP8 refused to accept the lower counter offer. Tender enquiry at serial no. 4 was also re-tendered *vide* tender no. 201000039 dated 13.04.2010. For tender enquiry at serial no. 5, five out of eleven Opposite Parties had quoted identical rate Rs. 10.50 and the supply orders were placed on OP8, OP7 and OP1 in the ratio of 50:30:20 as per tender condition based on vendor rating.

Ordnance Factory, Dehu Road

7. As per OFDR, for tender enquiry at serial no. 1, six out of the eight Opposite Parties *i.e.*, OP1, OP2, OP3, OP7, OP8 and OP9 quoted identical rate of Rs. 14.47 per set. The contract was awarded to OP12 @ Rs. 9.50 per set for 50% of the tendered quantity *i.e.*, 9.2850 sets. Upon non-acceptance of counter offer @ Rs. 9.50 per set by OP1, OP2 and OP9, the quantity of supply order was increased to 185700 sets on OP12. OFDR further stated that two enterprises *i.e.*, OP1 and OP2 used common Fax No. 022-26237710. OFDR stated that tender enquiry at serial no. 2 was re-tendered *vide* TE2008000790. For tender enquiry at serial No. 3, the order was placed on OP12 for 50% of the tendered quantity *i.e.*, 187727 sets. Upon non-acceptance of counter offer @ Rs. 9.50 per set by OP8 and OP9, supply order quantity was increased to 375453 sets on OP12. For tender enquiry at serial no. 4, the order was placed on OP12 for 50% of the tendered quantity *i.e.*, 192925 sets. Upon non-acceptance of counter offer @ Rs. 10.50 per set by OP1, OP2 and OP9, supply order quantity was increased to 375453 sets on OP12. Against tender enquiry at serial no. 5, six Opposite Parties *i.e.* OP2, OP3, OP6, OP7, OP9, and OP12 had quoted identical rate of Rs. 14.47 per set. However, on negotiation,



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only OP12, revised its rate to Rs. 10.50 per set whereas the other firms refused to supply the Product at this rate. Accordingly, the entire order was placed on OP12.

8. From the information provided by the Ordnance factories, the Commission observed that even though the Opposite Parties were located at different places, some of them quoted identical prices in response to few tenders while others have refrained from participating in the tender process. Based on the above, the Commission was of the *prima facie* view that a cartel existed amongst the Opposite Parties for supply of CN Container to the three ordnance factories named above. Accordingly, *vide* its order dated 03.05.2013 under section 26(1) of the Act, the Commission directed the Director General (hereinafter, the 'DG') to investigate into the matter.

Investigation by the Director General

9. The DG has submitted its investigation report to the Commission on 07.08.2014. During the course of investigation, DG framed three issues in the present matter. These issues framed are: (i) whether the peculiar market conditions encouraged collusive action by the bidders; (ii) whether the bidders acted pursuant to an agreement to quote identical/ similar bid prices in contravention of the provisions of section 3(1) read with section 3(3) of the Act; and (iii) whether the bidders had also colluded to impose any quantity restrictions.
10. On the issue of market conditions, the DG has noted that only few sellers controlled the entire product market and there were no significant fluctuations in demand for the Product which was attributable to the fact that out of the 41 ordnance factories, only three factories engage in the production of 81 mm bomb. Further, these factories lacked the in-house capacity to produce 81 mm disc with container which is one of the essential raw materials required for producing 81 mm bomb. As such, the Product was procured from other sources.



