NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Competition Appeal (AT) No. 38 of 2022 &
I.A. Nos. 3017, 3018 of 2022

IN THE MATTER OF:

M/s Yash Solutions
Through its AR Mr. Praveen Kumar Agarwal
Having registered office at 70, Prakash
Bhawan Sahukara,
Bajaria, MotiLal,
Bareilly-243001
Email ID: ceo.yopl@gmail.com **...Appellant No. 1**
Mob: +91 9837530066

M/s Chaitanya Business Outsourcing Pvt. Ltd.
Through its AR Mr. Nitish Agarwal
Having registered office at 70, Prakash
Bhawan Sahukara, Bajaria, MotiLal,
Bareilly-243001
Email ID: cb.outsoutcing@gmail.com **...Appellant No. 2**
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Mr. Praveen Kumar Agarwal
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Bareilly-243001
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Mr. Nitish Agarwal
Kesar Singh Farm Road,
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Versus

Competition Commission of India
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Cont'd.../

Present

For Appellants : **Mr. Prashant Mehta & Ms. Prachi Kohli, Advocates.**

For Respondent : **Mr. Vaibhav Gaggar, Mr. Mrityunjay Manchanda, Mr. Prerak Khurana, Ms. Aditi Sinha, Ms. Kokila Kumar, Advocates for R-1/CCI.**
Ms. Monica Lakhanpal Gaggar, Advocate for CCI.

J U D G E M E N T

(22nd August, 2024)

INDEVAR PANDEY, MEMBER (TECHNICAL)

This appeal arises out of final order and judgment passed by the Competition Commission of India (Commission) on 04.04.2022 under Section 27 of the Competition Act, 2002 (hereinafter called the Act,) wherein the Commission held that the appellants had contravened Sections 3 (3) (c) and 3 (3) (d) r/w Section 3 (1) of the Act. The appeal has been filed under Section 53 (b) of the Act challenging the impugned order of the Commission.

Brief facts of the case

2. The Commission received a general complaint dated 07.08.2018 alleging bid-rigging in tenders invited by the Department of Agriculture, Government of Uttar Pradesh for soil sample testing. The complaint pertains to alleged bid-rigging in respect of two e-tenders namely, Tender 2018_AGRUP_210583_1 (Moradabad) dated 31.05.2018 ("Tender No. 1") and Tender 2018_AGRUP_212591_1 (Bareilly) dated 18.06.2018 ('Tender No. 2"), invited for the soil sample testing by the Department of Agriculture, Government of Uttar Pradesh.

3. It was stated in the complaint that the following parties participated in the aforesaid two tenders of soil testing in Uttar Pradesh:

(i) M/s Yash Solutions
(ii) M/s Satish Kumar Agarwal
(iii) M/s Siddhi Vinayak and Sons
(iv) M/s Saraswati Sales Corporation
(v) M/s Lab Traders
(vi) Edward Food Research and Analysis Centre Limited
(vii) Atharva Laboratories Pvt. Ltd.
(viii) M/s Newgen Computers
(ix) Austere System Pvt. Ltd.

4. It was alleged in the complaint that the following participating bidders acted in a concerted manner in respect of Tender No. 1 and Tender No.2 and resorted to bid-rigging in contravention of provisions of Section 3 (1) read with Section 3 (3) (d) of the Competition Act 2022 ('Act'):

(i) M/s Yash Solutions, Bareilly (Unit of Yash Ornaments Pvt. Ltd.) ("Yash Solutions"/OP-1)
(ii) M/s Satish Kumar Agarwal, Bareilly ("M/s Satish Kumar"/OP-2)
(iii) M/s Siddhi Vinayak & Sons, Bareilly ("M/s Siddhi Vinayak"/OP-3)
(iv) M/s Saraswati Sales Corporation, Bareilly ("M/s Saraswati Sales"/OP-4)
(v) Austere System Pvt. Ltd., New Delhi ("Austere Systems"/OP-5)

5. It was further alleged that there were numerous red flags in the documents submitted by the aforesaid entities for Tender No. 1 and Tender No. 2, but the tender inviting authorities preferred to ignore these aspects. M/s Yash Solutions emerged as the successful bidder for the award of work for Tender No. 1 and Tender No.2 for the regions Moradabad and

Bareilly, respectively, in the year 2018-19. It was also stated in the complaint, that in the previous year, i.e., 2017-18, M/s Yash Solutions was awarded tender for soil testing for the regions of Bareilly and Moradabad, and Austere Systems was awarded tenders for the regions of Jhansi, Saharanpur and Meerut as a result of such collusive bidding. It was alleged in the complaint that the entities referred above, rigged the tenders of soil testing in the state of Uttar Pradesh by indulging in cover bidding, bid rotation and collusive bidding.

6. The commission considered the complaint and obtained documents like audit report, experience certificates and term deposit receipts submitted by relevant parties. Based on the analysis of records the commission was of the prima facie view that despite being competitors, these entities appear to have manipulated the process of bidding in the soil testing tenders in state of UP by indulging in bid-rigging, in contravention of provisions of Section 3 (1) r/w Section 3 (3) (d) of the Act. Accordingly, the commission passed an order dated 30.01.2020 under Section 26 (1) of the Act directing the Director General (DG) to cause an investigation and submit the investigation report in the matter. The commission also observed that if the DG came across anti-competitive conduct of any other entity in addition to those mentioned in the information in the information, the DG would be at a liberty to investigate the same. The DG was also directed to investigate the role of the persons/officers who were in charge of and responsible for the conduct of the businesses of the parties at the time the alleged contravention was committed, as well as persons/officers

with whose consent or connivance the alleged contravention was committed, in terms of the provisions of section 48 of the Act. The DG, pursuant to the directions of the Commission, investigated the matter, and after seeking due extensions of time, submitted the investigation Report dated 08.04.2021.

7. The relevant findings of the investigation report relating to the appellant's role are the following:

(i) Investigation covered 9 tenders namely, tenders of (a) 2017 and 2018 for Moradabad division, (b) 2017 and 2018 for Bareilly division, (c) 2017 for Jhansi division, (d) 2018 for Saharanpur division, (e) 2017 and 2018 for Meerut division, and (f) 2018 for Aligarh division.

(ii) As per the records submitted by the Department of Agriculture, Government of Uttar Pradesh, during the year 2017-18, the contract for soil testing work was awarded to M/s Yash solutions on L-1 basis for Moradabad and Bareilly divisions, whereas the contract for Jhansi and Meerut divisions was awarded to Austere Systems.

(iii) For the year 2018-19, the contract for soil testing work was awarded again to M/s Yash Solutions for Moradabad, Bareilly and Aligarh divisions. With respect to Saharanpur and Meerut Divisions, the contract was awarded to Austere Systems.

(iv) The investigation revealed that M/s Yash Solutions, M/s Satish Kumar, M/s Siddhi Vinayak, M/s Saraswati Sales and Austere Systems (the Opposite Parties as identified by the Commission at *prima facie* stage) as well as other parties/bidders, namely, Delicacy Continental Private Limited ("Delicacy Continental"), Fimo Info Solutions Pvt. Ltd. ("Fimo Info Solutions"), M/s Toyfort and M/s Chaitanya Business Outsourcing Pvt. Ltd. ("Chaitanya Business Outsourcing") indulged in cartelisation and bid-rigging in the 2017 and 2018 tenders pertaining to soil testing work issued by various divisions of the Department of Agriculture, Government of Uttar Pradesh.

(v) The investigation also brought out that M/s Yash Solutions, in collusion with M/s Satish Kumar, M/s Siddhi Vinayak, M/s Saraswati Sales and M/s Chaitanya Business Outsourcing, had rigged the bids and emerged as L-1 in soil testing tenders floated by the Department of Agriculture, Government of Uttar Pradesh, in Bareilly and Moradabad divisions in 2017 and Bareilly, Moradabad and Aligarh division in 2018.

(vi) Austere Systems in collusion with M/s Yash Solutions, Delicacy Continental, M/s Toyfort and Fimo Info Solutions, had rigged bids and emerged as the L-1 bidder in soil testing tenders floated by the Department of Agriculture, Government of Uttar Pradesh in Meerut and Jhansi divisions in the year 2017 as well as Saharanpur and Meerut division tenders in the year 2018.

(vii) The investigation also brought out that Delicacy Continental, Fimo Info Solutions, M/s Toyfort and M/s Chaitanya Business Outsourcing be added as Opposite Parties in the matter.

(viii) With respect to M/s Satish Kumar and M/s Siddhi Vinayak, the investigation brought out that the said entities are sister concerns. Both entities are proprietorship concerns owned by Mr. Satish Kumar Agarwal and are engaged in the business of supplying vegetables and fruits. Both entities had bid for 2017 and 2018 soil testing tenders despite having no prior experience of soil testing. Further, the said entities did not have any soil testing machine. M/s Satish Kumar and M/s Saraswati Sales, in collusion with M/s Yash Solutions, used fake documents provided by M/s Yash Solutions to become eligible and submit cover bids to support the bid of M/s Yash Solutions. Both the entities were blacklisted by the Department of Agriculture, Government of Uttar Pradesh for two years in relation to the lack of authenticity of the documents submitted along with bids for soil testing tenders. However, the said decision was not appealed by the proprietor of the said entities.