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11. The DG has noted that the high installed capacities of the existing players discouraged the entry of new players into the market. Further, during the last 5-6 years, no new player except OP13 had entered into the market. Moreover, OP13 was found to be a group company of OP12. The DG also noted that out of above thirteen players, only eleven were supplying the Product. Further, the products manufactured by each of the Opposite Parties were homogeneous in nature, the reason being that the Product, which is an essential input for military hardware, can be used only if it meets the stipulated stringent specifications. Accordingly, the Product is to be manufactured in a manner that it matched the prescribed standards of fail safe performance of the end product.
12. The DG has placed reliance on the OECD guidelines and noted that the prevalent market conditions in the present case, which is small number of suppliers, little or no entry, stable demand conditions, identical products or services and few or no substitutes, *etc.*, indicate that the market is conducive to cartelization. The DG has also noted that supply of the Product is controlled by few entities operating under different names. Moreover on account of relatively low demand for the Product and the high installed capacities of the existing players, the market has not seen any significant new entrant(s) in the last few years and this fact has further insulated the existing players from any competitive pressure. Based on figures of supply orders, the DG has also highlighted that demand of the Product is not only limited but has also been stagnant since the last three years. During the financial years 2010-11, 2011-12 and 2012-13, the demand for the Product fluctuated in the narrow range of 6,00,000 to 7,80,000 units which clearly indicated the presence of a stable demand. Further, as there are no available substitutes of the Product, the probability of the bidders reaching an agreement on a common price is very high.
13. On the basis of tender wise information for years 2006 to 2013 supplied by the three ordnance factories, the DG has observed that price parallelism was evident from the bid prices quoted by the Opposite Parties. In relation to the tenders



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issued by each of the ordinance factories, price bids submitted by all the Opposite Parties were found to be either identical or with a very minor price variation.

14. Based on submissions of representatives of the Opposite Parties, DG has noted that pricing of the Product was not based on costing and expected profit margins. Though the source of procurement of raw material was the same for all the above manufacturers, the cost incurred by the Opposite Parties was not the same. The cost of 'CN sheet', a major raw material for manufacturing the Product, was found to vary in the price range of Rs. 4.00 to Rs. 7.60 for different Opposite Parties even though the CN sheet was procured by almost all the Opposite Parties from M/s Asha Celluloid. Based on the information collected from M/s Asha Celluloid w.r.t. the sale prices of the 'CN sheet' qua the Opposite Parties during 2006-07 to 2012-13, it was found that 'CN sheet' was sold to different Opposite Parties at different prices, ranging from Rs. 400/- kg to Rs. 1000/- kg. As such, the explanations offered by the Opposite Parties that their pricing was based on costing was not found to be satisfactory. The DG also noted that the Opposite Parties were closely related through common or related directors, thereby, making it conducive for them to engage in concerted action, by quoting identical/ similar prices in response to the ordinance factories' tenders.
15. The DG, however, did not find any evidence regarding any agreement imposing a restriction on the total or the maximum quantity to be supplied by the Opposite Parties in contravention of the provisions of section 3(1) read with sections 3(3)(b) of the Act.
16. On the basis of the above factors, DG has concluded that behaviour of all the Opposite Parties clearly indicated concerted action, intended to eliminate competition from the market. All the Opposite Parties failed to provide any plausible justification for quoting identical prices in every tender issued by the three ordinance factories from 2008 onwards. Accordingly, the DG has concluded



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that the Opposite Parties acted in contravention of the provisions of section 3(1) read with sections 3(3)(a) and 3(3)(d) of the Act.

17. In addition to the contraventions by the Opposite Parties, the DG identified thirty six persons as responsible for the anti-competitive conduct of the Opposite Parties and has proposed initiation of penalty proceedings against them under section 48 of the Act.
18. The Commission considered the investigation report of the DG in its ordinary meeting held on 21.08.14 and decided to forward an electronic copy of the investigation report to the all the Opposite Parties and their partners/ proprietors/ directors for filing their replies/ objections.

Replies/ objections/ submissions of the Opposite Parties

19. All the Opposite Parties have submitted their replies in response to the DG report with some common grounds as detailed in following paragraphs.
20. The Opposite Parties have submitted that the Commission has taken *suo moto* cognizance and initiated proceedings under provisions of the Act which came into force in 20.05.2009 and as such the Commission is precluded from taking cognizance of events/facts prior to the date on which relevant provisions of the Act came into force in May, 2009. Citing the Commission's orders dated 26.10.2010 in the matter of *Shri Pramod Kumar Arora vs. Newlook Retailers and Anr.* (Case No. 46/2010) and *S. K. Sharma vs. RNG* (Case No. RTPE 31/2008, decided in 2011), Opposite Parties submitted that there is no violation of the relevant provisions of the Act as the conduct of the Opposite Parties related to the period prior to the notification of the relevant provisions of the Act.