(ix) With respect to M/s Saraswati Sales, the investigation revealed that M/s Saraswati Sales, a proprietorship concern, was engaged in the business of electrical contract work for various agencies and had submitted bids in the soil testing tenders in the year 2018 for the Bareilly, Moradabad and Aligarh divisions, even though the proprietorship concern neither had prior soil testing experience nor any infrastructure for conducting soil testing. The investigation also brought out that M/s Saraswati Sales, in collusion with M/s Yash

Solutions, submitted cover bids using fake documents provided by M/s Yash Solutions.

(x) The investigation also brought out that a common IP address was used for the submission of e-bids in respect of M/s Satish Kumar, M/s Siddhi Vinayak, M/s Saraswati Sales and M/s Yash Solutions in the Moradabad tenders for the year 2018 Further, in the Bareilly tenders for the year 2018, the bids submitted by M/s Siddhi Vinayak, M/s Satish Kumar and Yash Solutions were submitted through a common IP address. The login ID used by M/s Siddhi Vinayak to submit the bids in the Bareilly and Moradabad tenders for the year 2018 also belonged to M/s Yash Solutions.

(xi) The investigation also revealed that Chaitanya Business Outsourcing, a group company of M/s Yash Solutions, had also submitted cover bids in collusion with M/s Yash Solutions in the Bareilly soil testing tenders for the year 2017.

(xii) M/s Yash Solutions, having no prior experience of soil testing work, had submitted its bids, for various divisions and was awarded tenders in the Bareilly and Moradabad divisions in the year 2017 and Moradabad and Aligarh Divisions in the year 2018. The investigation concluded that M/s Yash Solutions, in collusion with M/s Satish Kumar, M/s Siddhi Vinayak, M/s Saraswati Sales and Chaitanya Business Outsourcing, had rigged the bids in the years 2017 and 2018 issued by various divisions of the Department of Agriculture, Government of Uttar Pradesh.

(xiii) It was also revealed in the investigation that M/s Yash Solutions and Austere Systems, through an understanding/arrangement, had geographically allocated the divisions for soil testing tenders and either deliberately avoided bidding or submitted supporting bid documents in each other's regions/areas.

(xiv) The investigation found M/s Yash Solutions, M/s Satish Kumar, M/s Siddhi Vinayak, M/s Saraswati Sales, Austere Systems, Delicacy Continental, Fimo Info Solutions, M/s Toyfort and Chaitanya Business Outsourcing to be in contravention of provisions of Section 3(3)(c) and 3(3)(d) read with Section 3(1) of the Act.

(xv) The investigation also identified individual officials/officers of the Opposite Parties who are found to be responsible under Section 48 of the Act:

(a) Mr. Naresh Kumar Sharma, Proprietor, M/s Saraswati Sales;

(b) Mr. Satish Kumar Agarwal, Sole Proprietor, M/s Satish Kumar and de facto owner of M/s Siddhi Vinayak;

(c) Mr. Praveen Kumar Agarwal, Managing Director, Yash Solutions;

(d) Mr. Nitish Agarwal, Director, Chaitanya Business Outsourcing;

(e) Mr. Ankur Kumar, Director, Delicacy Continental;

(f) Mr. Jai Kumar Gupta, Director, Fimo Info Solutions;

(g) Mr. Suresh Kumar Gupta, Proprietor, M/s Toyfort; and

(h) Mr. Rahul Gajanan Teni, Director, Austere Systems

8. The commission considered the investigation report of the DG in its meeting on 08.06.2021 and noted the findings that M/s Yash Solutions,

M/s Satish Kumar, M/s Siddhi Vinayak, M/s Saraswati Sales and Austere System along with other entities namely, M/s Delicacy Continental, Fimo Infosolutions, M/s Toyfort and M/s Chaitanya Business Outsourcing indulged in cartelisation and bid rigging in the soil testing tenders floated by Government of U.P.

9. Thereafter, commission decided to add M/s Delicacy Continental, Fimo Info solutions, M/s Toyfort and M/s Chaitanya Business Outsourcing as parties to the proceedings and they were arrayed as Opposite Party (OP) Nos. 6, 7, 8 & 9 respectively. The commission, thereafter forwarded a copy of investigation report in electronic form to all the 9 OPs mentioned above and the persons/ individuals of the opposite parties identified by the DG as being responsible under Section 48 of the Act for filing their respective objections/ suggestions thereto latest by 16.07.2021. The Commission also directed the Opposite Parties to furnish copies of their audited balance sheets and profit & loss accounts/turnover for the last three financial years, i.e., 2018-19, 2019-20 and 2020-21 latest by 16.07.2021. The persons/individuals named above were also directed to file their income details including copies of the income tax returns for the last 3 financial years, i.e., 2018-19, 2019-20 and 2020-21. The Commission further decided to hear the parties on the Investigation Report on 05.08.2021, which was later deferred to 16.12.2021 on the request of parties.

10. In its objections, M/s Yash Solutions stated that it has never indulged in acts of bid- rigging/ cartelisation in any manner whatsoever in relation to soil testing tenders of Moradabad, Bareilly and Aligarh divisions

invited in 2017 and 2018 by the Government of Uttar Pradesh M/s Yash Solutions submitted that it is an MSME with modest operations and meagre turnover.

11. M/s Yash Solutions has averred that the Department of Agriculture, Government of Uttar Pradesh cancelled tenders of 2018 awarded to it in relation to Bareilly, Moradabad and Aligarh divisions and blacklisted it vide its order dated 08.10.2018, due to similar complaints from other non-successful bidders, namely, EFRAC, which was quashed by the Hon'ble Allahabad High Court vide its order dated 22.05.2019. It has mainly averred that it was declared L-1 in only three out of five tenders floated by the Department of Agriculture, Government of Uttar Pradesh as it had offered the lowest price amongst all other bidders. It has averred that it had neither fixed the price by manipulation of bids of participants nor fixed the quantity to be supplied by the participants by forming a cartel as alleged. It has contended that the DG has wrongly found that M/s Yash Solutions was responsible for rigging the soil testing tenders as floated by the UP government.

12. It has submitted that in the 2017 Bareilly tenders, none of the other Opposite Parties except Chaitanya Business Outsourcing, which is its sister concern, had participated, and filing of bids by both these companies, though related to each other, did not amount to bid-rigging as there was no condition in the tender that related parties could not file bids in their respective names. It further avers that its sister concern, Chaitanya Business Outsourcing did not participate in any of the tenders

after the 2017 Bareilly tender. In so far as the 2017 Moradabad tenders are concerned, it is submitted that, apart from M/s Yash Solutions, M/s Satish Kumar and M/s Siddhi Vinayak and certain other bidders had participated, however, the said tender was awarded to it for being the L-1 bidder and that there was no reason for M/s Yash Solutions to collude with other bidders, it being the bidder offering the lowest quote.

13. In relation to 2018 Moradabad, Bareilly and Aligarh tenders, M/s Yash Solutions had submitted that those tenders were awarded to it for being the L-1 bidder and that, in relation to the Bareilly and Moradabad tenders, bidders other than the present Opposite Parties had also participated

14. It has also been submitted that the invoices of M/s Yash Solutions which were submitted by it for 2017 Bareilly and Moradabad Tenders were misused by M/s Satish Kumar, M/s Siddhi Vinayak and M/s Saraswati Sales in 2018 tenders, without its consent and knowledge. It has also been submitted that M/s Yash Solutions never issued any experience certificates to M/s Satish Kumar, M/s Siddhi Vinayak and M/s Saraswati Sales and that the same were procured and misused by them without their authorisation and knowledge.

15. In relation to the same IP address, M/s Yash Solutions averred that there is no evidence on record to show that the IP address belonged to Yash Solutions or to any of the other Opposite Parties. As for the evidence in the form of CDR indicating telephonic conversations between M/s Yash Solutions and other Opposite Parties, namely, M/s Satish Kumar,

M/s Siddhi Vinayak and M/s Saraswati Sales, it has been submitted that they do not bear relevance for not being within the relevant.

16. On the issue of higher bid quotes for Meerut and Saharanpur, M/s Yash Solutions had submitted that they were higher owing to certain logistical reasons.

17. On the issue of penalty, it has been submitted that, in light of the decision of the Apex Court in the case of *Excel Crop Care Limited vs CCI and others (2017) 8 SCC 47.* wherein it was held that "turnover' for the purpose of Section 27(b) is the 'relevant turnover of a company which relates to the product in question in respect whereof the provisions of the Act are found to have been contravened, "relevant turnover' and 'relevant profit details of M/s Yash Solutions may be considered for the purposes of calculation of penalty.

18. Chaitanya Business Outsourcing had submitted that it had not indulged in the alleged bid rigging in any manner whatsoever with respect to any of the soil testing tenders as floated in the year 2017 and 2018 and more particularly in respect of the 2017 Bareilly and Moradabad tenders and 2018 Bareilly, Moradabad and Aligarh tenders.

19. It had submitted that it had no role in bid rigging with respect to the aforementioned tenders as it neither participated in any of the tenders after the 2017 Bareilly tender nor did it collude with any other OPs with respect to the soil testing tenders floated by the Department of Agriculture Uttar Pradesh. It has further submitted that it only participated in 2017 Bareilly

tender and, on not qualifying, it did not participate in any other tenders floated by the Department of Agriculture, UP.

20. It had averred that no case of bid rigging can remotely be made out against it in as much as it has not indulged in any incriminating conducts like using the same invoices, submission of tender from same IP address, submission of tender from same Login ID, etc.

21. On the issue of penalty, it has been submitted that it never participated in any of the soil testing lenders, therefore, there is neither any profit nor any revenue from any alleged bid rigging. It has submitted that, given the fact that it did not earn any profit or revenue for the relevant period/ the relevant market, no penalty be imposed on it. Moreover, it is also registered as an MSME and, therefore, a lenient view may be taken while imposing penalty, if any.

22. The commission after careful perusal of the investigation report, the objections/suggestions thereto received from OPs and the submissions made by the OPs during the hearing on 16.12.2021 framed two issues, these are as follows:

> *"Issue 1: Whether the Opposite Parties have directly or indirectly rigged/ manipulated the tenders of soil testing issued by the Department of Agriculture, Government of Uttar Pradesh, in various regions for the year 2017 and 2018, by indulging in bid rigging, collusive bidding and sharing of market, resulting in contravention of provisions of Section 3(3)(c) and 3(3)(d) read with Section 3(1) of the Act.*
>
> *Issue 2: If the Opposite Parties are found to have contravened the provisions of Sections 3(3)(c) and 3(3)(d) read with Section*

3(1) of the Act, then who are the persons in charge thereof and responsible for the conduct of business of the respective enterprises under Section 48 of the Act?"

23. For the analysis of the first issue the commission grouped the opposite parties in 3 sets are as under

"For the sake of brevity, the analysis of the first issue in the present case is being carried out by grouping the Opposite Parties in sets, as under:

a) Set 1: Yash Solutions, M/s Saraswati Sales, M/s Satish Kumar, M/s Siddhi Vinayak and Chaitanya Business Outsourcing,

b) Set 2: Austere Systems, M/s Toyfort, Fimo Info Solutions and Delicacy Continental, and

c) Set 3: Austere Systems and Yash Solutions."

24. Commission analysed and gave its findings regarding the Set-I and Set-III in the following manner:

Set-I: M/s Yash Solutions, M/s Saraswathi Sales, M/s Satish Kumar, M/s Siddhi Vinayak and Chaitanya Business Outsourcing

In order to analyse the allegations of bid rigging and collusion against the parties the commission first discussed the activities of the relevant parties and their key personnel. The relevant parties in the present case are the following:

(i) M/s Yash Solutions: It is a unit of Yash Ornaments Private Ltd, and is engaged in Jewellery- related work, Manpower Recruitment Agency and Business Auxiliary Service and is based in Bareilly. Mr Praveen Kumar Agarwal is its MD and his wife Ms. Komal Agarwal is a director.

Mr. Nitish Agarwal, who is director of Chaitanya Business Outsourcing, is the CEO of M/s Yash Solutions. The firm did not have any experience of soil testing before submitting its response to the tender of 2017.

(ii) Chaitanya Business Outsourcing: Its is a group company of Yash solutions and is engaged in e-governance work such as the preparation of PPAN Cards, NPS data etc. Mr. Nitish Agarwal who is the CEO of M/s Yash Solutions is also the Director of Chaitanya. The other directors are Ms. Komal Agarwal w/o Mr. Praveen Kumar Agarwal, MD of M/s Yash Solutions; and Ms. Vasu Agarwal w/o Nitish Agarwal, CEO of M/s Yash solutions. This company also did not have any soil testing work experience prior to the issuance of soil testing tenders in 2017.

(iii) M/s Yash Solutions had submitted its bids in the soil testing tenders of the Department of Agriculture, Government of Uttar Pradesh for the Moradabad and Bareilly divisions in the year 2017 and Bareilly, Moradabad, Jhansi, Saharanpur, Meerut and Aligarh divisions in the year 2018. The financial bids for the Jhansi division in 2018 were not opened, and the tenders were cancelled. M/s Yash Solutions had won contracts in the tenders of 2017 for Bareilly and Moradabad divisions and tenders of 2018 for Bareilly, Moradabad and Aligarh divisions.

(iv) In his statement before the DG, Mr. Praveen Kumar Agarwal submitted that there were very few companies operating in the soil testing business in 2017, and thus, he decided to submit separate bids on behalf of both his group companies, namely, M/s Yash Solutions and Chaitanya Business Outsourcing in the 2017 tender for Bareilly

Division with a view to show competition. Chaitanya Business Outsourcing had submitted bid only in the 2017 tender for Bareilly division.

(v) Commission noted that Mr. Nitish Agarwal, Director of Chaitanya Business Outsourcing, had also submitted that the reason for participation in the soil testing tenders of Bareilly division in. 2017 was that as there were few companies present in the business of soil testing, therefore they had submitted their bid with their group company, M/s Yash Solutions, due to apprehension that the tenders for soil testing may get cancelled due to lack of bids. Mr. Nitish Agarwal had also stated that Chaitanya Business Outsourcing had not participated in any future tenders since M/s Yash Solutions, its group company, had already got the contract in 2017 in the soil testing tender Further, Mr. Nitish Agarwal had submitted that his company neither had any soil testing lab nor any soil testing machine. The Commission noted that as brought out by the investigation, that Chaitanya Business Outsourcing had also submitted a false undertaking to the Department of Agriculture, Government of Uttar Pradesh, of having established a soil testing lab. The Commission also noted that Mr. Nitish Agarwal is also the CEO of M/s Yash Solutions and that he was the authorised signatory for M/s Yash Solutions and had submitted bids in the tenders of 2017 for Moradabad and Bareilly divisions as well as Bareilly, Moradabad, Meerut and Aligarh in relation to the tenders of 2018. Accordingly, the Commission observed that Mr. Nitish Agarwal had submitted cover bids (on behalf of Chaitanya Business Outsourcing) in the 2017 tender for Bareilly division in support of its group company, M/s Yash Solutions, to ensure that the tender did not get cancelled due to lack of bids and thus, manipulated the process of bid rigging by eliminating/ reducing competition and that both the Opposite Parties could not bring forth any cogent reasons refuting the findings of the investigation in this regard either in their objections/suggestions to the investigation or during the course of hearing or in subsequent submissions.

(vi) The Commission further noted that even though the 2017 soil testing tenders for Bareilly and Moradabad divisions did not prescribe any prior soil testing experience, the 2018 soil testing tenders for Bareilly, Moradabad and Aligarh divisions had prescribed prior experience of analysing 50,000 soil samples. The eligibility conditions in the said tenders also required the bidders to conduct tests on an ICP-OES soil testing machine.

(vii) The Commission noted that the investigation revealed that M/s Satish Kumar and M/s Siddhi Vinayak submitted experience certificates of soil testing work issued by rival entity in the tender, the same being M/s Yash Solutions, despite admitting before the DG that both his concerns had no experience of soil testing work nor did they have any soil testing lab or any soil testing machine. The Commission notes that Mr. Satish Kumar Agarwal could not come forth with any justification as to why such false certificates were issued by M/s Yash Solutions to the above concerns. The Commission also notes that the experience certificates issued by M/s Yash Solutions to M/s Satish Kumar and M/s Siddhi Vinayak bore the same date and were issued despite the fact that those entities never had any soil testing experience or experience of working on ICP-OES machine, and these were fake.

(viii) The Commission also noted that Mr. Praveen Kumar Agarwal in his statement before the DG admitted that fake work orders and experience certificates were issued by M/s Yash Solutions to rival bidder's M/s Satish Kumar and M/s Siddhi Vinayak in the 2018 soil testing tenders for Aligarh, Bareilly and Moradabad divisions. However, Mr. Praveen Kumar Agarwal submitted in his deposition that he did not know why such fake experience certificates and work orders were issued by his company to rival bidders. Mr. Praveen Kumar Agarwal, in his statement, could not come up with any cogent explanation for issuing such fake certificates and work orders.