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21. The Opposite Parties submitted that DG has failed to establish, in unambiguous terms, any agreement between the Opposite Parties, duration of such agreement, when and how commercially sensitive information was allegedly exchanged between the Opposite Parties, the terms and conditions of the alleged agreement/ understanding, *etc.* DG has failed to establish any arrangement, understanding, communication, concerted action among the Opposite Parties. According to the Opposite Parties, the DG has also failed to establish that there was any form of communication or exchange between the Opposite Parties or that there was an element of mutuality amongst them. Quoting of similar prices was as a result of similar cost of production, similar profit margins and small scale nature of the industry. The Opposite parties contended that DG failed to take into account the fact that all three ordnance factories and ten Opposite Parties were located in State of Maharashtra and as such the taxes, labour costs, transportation costs of raw material and other relevant cost involved in the production of the Product were similar, which led to similarity of prices.
22. The Opposite Parties had also tried to justify their near same prices quoted by them by stating that in a small market dominated by few players, each enterprise will keep an eye on price quoted by its competitors in previous tenders. This, coupled with increase or decrease in production costs, will inevitably lead to quotations of similar prices in the coming tenders and this cannot be implied as concerted action for fixation of sale prices. Non-substitutability of the Product due to defined specifications cannot be held against them or indicate that they are secretly agreeing on a common price structure. The Opposite Parties argued that where the cost of production is similar, similar pricing cannot be a presumption in favour of existence of a cartel. Even if it is accepted for the sake of argument that economic factors such as price parallelism, identical pricing, few players existed, even then these factors are *per-se* insufficient to establish the existence of any alleged cartel in absence of any corroborative evidence.



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23. The Opposite Parties have also stated that few sellers dominate the industry and due to various economic reasons no new players have entered the market and that there is only one major supplier of raw materials. The DG has solely relied on similar/ mere identical pricing to establish his case and the evidences relied by DG are purely circumstantial in nature, neglecting the various economic and industry factors that have resulted in the alleged circumstances.
24. The Opposite Parties have submitted that there are significant checks and balances in the tender process and after invitation of tenders, final decision to award the tender is taken by the Tender Purchase Committee (“TPC”) in consonance with the OFB manual. Therefore, if the Opposite Parties were acting in connivance with each other, DG should have highlighted some kind of direct or indirect connection of the Opposite Parties with TPC. Various instances have occurred wherein ordinance factories have rejected bids of the Opposite Parties and negotiated the prices quoted by the Opposite Parties.
25. The Opposite Parties have submitted that existence of appreciable adverse effect on competition in India should not be presumed as there has been no barrier for new entrants. Non-entry of new players can be attributed to uncertain market size, significant and cumbersome processes of approval, and heavy costs involved in production. On the contrary, the Opposite Parties have argued that the consumers have been benefitted as the prices have remained constant over the past few years.
26. A reference has been made by the Opposite Parties to *M RTP Case: RTPE No. 20 of 2008 In Re: All India Tyre Dealers’ Association vs. Tyre Manufacturers*, wherein Commission observed that high concentration may provide a structural reasoning for collusive action resulting in parallelism (price or output), yet it is very important to differentiate between “rational” conscious parallelism arising out of the interdependence of the firms’ strategic choices and parallelism stemming from purely concerted action.



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27. The Opposite Parties have submitted that without ‘plus-factors’ a case of cartel like behaviour will not be made out. Reliance was placed on *In Re: Alleged cartelization by Steel Producers, 2014 Comp LR 145 (CCI)*, where the Commission was of the view that non competitive nature of a market does not imply an agreement and interdependent behavior of enterprises does not necessarily indicate collusive conduct. Without additional evidence *i.e.*, ‘plus factors’, such parallel behavior, is not enough to establish a violation. DG has failed to provide details of a single meeting between the Opposite Parties nor has given details of any coordination mechanism, which allegedly facilitated the cartel. Moreover, in the present case, there is no trade association where the Opposite Parties can discuss prices amongst themselves.
28. OP1 in its written submission filed on 01.12.2014 submitted that the DG has considered the fact that all the Opposite parties except OP10 to OP13 were located in close proximity to each other and on this basis it has been wrongly concluded that they formed a cartel. Mere close proximity of one entity with other does not amount to cartelization. OP8, in its written submission filed on 02.12.2014, submitted that a uniform process is followed by most of the players in the market and there is very little scope for improvisation. It was also submitted that all the Opposite Parties are also simultaneously engaged in other business activities which implies that ‘CN Container’ is a niche market with a few fixed set of manufacturers operating in the market. It has also submitted that demand has been increasing significantly over the years and there is scope for newer players to enter into the market. It has also argued that there are markets where few sellers/ producers operate yet such markets are highly competitive whereas there are markets where many sellers/ producers operate with less competition among the sellers/ producers.