(ix) The Commission also noted that Mr. Praveen Kumar Agarwal in his statement before the DG admitted that fake work orders and experience certificates were issued by M/s Yash Solutions to rival bidders' M/s Satish Kumar and M/s Siddhi Vinayak in the 2018 soil testing tenders for Aligarh, Bareilly and Moradabad divisions. However, Mr. Praveen Kumar Agarwal submitted in his deposition that he did not know why such fake experience certificates and work orders were issued by his company to rival bidders. Mr. Praveen Kumar Agarwal, in his statement, could not come up with any cogent explanation for issuing such fake certificates and work orders.

(x) The Commission further noted that Mr. Satish Kumar Agarwal had submitted invoices for the purchase of soil testing machine, i.e, ICP-OES machine, with identical account number and serial number of the invoices submitted by other bidders such as M/s Yash Solutions, M/s Siddhi Vinayak and M/s Saraswati Sales in the soil testing tenders. However, Mr. Satish Kumar Agarwal was persistently evasive with replies of *"I do not know"* and came up with no explanation as to how the invoices bore identical accounts and serial numbers and who arranged the said invoices, which the Commission finds highly improbable. The Commission also notes that M/s Satish Kumar Agarwal had submitted invoices for the purchase of lab consumables related to soil testing, issued by M/s Today Tech Scientific Solutions, Ambala Cantt, with exactly the same number of items, amount and time mentioned therein, as other invoices furnished by other bidders namely, M/s Yash Solutions and M/s Siddhi Vinayak, which again the Commission finds highly improbable and inconceivable. Mr. Satish Kumar Agarwal, in his statement before the DG, admitted that the said invoices were fake/ altered, however, he evasively replied *"I do not know"* when questioned as to who provided the said invoices and for what purpose.

(xi)Further, the Commission also noted that M/s Saraswati Sales, which had no experience, infrastructure such as soil testing machine and manpower for conducting soil testing work, had participated in the soil testing tenders of 2018 for Bareilly, Moradabad and Aligarh divisions and had also submitted fake invoices for the purchase of ICP-OES soil testing machine in the soil testing tenders of 2018. The Commission also took notice of the fact that Mr. Naresh Kumar Sharma of M/s Saraswati Sales, in his statement before the DG, admitted that the said invoices were arranged by Mr. Praveen Kumar Agarwal of M/s Yash Solutions, and that Mr. Praveen Kumar Agarwal in his statement agreed with the aforesaid statement of Mr. Naresh Kumar Sharma.

(xii) The Commission further noted that Mr. Naresh Kumar Sharma, on being questioned as to why he bid for the tenders, stated that he submitted the bids on the request of Mr. Praveen Kumar Agarwal of M/s Yash Solutions to submit a cover bid or supporting bid so that M/s Yash Solution's bid could not be rejected due to insufficient number of bids. The Commission also took note of the fact that Mr. Praveen Kumar Agarwal decided the bid price quotation for the 2017 and 2018 tenders for Bareilly and Moradabad divisions. In his statement, Mr. Naresh Kumar Sharma regretted his decision to submit supporting bids and said that it should not have happened. He also stated that the experience certificates from Austere Systems were arranged at the instance of Mr. Praveen Kumar Agarwal Even the undertaking for the establishment of a lab was arranged at the instance of Mr. Praveen Kumar Agarwal. The Commission also noted that Mr. Rahul Teni of Austere Systems, in his statement before the DG, submitted that his company had not issued any experience certificate for analysing soil samples to M/s Saraswati Sales, which is indicative of the fact that fake experience certificate was furnished by M/s Saraswati Sales to fulfil eligibility criteria under the pertinent tenders.

(xiii) From the above, it is clear that there was no other reason for M/s Saraswati Sales to submit bids in the 2018 tenders of soil testing for Bareilly, Moradabad and Aligarh divisions with fake and fabricated documents other than to submit cover bids in support of M/s Yash Solutions.

(xiv) The Commission also noted that Mr. Praveen Kumar Agarwal of M/s Yash Solutions submitted evasive replies to the questions regarding the similarity in the invoices for the purchase of lab consumables from M/s Today Tech Scientific Solutions and soil testing machine from M/s Thermo Fisher Scientific Pvt. Ltd. (Singapore), which were submitted by M/s Yash Solutions, M/s Satish Kumar, M/s Siddhi Vinayak and M/s Saraswati Sales in the 2018 soil testing tenders.

(xv) The Commission also observed that as per the reply of M/s Thermo Fisher, dated 14.04.2020, M/s Yash Solutions had purchased soil testing machines from it, however, no sale was ever made to M/s Satish Kumar, M/s Siddhi Vinayak and M/s Saraswati Sales, which implies that the invoices submitted by them in the soil testing tenders of 2018 were fake and fabricated.

(xvi) The Commission also noted that, as per reply dated 30.06.2020 of the Excise Department, Haryana, filed before the DG, no sale was ever made by M/s Today Tech Scientific to M/s Satish Kumar and M/s Siddhi Vinayak. Accordingly, the Commission is of the view that the invoices so submitted by them were fake.

(xvii) The Commission further noted that Mr. Satish Kumar Agarwal, in his statement, had admitted that he had submitted fake documents and bid separately for both his concern, M/s Satish Kumar and M/s Siddhi Vinayak, in the 2017 soil testing tenders for Moradabad and 2018 soil testing tenders for Aligarh, Moradabad and Bareilly divisions, just to show that there was enough competition and to avoid cancellation of tenders due to lack of participation. The Commission further notes that the name of M/s Yash Solutions appeared in the affidavits submitted by M/s Satish Kumar and M/s Siddhi Vinayak. Further, the phone number of the authorised signatory of M/s Yash Solutions, i.e. Mr. Rachit Agarwal, appeared in the character certificate issued to Ms. Sangeeta Agarwal of M/s Siddhi Vinayak. The Commission also notes that Mr. Satish Kumar Agarwal persistently submitted evasive replies "I do not know" or "I do not remember" and submitted no explanation for the alleged linkages. It is also noted that Mr. Satish Kumar Agarwal initially denied knowing Mr. Praveen Kumar Agarwal of M/s Yash Solutions, however, when confronted with the CDR of his mobile number, he admitted having regular interactions with Mr. Praveen Kumar Agarwal. He also admitted to be in regular communication with Mr. Nitish Agarwal, CEO of Yash Solutions, as well as Mr. Rachit Agarwal, General Manager of M/s Yash Solutions.

Mr. Satish Kumar Agarwal admitted that he used to take Mr. Rachit Agarwal's assistance in completing and submitting tender formalities of both his concerns. The Commission noted that Mr. Satish Kumar Agarwal also admitted that the Department of Agriculture, Government of Uttar Pradesh, had blacklisted both his concerns namely M/s Satish Kumar Agarwal and M/s Siddhi Vinayak, questioning the authenticity of the documents submitted by his concerns in the soil testing tenders and he had not appealed against that order as he did not want to escalate the matter further and appeal in the court, as he was aware of the fact that both his concerns have submitted manipulated documents in the said tenders.

(xviii) The Commission noted that the investigation revealed that Mr. Suraj Singh, an employee of M/s Yash Solutions, had submitted bids as an authorised signatory in the 2017 soil testing tenders for Bareilly and Moradabad divisions and in 2018 for Bareilly, Aligarh and Moradabad divisions on behalf of M/s Satish Kumar and M/s Siddhi Vinayak on the directions of Mr. Praveen Kumar Agarwal. Further, Mr Vivek Saxena, another employee of M/s Yash Solutions, had submitted bids as an authorised signatory in respect of M/s Saraswati Sales in the soil testing tenders of 2018 for Aligarh, Moradabad and Bareilly divisions, and in his capacity as an authorised signatory of M/s Siddhi Vinayak in the 2017 tenders for Moradabad division. Mr. Anuj Sharma, an employee of M/s Yash Solutions, had submitted bids as an authorised signatory in respect of Mr Satish Kumar in the 2018 soil testing tenders for Bareilly, Aligarh and Moradabad divisions. Mr. Praveen Kumar Agarwal of M/s Yash Solutions submitted evasive replies and could not provide any plausible justification as to why his own employees, Mr. Suraj Singh, Mr. Vivek Saxena and Mr. Anuj Sharma, had submitted bids on behalf of rival bidders in the 2017 and 2018 soil testing tenders on his directions. Further, Mr. Praveen Kumar Agarwal stated that there was no justification for the actions of his senior employee Mr. Rachit Agarwal (General Manager) in assisting the submission of bids of rival bidder, M/s Siddhi Vinayak.

(xix) The Commission also noted that Mr. Satish Kumar Agarwal submitted evasive replies of "I do not know" when he was questioned about the authorised signatories namely, Mr. Suraj Singh and Mr. Vivek Saxena, employees of M/s Yash Solutions, who had submitted bids in respect of his concerns M/s Satish Kumar and M/s Siddhi Vinayak as well as of rival bidders, namely, M/s Saraswati Sales, in the 2017 and 2018 soil testing tenders. Further, Mr. Satish Kumar Agarwal admitted to have known Mr. Nitish Kumar Agarwal (CEO of M/s Yash Solutions and Director of Chaitanya Business Outsourcing) and Mr. Rachit Agarwal (General Manager of M/s Yash Solutions). In his statement before the DG, Mr. Satish Kumar Agrawal admitted to taking Mr. Rachit Agarwal's assistance in completing and submitting the tender documents of both his concerns.