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29. OP11 in its written submission dated on 23.01.2015 submitted that the DG in its investigation report has already noted that its operations have ceased since 2011 and its land and machinery have already been liquidated. Being a bankrupt firm, it prayed to the Commission to exempt from any fine regarding the alleged infraction. OP12, in its written submission filed on 27.10.2014, argued that the DG has investigated only 17 out of 29 tenders floated by the ordnance factories. It cited tender dated 30.09.2008 where the other Opposite Parties including itself have quoted extremely competitive rates. OP12 also submitted that considering the product specifications provided by ordnance factories and limited demand, there cannot be hundreds of players in the said market. Even after being approved for supply, the ordnance factories can reject the material of the supplier at any time, if the Product does not conform to the specifications. Lastly, Opposite Parties have contended that the DG report contains instances where the DG contradicts his own observations.

30. After a perusal of DG report, replies/ objections filed by the Opposite Parties and arguments advanced and materials available on record, Commission now proceeds to determine whether the Opposite Parties acted in pursuance of an agreement in contravention of section 3(3) read with section 3(1) of the Act.

Commission's Findings

31. At the outset, the Commission considers it necessary to state that the challenge against exercise of jurisdiction by the Commission, which has been raised by the Opposite Parties, deserves to be out rightly rejected. In the present case, The anti-competitive activities of the Opposite Parties *i.e.*, collusion of bid prices in violation of section 3(3)(a) and section 3(3)(d) of the Act have continued beyond the date of notification of the relevant provisions of the Act *i.e.*, May 2009 and as such the activities of the Opposite Parties are liable to be examined under the Act.



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32. The Opposite Parties have submitted identical/ similar price bids in response to tenders floated by the three ordinance factories from 2008 onwards. The bids submitted by the Opposite Parties demonstrated a peculiar bidding pattern - whilst majority of the bidders quoted same prices, only 2-3 of the bidders quoted prices which were slightly higher than the price bids submitted by the remaining. Analysis of the cost structures *i.e.*, (a) profit and loss statements showing the value of raw material purchased and other cost heads; and (b) price data obtained from Asha Celluloid (the sole supplier of CN sheets to Opposite Parties) shows variations in sale prices of this input/ raw material *qua* the Opposite Parties, shows that there were significant differences in the cost structures of the Opposite Parties, attributable to variations in the input procurement costs and labour costs.
33. As per provisions of 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 production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid



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rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

34. To invoke provisions of section 3 of the Act, existence of an ‘agreement’ is *sine qua non*. Section 2(b) of the Act provides a very wide definition of the term ‘agreement’ which includes any arrangement or understanding or action in concert and has not been restricted to documented and written agreements. Considering the remote possibility of availability of any direct evidence in cartel cases, the existence of an anti-competitive practice or agreement can be inferred from the conduct of the colluding parties. Such conduct may include a number of coincidences and indicia which, taken together and in absence of any plausible explanation, points towards the existence of a collusive agreement. In the light of the definition of the ‘agreement’, as noted *supra*, the Commission has to find sufficiency of circumstantial evidence on the benchmark of ‘preponderance of probabilities’. The Commission is of the view that in absence of any direct evidence of existence of an agreement in the present case, it is appropriate to infer the existence of an agreement on the basis of circumstantial evidence.