(xx) The Commission further noted that Mr. Naresh Kumar Sharma, of M/s Saraswati Sales, initially feigned ignorance with respect to the submission of bids by his proprietorship concern in the soil testing tenders in question. However, when he was confronted with the authorisation letter issued by him in favour of Mr. Vivek Saxena, an employee of M/s Yash Solutions, he stated that his signatures may have been misused. In another statement recorded before the DG, he stated that Mr. Vivek Saxena was his authorised signatory and had discussed with him before bidding in the said tenders and the bid was submitted with his consent and knowledge.

(xxi) The Commission, from the above, noted that it clearly comes out to the fore that fake and fabricated documents were arranged/ provided by M/s Yash Solutions, to M/s Satish Kumar, M/s Siddhi Vinayak and M/s Saraswati Sales with a view to ensure their technical eligibility and submission of cover bids in favour of M/s Yash Solutions in the 2017 tenders for Bareilly and Moradabad divisions and in the 2018 tenders for the Bareilly, Moradabad and Aligarh divisions.

(xxii) The Commission further noted that, as per records of e-bidding submitted by the National Informatics System, the bids of M/s Yash Solutions, M/s Siddhi Vinayak and M/s Satish Kumar were submitted from the same IP Address in the Bareilly tenders of 2018. Further, in the Moradabad tenders of 2018, the bids of M/s Yash Solutions, M/s Siddhi Vinayak, M/s Saraswati Sales and M/s Satish Kumar Agarwal were also submitted from the same IP Address. The bids submitted by M/s Siddhi Vinayak in both the tenders were submitted using the login id acs.yop@gmail.com, which is the email address of M/s Yash Solutions.

(xxiii) The Commission noted that, in response to the notices of the investigation dated 25.03.2021 regarding common IP address for submission of e-bids, Mr. Satish Kumar Agarwal of M/s Satish Kumar and M/s Siddhi Vinayak and Mr. Praveen Kumar Agarwal of M/s Yash Solutions, vide their affidavits, submitted that, being technically incapable, they could not submit any clarifications in the matter. Further, Mr. Naresh Kumar Sharma of M/s Saraswati Sales could not comment as to how the same IP address was used in submitting the said bid. In this regard, the Commission, in agreement with the DG finding, observes that it is highly inconceivable as to how all the aforesaid bidders, who were independent entities having separate ownership, had a common IP address, which indicates collusion and cartelisation by M/s Yash Solutions, M/s Siddhi Vinayak, M/s Saraswati Sales and M/s Satish Kumar Agarwal in the soil testing tenders of 2018.

(xxiv) The Commission observed that the evidence on record coupled with the statements of the individuals of the above-mentioned Opposite Parties point to their complicity in manipulating the tenders issued by the Department of Agriculture, Government of Uttar Pradesh. Further, even acts of forgery were resorted to in such processes, which speaks about the conduct of such Opposite Parties. Further, M/s Yash Solutions, M/s Satish Kumar and M/s Siddhi Vinayak were blacklisted by the procurer. The Commission does not find any merit in the submissions made by the said Opposite Parties in their objections/ written submissions as well as the arguments advanced during the oral hearing and in subsequent submissions. The Commission thus concluded that M/s Yash Solutions, M/s Satish Kumar, M/s Siddhi Vinayak, M/s Saraswati Sales and Chaitanya Business Outsourcing have contravened the provisions of Section 3 (3)(d) read with Section 3(1) of the Act.

25. **Set III Austere Systems and M/s Yash Solutions**

i) The Commission noted that Austere Systems had submitted bid in 2018 Bareilly tender, which was technically rejected due to various reasons, viz. non- submission of three years balance sheet; non-submission of last three years returns; non-availability of ICP machine, etc.

ii) On being questioned whether the grounds for rejection of 2018 Bareilly tender were appropriate, Mr. Rahul Teni, of Austere Systems, in his statement before the DG submitted that it could have been a mistake and that he was not keen for the tender of 2018 for the Bareilly division, although he gave no reasons for the same. The Commission noted that Mr. Rahul Teni could not give any explanation for not submitting the bids in the Aligarh and Moradabad tenders of 2018, although his company had submitted bids in Meerut and Saharanpur tenders.

iii) The Commission further noted that Mr. Rahul Teni submitted evasive replies with regard to the reason for not submitting the bids in the 2017 soil testing tenders for the Moradabad division although it had already won a contract for soil testing for Meerut division. In similar fashion, Mr. Praveen Kumar Agarwal, MD, M/s Yash Solutions, in his statement submitted that his entity submitted high price bids in 2018 Meerut and Saharanpur tenders, as he was not interested in winning those tenders.

iv) In the objections to the Investigation Report, Austere Systems stated that the DG has not been able to demonstrate with any cogent evidence, either directly or indirectly, which could even remotely suggest that there was any geographic allocation between Austere Systems and M/s Yash Solutions and that either of them deliberately avoided submitting bids in each other's areas. Unless such collusion is established, such erroneous and legally impermissible conclusions would be regarded as pure conjecture and surmise.

v) In this regard, M/s Yash Solutions submitted that it had submitted high price bids in the Saharanpur and Meerut 2018 tenders due to the issue of greater distance and poor connectivity from the head office of Bareilly. Further, the number of samples to be tested in Meerut and Saharanpur were very large, which would have increased the total cost.

vi) The Commission noted that Mr. Praveen Kumar Agarwal's statement is self- contradictory. In the first place, Mr. Praveen Kumar Agarwal accepted that he had no interest in getting the soil testing tenders of 2018 for Meerut and Saharanpur divisions. At the same time, he could not explain why his company, M/s Yash Solutions, submitted high price bids in those tenders. In this regard, the Commission found no merit in the arguments advanced by the said Opposite Party and agreed with the DG, that there could be no explanation for the submission of high price bids by M/s Yash Solutions except that they were cover bids made in support of bid of Austere Systems in the said divisions and to enable Austere Systems to bag the tenders.

vii) The Commission observed that only three bidders, namely, Austere Systems, M/s Yash Solutions and Delicacy Continental, had submitted bids in the 2018 Meerut and Saharanpur tenders. From the above, the Commission notes that there was an arrangement/agreement between the said three entities to manipulate the process of bidding in the soil testing tenders of 2018.

viii) The Commission agreed with the findings of DG that Austere Systems, under an arrangement understanding with rival company M/s Yash Solutions, had geographically allocated the soil testing tenders issued by the Department of Agriculture, Government of Uttar Pradesh, in 2017 and 2018 by not bidding in each other's allocated regions and by submitting supporting bids in favour of each other.

Issue 2: If the Opposite Parties are found to have contravened the provisions of Sections 3(3)(c) and 3(3)(d) read with Section 3(1) of the

Act, then who are the persons in charge thereof and responsible for the conduct of business of the respective enterprises under Section 48 of the Act?"

26. After establishing the contravention by the Opposite Parties, the Commission then proceeded to analyse the conduct of directors/ proprietors of the Opposite Parties, who were directly involved in the activities and affairs of such parties and had full knowledge and played an active role in the anti-competitive conduct and hence, are liable in terms of Section 48 of the Act. The DG in his investigation identified the following individuals liable in terms of the provisions of Section 48 of the Act:

"(i) Pranav Kumar Agarwal, MD, M/s Yash Solutions

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(viii) Mr. Nitish Agarwal, Director (M/s Chaitanya Business Outsourcing)"

27. **Mr. Praveen Kumar Agarwal (M/s Yash Solutions)** He was entirely responsible for the affairs of M/s Yash Solutions, the Commission noted that his liability under the Act emanates from the fact that separate bids had been submitted, at his instance, on behalf of both his group companies, namely, M/s Yash Solutions as well as Chaitanya Business Outsourcing, in the 2017 Bareilly tenders, as has been discussed in the preceding paragraphs. Fake work orders and work experience certificates were issued to rival bidders, M/s Satish Kumar and M/s Siddhi Vinayak,

in 2018 soil testing tenders for Aligarh, Bareilly and Moradabad divisions to enable them to place cover bids. Fake invoices towards the purchase of ICP-OES machine were issued by his company to M/s Satish Kumar, M/s Siddhi Vinayak and M/s Saraswati Sales, for use against soil testing tenders invited in the year 2018 with his knowledge It is noted that the bids of the rival bidders were submitted by the employees of M/s Yash Solutions in the 2017 and 2018 Bareilly and Moradabad tenders, which was with his active knowledge. Mr. Praveen Kumar Agarwal could also not submit any justifications for quoting high price cover bids by M/s Yash Solutions in the Saharanpur and Meerut soil testing tenders, which were won by Austere Systems. The Commission noted that Mr. Praveen Kumar Agarwal has not been able to refute in any manner the findings of the DG qua him and his liability under Section 48 of the Act.

28. **Mr. Nitish Agarwal (Chaitanya Business Outsourcing)** The Commission noted that Mr. Nitish Agarwal, one of the Directors of Chaitanya Business Outsourcing and CEO of M/s Yash Solutions, was responsible for the entire affairs of Chaitanya, and all decisions were taken by him. Chaitanya Business Outsourcing had participated in the soil testing tenders for Bareilly division in 2017, with Mr. Nitish Agarwal acting on behalf of such company. The Commission notes that, in his statement before the DG, Mr. Nitish Agarwal stated that, as there were very few companies present in the business of soil testing, it had submitted its bid along with their group company Yash Solutions, with no intention of submitting any competitive bids, but only cover bids in favour of Yash

Solutions in the 2017 Bareilly tenders so that the tenders for soil testing do not get cancelled due to lack of bids. Moreover, Mr. Nitish Agarwal had admitted that his company had submitted a false undertaking regarding having a soil testing lab to the Department of Agriculture, Government of Uttar Pradesh. The Commission finds that Mr. Nitish Agarwal played an active role in getting Chaitanya Business Outsourcing to manipulate the bid process in violation of provisions of the Act, for which he is found liable under Section 48 of the Act.

29. The Commission noted that aforementioned individuals have not been able to rebut or deny the respective roles played by them in cartelization, for which the DG has gathered cogent and clinching evidences, which are primarily based on their active conduct in perpetuating the anti-competitive conduct with a view to manipulate and vitiate the tender process as discussed in the foregoing paragraphs. None of these individuals have been able to credibly refute the evidence against them unearthed by the investigation nor been able to explain the conduct. From the statements of the individuals, it can be discerned that they have chosen to be evasive in submitting before the investigation. Mere perfunctory justifications have been proffered to escape their liability Neither the Opposite Parties nor their individuals have been able to rebut the presumption that stares them in their faces. The Commission was therefore convinced that the Opposite Parties acted in a concerted manner to rig the tenders, which is in violation of Section 3(1) read with Sections 3(3)(c) and 3(3)(d) of the Act. Therefore, the Commission found the

concerned individuals of the Opposite Parties liable in terms of the provisions of Section 48(1) and 48(2) of the Act.

30. The Commission noted that cartelisation, including bid rigging, is a pernicious form of anti-competitive conduct under the provisions of Section 3 of the Act. None of the Opposite Parties or their individuals have been able to rebut the evidence found against them by the DG of having indulged in anti-competitive conduct and manipulating the bids/bid rigging in respect of tenders floated by the Department of Agriculture, State of Uttar Pradesh. The Commission finds that certain Opposite Parties and their individuals had also resorted to the production and submission of fake invoices and grant of false certificates for making some of the Opposite Parties eligible for participating in the bid process so as to effectively act as cover bidders in respect of the winning bidders. Some of the Opposite Parties did not even have prior experience and were later blacklisted.

31. In view of these findings, the Commission held that Yash Solutions, M/s Satish Kumar Agarwal, M/s Siddhi Vinayak, M's Saraswati Sales Corporation, M/s Austere System Pvt. Ltd., Delicacy Continental Pvt. Ltd, Fimo Infosolutions Private Limited, M/s Toyfort and Chaitanya Business Outsourcing Pvt. Ltd. to have contravened the provisions of Section 3(1) of the Act read with Section 3(3)(c) and 3(3)(d) thereof, as detailed in this order.

32. Further, the Commission, in terms of Section 27 (a) of the Act, directed the Opposite Parties and their respective proprietors and directors who have been held liable in terms of the provisions of Section 48 of the

Act to cease and desist from indulging in practices which have been found in the present order to be in contravention of the provisions of Section 3(3)(c) and 3(3)(d) read with Section 3(1) of the Act, as detailed earlier.

33. The Commission found the present case fit for imposition of penalty, under the provisions contained in Section 27(b) of the Act. Under the aforesaid section the Commission may impose such penalty upon the contravening parties as it may deem fit, which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreement.

34. The commission noted that the twin objectives behind the imposition of penalty are. (a) to reflect the seriousness of the infringement, and (b) to ensure that the threat of penalties will deter the infringing undertakings from indulging in similar conduct in the future. Therefore, the quantum of penalty imposed must correspond to the gravity of the offence, and the same must be determined after having due regard to the mitigating and aggravating circumstances of the case.

35. On the issue of penalty, most of the Opposite Parties in their objections to the Investigation Report and subsequent submissions have averred, referring the decision of the Hon'ble Apex Court in the case of "***Excel Crop Care Limited vs. Competition Commission of India and others***" [(2017) 8 SCC 47], that the turnover to be calculated under Section 27 of the Act has to be the relevant turnover, which relates to the product in question, in respect whereof, the provisions of the Act are found to be

contravened. The Opposite Parties have averred that, as that they could not derive any income from the soil testing tenders for never being involved in the business of soil testing, zero penalty would naturally arise out of nil income and nil turnover. Opposite Parties have prayed for mitigation of penalty on the grounds of being Micro Small and Medium Enterprises (MSME).

36. With regard to the submission of the Opposite Parties that they have derived no income from tenders in question and hence zero penalty would arise, the Commission found no merit in the said submission and stated that no narrow interpretation of the relevant turnover can be taken as suggested. The Commission, in this regard, reiterated its decision dated 03.02.2022 in Suo Motu Case No. 2 of 2020 (In Re: Alleged anti-competitive conduct by various bidders in supplying and installation of signages at specified locations of State Bank of India across India):

> *"115. In relation to the contention that turnover derived from the Impugned Tender alone should be considered, it is noted that a bare perusal of the Excel Crop Care judgement makes it clear that nowhere is held or otherwise declared that relevant turnover should he limited to the turnover earned from the specific customer or tender. Such a plea would fratrate the underlying policy objective of deterring the cartelists besides providing them a fertile ground for regulatory arbitrage. For example, if owing to the understanding between the bidders. If some or few bidders have refrained from participating in the particular tender under investigation, the turnover of the said parties from the said tender would obviously be mil, resulting in nil penalty. To allow such parties to walk free without incoring any monetary penalty for their anti-competitive*

conduct simply because they did not have any turnover from the concerned tender, would not only smultify the Parliamentary intent in providing deterrence through penalties against such behaviour hut would also run contrary to the underlying spirit of the judgment of the Hon'ble Supreme Court of India in Excel Crop Care Judgment. Taking such a pedantic interpretation would provide a virtual free run to the infringing parties and an effective immunity against any antitrust action for their anti-competitive behaviour. This cannot be the purport or intent either of the Parliament or the Hon'ble Supreme Court of India in laying down the parameters and perimeter for Imposition of monetary penalty upon the contravening parties. Therefore, such contentions by the OPs need to be rejected."

37. The Commission noted that the instant case emanates out of conduct pertaining to public procurement in soil testing tenders and, as such, is a fit case to impose penalties upon the infringing parties. On a holistic appreciation of the facts and circumstances of the case and the mitigating factors put forth by the Opposite Parties, the Commission observed that the findings of the DG clearly indicate the active role played by each of the Opposite Parties in rigging the tenders. The Commission accordingly imposed the penalty upon the Opposite Parties @ 5 percent of the average of their turnover for the three financial years, i.e, 2017-20.

38. The Commission further deemed it appropriate and necessary to impose penalty on the individuals identified above for being liable under Section 48 of the Act at the rate of 5 percent of their average income of the financial years 2017-18, 2018-19 and 2019-20 filed with the Commission.

39. Keeping in view the facts, clinching evidence, own admissions along with circumstantial evidence, the Commission vide the Impugned Order,

imposed a penalty of 5% on their average turnover for FY 2017-18 to 2019-20: (a) INR 84,31,706/- on Yash Solutions (Appellant No. 1); (b) INR 10,12,323/- on Chaitanya Business Outsourcing (Appellant No. 2); (e) INR 1,49,254/- on Mr. Praveen Kumar Agarwal (Appellant No. 3); (d) INR 84,541/- on Mr. Nitish Kumar Agarwal (Appellant No. 4).

Submission of the Appellant

40. The appellant No. 1 has submitted that the order passed by NCLAT dated 14.11.2022 in Saraswati Sales Corporation Vs. Competition Commission of India (Competition Appeal (AT) No. 31 of 2022) is not applicable to the present case in any manner whatsoever. It is submitted that while passing the aforesaid Judgment no submissions were made on the merits of the case by the Petitioner therein. It is further submitted that appellant was not a party to the said proceedings and had no opportunity to present the full picture. The appellant also submitted that the aforesaid Judgment is completely unreasoned and does not consider any submission made in the case.