35. In the present case, the price bids submitted by the Opposite Parties to the tenders issued by the ordinance factories were either identical or similar with minor variations in a very narrow price band. The Opposite Parties have also admitted to their bid quotes being identical though they tried to justify their near same prices under the guise of production costs, taxes etc. The Commission notes that there is a noticeable difference in price at which the main raw material *i.e.*, CN sheet is being supplied by Asha Celluloid to different Opposite Parties and this rate has remained constant over the years. Further, the CN sheet constitutes a substantial portion of the overall cost of production for all the Opposite Parties varying between 50% to 80% and any variation in the per unit purchase price of CN sheet would not result in parallel prices, identical to the last paisa.



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36. The Commission takes note of the fact that the price collusion adopted by the Opposite Parties in the present case is very apparent. Even if we accept the contention of OP3 that it quoted a uniform price of Rs. 14.47 over the years as it procured CN sheet from Asha Celluloid @ Rs. 400 per unit, it remains unexplained as to why and how OP8 also quoted the same rate in various tenders (TE 2008000790 dated 12.03.2009, TE 200900002 dated 11.05.2009 and TE 2009000359 dated 11.10.2009) despite the fact that OP8 procured CN sheets @ Rs 850 per unit, which is much higher than procurement costs incurred by OP3. The Commission is also not convinced with the justification offered by Opposite Parties that the rates of their bids were based on the previous year's bids submitted by their competitors. In the present case, the typical market conditions *i.e.*, small number of manufacturers, geographical proximity, absence of new entrants, predictable and stable demand, standardized product, non-availability of substitutes etc. strongly indicates that the market is very conducive to collusion. Further, given the fact that Product is stringently standardized, there is hardly any opportunity for manufacturers to innovate on quality of the Product or offer better prices to compete for higher market shares.

37. Further, the Commission notes that the cross ownership of the few market players unequivocally points towards concerted action in the bidding process. The statements of the representatives of some of the Opposite Parties set out below show that the companies are closely related with common or related directors. From the statements of representatives of the Opposite Parties, it is clear that: (i) OP1 and OP2; (ii) OP4 and OP6; (iii) OP3 and OP11; (iv) OP8 and OP9; (v) OP12 and OP13 are either having common directors or having different members of the same family at the helm of affairs. This clearly indicates that out of the thirteen manufacturers *i.e.* Opposite Parties in the market, the modus operandi of at least ten of these firms is governed by the principles of mutual understanding and benefit. The Commission is convinced that common ownership of a large number of Opposite Parties coupled with the fact that a number of Opposite



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Parties quoted same rates indicates to a conclusion that the Opposite Parties acted pursuant to an anti-competitive agreement/ understanding to manipulate the bidding process in the present case. Moreover, the Opposite Parties have not produced even a single piece of evidence to show that their individual price bids were independently determined by them.

38. The law is well settled that price parallelism *per se* is not enough to establish an agreement in contravention of section 3 of the Act. However, in the present case, price parallelism coupled with peculiar market conditions like few enterprises with same owners, stringently standardized product, predictable demand, *etc.*, unequivocally establishes that the conduct of the Opposite Parties of quoting identical/ similar price bids was only due to collusive tactics adopted by them in violation of section 3(1) read with sections 3(3)(a) and section 3(3)(d) of the Act. The provisions of section 3(3) envisage that once ingredients of section 3(3) are established, there is no further need to determine the factors mentioned in section 19(3) of the Act as there is a presumption in the Act that such agreements cause appreciable adverse effects on competition. This presumption is a rebuttable presumption and the onus to prove that there are pro-competitive effects of such agreements which outweigh the anti-competitive effects shifts on the entities facing charges. In the present case, the Commission notes that the Opposite Parties have failed to provide any evidence, whatsoever, in order to rebut this presumption.

39. In the present case, the adverse effects of the agreement/understanding between the Opposite Parties are also clearly visible. The agreement between the Opposite Parties has not only resulted in creation of barriers to new entrants but has also foreclosed competition by hindering entry into the market. Only a handful of entities control the already limited market and make every possible attempt to share the bids amongst themselves. Moreover, during last 5-6 years, only one new firm, *i.e.*, the OP13, a group company of OP12 has entered the market.



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Additionally, the case records also indicate that at least one firm has been ousted from the market in the period between 2009 and 2013, thereby, indicating that the agreement may have also led to driving the existing competitors out of the market. The consumers in the present case are the three ordinance factories. The prices quoted by the bidders were artificially inflated as the contracts were awarded at downward negotiated prices. The Commission notes that, in the absence of any such an anti-competitive agreement, the bidders would have not only competed against each other (on price) but may have also undercut each other to secure the contract which would have resulted in lower prices for the consumers. Therefore, the consumers, *i.e.*, the three ordinance factories, have also been deprived of the benefits that could have accrued to them on account of the competitive bidding process.

40. The Commission rejects the justification of the Opposite Parties that the agreement between them has resulted in stabilization of prices. On the contrary, Opposite Parties have artificially inflated the prices at which the contracts were awarded to them and there is no evidence to show that the agreement amongst the Opposite Parties resulted in improvement in production or distribution of goods or promotion of scientific, technical and economic developments.
41. During the course of the investigation, the DG did not find any evidence regarding imposition of quantity restrictions by the Opposite Parties and contravention of section 3(3) (b) of the Act was ruled out. The Commission agrees with the DG's findings on this aspect and is of the view that Opposite Parties have not resorted to any practices that limit or control the production or supply of 'CN Container' in violation of section 3(3)(b) of the Act.
42. Based on the analysis recorded above, the Commission is of the view that the Opposite Parties have engaged in the practices of determination of purchase price of 'CN Container' and collusive bidding in contravention of the provisions of



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sections 3(3)(a) and 3(3)(d) read with section 3(1) of the Act. In view of the above discussions, the Commission holds that the Opposite Parties have acted in contravention of the provisions of sections 3(3)(a) and section 3(3)(d) read with section 3(1) of the Act.

Order

43. Accordingly, the Commission directs the Opposite Parties to cease and desist from the practices that have been found to be anti-competitive *i.e.*, price fixing and collusive bidding.
44. In accordance with the provisions of section 27(b) of the Act, the Commission *inter alia* may impose such penalty upon the contravening parties, as it may deem fit which shall either be not more than ten per cent of the average of the turnover for the last three preceding financial years, or be upto three times of the profit or ten per cent of the turnover for each year of the continuance of such agreement, whichever is higher, upon each of such person or enterprises which are parties to such agreements.
45. Having regard to all the aggravating and the mitigating factors that may be available to the parties, the Commission notes that the quantum of penalties should commensurate with the extent of violations. Considering the totality of facts and circumstances of the present case including the nature of the product procured, total volume of tender, involvement of small scale units, irregular requirement of product, single source of raw material, and revenues generated from the product under consideration, the Commission decides to impose a penalty on the Opposite Parties @ 3% of their turnover, starting from financial year 2010-11 based on financial statements filed by them. The amount of penalty on each of the Opposite Parties is calculated in the following table:



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S. No	Name of the Party	Turnover (sales) in Year ended on 31.03.2011 (In Rs.)	Turnover (sales) in Year ended on 31.03.2012 (In Rs.)	Turnover (sales) in Year ended on 31.03.2013 (In Rs.)	Average Turnover (In Rs.)	3% of Average Turnover (In Rs.)
1.	M/s Sheth & Co	17,46,00,000	18,06,00,000	21,47,00,000	18,99,66,667	56,99,000
2.	M/s Veekay Enterprises	27,30,000	29,09,000	98,64,000	51,67,667	1,55,030
3.	M/s Sai Trading	1,56,83,659	2,19,22,395	1,23,36,688	1,66,47,581	4,99,427
4.	M/s Sai Industries	--	1,73,12,340	2,32,70,316	2,02,91,328	6,08,740
5.	M/s Shree Polymers	--	35,79,663	40,49,987	38,14,825	1,14,445
6.	M/s Sai Enterprises	--	59,42,671	29,78,388	44,60,530	1,33,816
7.	M/s Mac Polymer	51,25,517	83,84,191	27,53,768	54,21,159	1,62,635
8.	M/s Miltech Industrial Pvt. Ltd.	66,16,46,992	67,96,83,541	74,82,15,275	69,65,15,269	2,08,95,458
9.	M/s Nityanand Udyog	4,77,18,185	6,10,48,437	3,49,12,608	4,78,93,077	14,36,792
10.	M/s Interplas (India) Pvt. Ltd.	1,75,106	1,74,888	1,67,800	1,72,598	5,178
11.	M/s Baijnath Plastics Products					