41. The second submission of the appellant is that the impugned order is un reasoned and without application of mind. He has invited attention in this regard to the matters relating to IP address given in the DG's report. The appellant submits that the common IP address was used only in relation to submission of two tenders used by the appellant and M/s Siddhi Vinayak & Sons and not by any other bidder. The appellant further stated that it was the associate/ex-employees of the appellant, who had submitted the bids for the other bidder, without consent and knowledge of

the appellant. Hence, during the course of their employment they must have use the internet facility of appellant and submitted the bid for other bidder, which could not have been within the knowledge of the appellant. In this regard, the petition relies upon the Judgment of Hon'ble Bombay High Court in '*S K Translines Pvt. Ltd. Vs. The Maharashtra State'*, reported in ANU/MH/2073/2016. The appellant has also placed reliance on the Judgment of Hon'ble Supreme Court in *'Union of India Vs. Hindustan Development Corporation'*, reported in (1993) 3 SCC 499.

42. The submissions of the appellant is that the DG in his report has mentioned that same login id was used by competitors for filing the bids but in realty the appellant's login id was ceo.yopl@gmail.com. Two different emails were used by the parties. It is further stated that there is no material on record to show that the email id acs.yopl@gmail.com used by the M/s Siddhi Vinayak actually belongs to appellant. Merely because the word 'yopl' has been used in both the email ids cannot be a basis to claim that both the email ids belongs to the appellant.

43. The appellant submission regarding fake invoices is that while deciding the matter the commission fails to take cognizance of the reply received from Thermo Fischer Scientific India Pvt. Ltd. which clearly stated that the appellant had purchased 3 ICP machines from Thermo Fischer vide invoice(s) no. 8929003131 dated 21.08.2017, 8929003261 dated 14.09.2017 and 8929003-410 dated 27.09.2017. The appellant further states that merely because an associate of the appellant used the copies of

such invoices for M/s Siddhi Vinayak etc. without the knowledge and consent of the appellant, the appellant cannot be panelized for the same.

44. With regard to allegations regarding the call data record through which, the DG has alleged collusion in its report, it was alleged that DG had confronted the appellant as well as M/s Saraswati Sales, M/s Satish Kumar Agarwal and M/s Siddhi Vinayak with the CDR of their mobile numbers and after seeing them, such parties admitted about being in contact with each other. However, the Respondent Commission failed to appreciate that the CDR available on record did not disclose any details of any conversation of the above other bidders with the Appellant. Thus, purported admission as to being in contact on the basis of alleged CDR is nothing but another indication of an admission obtained under duress and coercion.

45. Regarding the fake experience certificate provided by appellant to M/s Satish Kumar Agarwal, M/s Siddhi Vinayak and M/s Saraswati Sales Corporation, the submission of the appellant is that the same were misused by the aforesaid parties without his consent. Appellant did not issue any certificate nor had any occasion or motive to issue the post experience certificate. The appellant further submitted that the Bareilly tender of 2017 ought to have been excluded from the scope of enquiry because there were 2-3 etc. parties beyond who were not part of this enquiry and they had also bid for the same.

46. It has been pleaded on behalf of the Appellant No.2 M/s Chaitanya Business Outsourcing that M/s Chaitanya did not qualify for the Bareilly

tender due to technical reasons. Thereafter it did not participate in any subsequent tender. Yet the respondent concluded that M/s Chaitanya Business Outsourcing is part of the bid rigging merely because the Directors or shareholders of the appellant and M/s Chaitanya Business Outsourcing are common or related to each other. It has been further submitted that there was no embargo on related party bids in the terms and conditions for tender and none of the documents submitted by M/s Chaitanya Business Outsourcing were found to be false. The Appellant 1 & 2 in any case are separately legal entities in the eye of law. The submission of the respondent is that the commission blindly followed the findings of the DG report without application of mind and wrongly held the appellant to have engaged in bid rigging and cartelization.

47. The Appellant 1 further submits that there is no reason for submitting cover bids by the appellant and other bidders in both 2017 and 2018 tenders as there was no requirement of minimum number of quotations of bids in the aforesaid tender. It further states that there was no appreciable adverse effect on competition by the so called acts of collusion and acting in consent by the appellant with other bidders the alleged activity of bid rigging does not meet the test of Section 3(3) (d) of the act which provides that the member/association of the personals of the cartel should be engaged in identical or similar paid of goods/services.

48. The submission of the appellant is that none of the bidders in Set-I were in identical trade of goods or services. The respondent further stated that impugned order was passed without considering any of the

ingredients of Section 19 (3), while considering whether there is an appreciable adverse effect on competition, before coming to the conclusion that the appellant entered into anti-competitive practices, since there was presence of no agreement, whether oral or written, as mentioned under Section 19 (3) of the Act in view of the Hon'ble Supreme Court of India in the matter of '*Rajasthan Cylinders and Containers Ltd. Vs. Union of India and Others*, (2020) 16 SCC 615 : 2018 SCC Online SC 1718', relevant para 75 of the judgement is extracted hereinunder:-

> *"75. We may also state at this stage that Section 19(3) of the Act mentions the factors which are to be examined by CCI while determining whether an agreement has an appreciable adverse effect on competition under Section 3. However, this inquiry would be needed in those cases which are not covered by clauses (a) to (d) of sub-section (3) of Section 3. Reason is simple. As already pointed out above, the agreements of nature mentioned in sub-section (3) are presumed to have an appreciable effect and, therefore, no further exercise is needed by CCI once a finding is arrived at that a particular agreement fell in any of the aforesaid four categories. We may hasten to add, however, that agreements mentioned in Section 3(3) raise a presumption that such agreements shall have an appreciable adverse effect on competition. It follows, as a fortiorari, that the presumption is rebuttable as these agreements are not treated as conclusive proof of the fact that it would result in appreciable adverse effect on competition. What follows is that once CCI finds that case is covered by one or more of the clauses*

mentioned in sub-section (3) of Section 3, it need not undertake any further enquiry and burden would shift upon such enterprises or persons, etc. to rebut the said presumption by leading adequate evidence. In case such evidence is led, which dispels the presumption, then CCI shall take into consideration the factors mentioned in Section 19 of the Act and to see as to whether all or any of these factors are established. If the evidence collected by CCI leads to one or more or all factors mentioned in Section 19(3), it would again be treated as an agreement which may cause or is likely to cause an appreciable adverse effect on competition, thereby compelling CCI to take further remedial action in this behalf as provided under the Act. That, according to us, is the broad scheme when Sections 3 and 19 are to be read in conjunction."

49. The appellant submitted that the commission heavily relied on the alleged admissions before the commission by different party who was part of the investigation and the same was obtained under duress and coercion. No opportunity for cross examination was given to the witnesses by the DG.

50. The appellant submits that the commission has wrongly arrived at the finding that the Austere Systems and the appellant had orchestrated the bid rigging process by allegedly geographically allocating the areas amongst themselves for the 2017 and 2018 soil testing tenders on the premise that the said entities had submitted high price bids for certain areas.

51. The Appellant-1 stated that the commission did not consider the submissions of the appellant, that he had submitted high price bid in 2018 tender in Meerut and Saharanpur division due to high transportation costs that the appellant would have been incurred on account of being headquartered in Bareilly and poor connectivity from Bareilly to Saharanpur and Bareilly to Meerut in contrast to Bareilly to Moradabad and Aligarh where the appellant was L1 bidder.

52. Regarding the imposition of the penalty the appellant has submitted that the commission has wrongly concluded that there was a cartel between the appellant and other participants of the 2017 and 2018 tenders in the present matter, then the penalty be imposed only on the relevant turnover of the impugned tender and not on average turnover of all the products or businesses, the entity is engaged in. The appellant placed reliance on the Excel Crop Care Ltd. Vs. Competition Commission of India and Others (2017) 8 SCC 47. The relevant paras are extracted below:

> *"91. When the agreement leading to contravention of Section 3 involves one product, there seems to be no justification for including other products of an enterprise for the purpose of imposing penalty. This is also clear from the opening words of Section 27 read with Section 3 which relate to one or more specified products. It also defies common sense that though penalty would be imposed in respect of the infringing product, the "maximum penalty imposed in all cases be prescribed on the basis of "all the products" and the "total turnover of the*

enterprise It would be more so when total turnover of an enterprise may involve activities besides production and sale of products, like rendering of services, etc. It. therefore, leads to the conclusion that the turnover has to be of the infringing products and when that is the proper yardstick, it brings home the concept of "relevant turnover".