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	Pvt. Ltd.					
12.	M/s Narendra Explosive	1,27,00,172	2,40,47,037	39,58,756	1,35,68,655	4,07,060
13.	M/s Narendra & Company	1,57,65,220	16,16,068	Not Legible in the financial statement submitted	86,90,644	2,60,719

46. Accordingly, the Commission imposes the following penalties on the Opposite Parties:

- i) OP1 - Rs. 56,99,000/- (Rupees Fifty Six Lakhs Ninety Nine Thousand)
- ii) OP2 - Rs. 1,55,030/- (Rupees One Lakh Fifty Five Thousand Thirty)
- iii) OP3 - Rs. 4,99,427/- (Rupees Four Lakhs Ninety Nine Thousand Four Hundred Twenty Seven)
- iv) OP4 - Rs. 6,08,740/- (Rupees Six Lakhs Eight Thousand Seven Hundred Forty)
- v) OP5 - Rs. 1,14,445/- (Rupees One Lakh Fourteen Thousand Four Hundred Forty Five)
- vi) OP6 - Rs. 1,33,816/- (Rupees One Lakh Thirty Three Thousand Eight Hundred Sixteen)
- vii) OP7 - Rs. 1,62,635/- (Rupees One Lakh Sixty Two Thousand Six Hundred Thirty Five)
- viii) OP8 - Rs. 2,08,95,458/- (Rupees Two Crore Eight Lakhs Ninety Five Thousand Four Hundred Fifty Eight)
- ix) OP9 - Rs. 14,36,792/- (Rupees Fourteen Lakhs Thirty Six Thousand Seven Hundred Ninety Two)
- x) OP10 - Rs. 5,178/- (Rupees Five Thousand One Hundred Seventy Eight)
- xi) OP12 - Rs. 4,07,060/- (Rupees Four Lakhs Seven Thousand Sixty)



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xii) OP13 - Rs. 2,60,719 (Rupees Two Lakhs Sixty Thousand Seven Hundred Nineteen)

47. It may be noted that as per the available record OP4 to OP6 have not submitted their financial statement for the financial year 2010-11 and the turnover figure of the OP13 for the financial year 2012-13 is not legible from the financial statement submitted. Hence, penalty amount of OP4 to OP6 is calculated as 3% of the average turnover of the financial years 2011-12 and 2012-13 and the penalty amount of the OP13 is calculated as 3% of the average turnover of the financial years 2010-11 and 2011-12.

48. The Commission also notes that OP11 has ceased operations since 2011 on account of the expiry of its license to supply 'CN Containers' to the ordinance factories. Further, the Commission notes that the OP11 is now a bankrupt entity and all its assets, including, land and machinery have been liquidated. Accordingly, in view of the peculiar circumstances, the Commission decides not to impose any penalty on OP11.

49. The Commission also directs that the penalty shall be paid by the Opposite Parties for the afore-mentioned anti-competitive conduct of the Opposite Parties within 60 days from the date of receipt of copy of this order.

50. So far as the individual liability of the office-bearers of the Opposite Parties in terms of the provisions of section 48 of the Act is concerned, it may be noted that the DG has identified persons who were in-charge and responsible for the business operations of the Opposite Parties during the time when the above mentioned anti-competitive conduct was undertaken. The Commission has forwarded copies of the DG's Report to the parties including the identified officials for filing their respective replies/ objections. The Commission has also directed them to file their income statements/ income tax returns of the last three



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financial years. However, the Commission decides to pass an order separately in this regard after the proceedings are completed in respect of the persons so identified.

51. The Secretary is directed to send a copy of this order to the concerned parties for compliance immediately.

Sd/-

(Ashok Chawla)

Chairperson

Sd/-

(S. L. Bunker)

Member

Sd/-

(Sudhir Mital)

Member

Sd/-

(Augustine Peter)

Member

Sd/-

(U. C. Nahta)

Member

New Delhi

Date: 10-06-2015