92. Even the doctrine of "proportionality" would suggest that the court should lean in favour of "relevant turnover".....xxxx

93. No doubt, the aim of the penal provision is also to ensure that it acts as deterrent for others. At the same time, such a position cannot be countenanced which would deviate from "teaching a lesson to the violators and lead to the death of the entity" itself. If we adopt the criteria of total turnover of a company by including within its sweep the other products manufactured by the company, which were in no way connected with anti-competitive activity, it would bring about shocking results not comprehended in a country governed by Rule of Law. Cases at hand itself amply demonstrate that the CCP's contention, if accepted, would bring about anomalous results. In the case of M/s Excel Crop Care Ltd., average of three years turnover in respect of APT, in respect whereof anti-competitive agreement was entered into by the appellants, was only Rs 32 41 crores. However, as against this, CCI imposed penalty of Rs 63 90 crores by adopting the criteria of total turnover of the said company with the inclusion of turnover of the other products as well Likewise, UPL was imposed penalty of Rs 252 44 crores by CCI as against *average of the three years' turnover of APT of Rs 77.14 crores. Thus, even when the matter is looked into from this angle, we arrive at a conclusion that it is the relevant turnover, Le turnover of the particular product which is to be taken into consideration and not total turnover of the violator."*

53. The appellant has further submitted that the proposed penalty is disproportionate and arbitrarily fixed on the appellants and is in stark contradiction to the catena of judgments passed by the Hon'ble Supreme Court as well as the precedents set forth by the respondent commission itself in cases having similar facts and circumstances. In this regard they have referred to the case of '*MDD Medical Systems India Pvt. Ltd.*, reported in 2013 SCC Online Comp AT 57: [2013] Comp AT 79'.

"25. This takes us to the last question as to whether the CCI was right at fixing the penalty at 5% of the average turnover. The learned counsel relied on the reported decision in Hindustan Steel Ltd. v. State of Orissa reported in (1969) 2 SCC 627: AIR 1970 SC 253 wherein it is observed "if there is discretion, authority is bound to take into account aggravating or mitigating circumstances and exercise discretion laid down under the law, judicially".

26. There is catena of Supreme Court decisions which have unhaultingly held that in the absence of any justifying reasons the exercise of discretion tends to become arbitrary. In reported decision of Kranti Associates Pvt. Lid. v. Masood Ahmed Khan reported in (2010) 9 SCC 496, after discussing the earlier case law on this subject, the Hon'ble Supreme Court has reiterated *the necessity of giving reason in paragraph-15 and has observed that, though initially there was a demarcation between administrative orders and quasi-judicial orders, but with the passage of time the distinction between the two got blurred and thinned out and virtually reached a vanishing point in the judgment in A.K. Kraipak v. Union of India reported in (1969) 2 SCC 262: AIR 1970 SC 150. It must be noted here that the present order is undoubtedly in the nature of adjudicatory jurisdiction and can be termed as a quasi-judicial order. In this judgment the Apex Court has taken the stock of practically all the earlier judgments on this subject and in paragraph-51 culled out the 15 conclusions, all of which speak about the necessity of giving reasons not only by quasi-judicial authorities, but also by the administrative authorities. It cannot be disputed that the reasons display as to how the mind of a particular authority exercising discretion was working or has worked. It also provides an opportunity for the Appellate Authorities to test the correctness of the same and thus the exercise of the discretion does not remain subjective, but remain objective because of the reasons.*

27. In the earlier paragraphs, we have already noted that the CCI has not given any reasons nor has it discussed as to why it was pegging the penalty at 5%.

28. While inflicting the penalty the CCI should have considered the aggravating as well as the mitigating circumstances. This case, being held of cartelization and bid rigging is undoubtedly a very serious circumstance against the appellants. In the *competition jurisdiction, bid rigging and cartelization have been treated to be abhorrent to the competition and have been looked down upon internationally. The trend in the countries where the competition jurisdiction has been in prevalence for substantial number of years, the judicial thought favours stiff penalties which can be deterrent. However, at the same time, we would have to consider the peculiarity of this jurisdiction in India. It is only for last three years that the competition jurisprudence has been introduced through the Competition Act, 2002. The nascent stage of competition jurisdiction would be one of the factors to be taken into consideration while inflicting penalties.*

29. This is apart from the fact that this was for the first time that these parties have been found to have engaged in cartelization and bid rigging. There is no allegation or evidence that they have been cartelizing in the past. Therefore, some consideration would have to be shown for that factor."

54. The appellant has further submitted that the commission relied upon Suo Moto Case 02/2020 (In Re: Alleged anti-competitive conduct by various bidders in supply and installation of signages at specified locations of State Bank of India across India) to depart from the settled law laid by Excel Corp (supra), however, the same is distinguishable from the instant case in as much as the alleged entities in Suo Moto Case No. 02/2020 were engaged in printed advertising/marketing material business and the Commission had to determine whether the making of glow signages business would fall within the ambit of printed advertising/marketing

material business. Unlike the facts in Suo Moto Case No. 02/2020, in the instant case the Appellant was engaged in jewelry related work and manpower recruitment agency and business auxiliary services, whereas the tender was for soil testing.

> *"114. The OPs have also relied on the above-mentioned judgement of the Hon'ble Supreme Court of India to assert that either the turnover derived from the Impugned Tender or from a specific type of signage to be considered for the computation of the penalty. In this regard, it is noted that the principle of proportionality as envisaged in Excel Crop Care Judgment (supra) by the Hon'ble Supreme Court was in the context of multiproduct companies only. The Commission notes that in the present matter, the OPs are engaged in the business of supply of printed advertising/ marketing material which includes signages. By no stretch of imagination, different types of signages be considered as multiple products in terms of the observations of the Hon'ble Supreme Court in Excel Crop Care judgement, rather they constitute different varieties of the same product."*

55. The final submission of the appellant is that it is an MSME with a meagre turnover and due to the economic slowdown during and in the post-covid eta, the Appellant's business was struggling to cope in a competitive market. In view of the same, the appellant had pleaded before the Respondent Commission to consider the fact that the appellant being a MSME may not be able to recover in case any penalty that is imposed on it

and had relied on the following precedents. The appellant relies on the orders passed by commission in the following matters:-

(i) Food Corporation of India and Shivalik Agro Poly Products Ltd. & Ors., reported in 2021 SCC Online CCI 65 (Ref Case No. 7/2018)

(ii) Eastern Railway, Kolkata Vs. Chandra Brothers, reported in 2021 SCC Online CCI 50 (Ref Case No. 2/2018)

(iii) Mr. Rizwanul Haq Khan Vs. Mersen (India) Pvt. Ltd. reported in 2021 SCC Online CCI 49 (Ref Case No. 2/2016).

56. Accordingly, the appellant has prayed for:

(i) Allow the present appeal and set aside the order dated 04.04.2022 passed by the Hon'ble Competition Commission of India in the matter 'SuoMotu Case No. 1 of 2020'

(ii) Annul or reduce the penalty imposed by the Respondent on the Appellants;

Submission of the Respondent

57. The respondent submitted that the Commission had grouped the parties under in 3 sets, where Appellant No. 1 and Austere Systems emerged as masterminds, to orchestrate the rigging of the bids for the soil testing tenders issued by the Department of Agriculture in 2017 and 2018, by geographically allocating certain states to themselves, by not bidding in each other's allocated regions and by submitting supporting bids in favour of each other.

58. The respondent submitted that the captioned appeal is covered by the Judgment dated 14.11.2022 of this Hon'ble Tribunal passed in

"Saraswati Sales Corporation v. Competition Commission of India" (Competition Appeal (AT) No. 31 of 2022), where this Hon'ble Tribunal acknowledged the fact that Saraswati Sales Corporation was a member of the cartel who provided cover for the success of bidder i.e., Appellant No. 1.

59. The respondent further made the following submissions:

i) Appellant No. 1 had submitted its bids in the soil testing tenders of the Department of Agriculture for Moradabad and Bareilly divisions in 2017 ("2017 Tender") and for Bareilly, Moradabad, Jhansi, Saharanpur, Meerut, and Aligarh divisions in 2018 ("2018 Tender") whereas Appellant No. 2 had submitted bids in the soil testing tenders of the Department of Agriculture for Bareilly division in 2017 only. Further, the financials bids for Jhansi division in 2018 were cancelled.

ii) Appellant No. 1 had won the tenders in 2017 for Bareilly and Moradabad divisions and tenders in 2018 for Moradabad, Bareilly, and Meerut divisions as a result of bid rigging and collusive bidding.

iii) Appellant Nos. 1 and 2 have no experience in soil testing: Appellant No. 1 is a unit of Yash Ornaments Pvt. Ltd. based in Bareilly, U.P., and is engaged in jewellery-related work, manpower recruitment agency and business auxiliary services. Further, Appellant No. 2 is a group company of Appellant No. 1 and is engaged in e- governance work such as preparation of PAN card etc.

iv) Appellant No. 3's own admission stating that since there were few companies operating in the soil testing business in 2017, he decided to submit separate bids on behalf of both Appellant Nos. 1 and 2 in the 2017 Tender to show competition.

v) Appellant No. 2 had submitted their bid only in the 2017 Tender for Bareilly division and Appellant No. 4 (Director of Appellant No. 2) in his statement had stated that the reason for participation in the 2017 Tender was due to the fact that there were few companies in the business of soil testing, therefore, both Appellant Nos. 1 and 2 submitted their bids due to the apprehension that the tenders for soil testing may get cancelled due to lack of bids.

vi) That Mr. Naresh Kumar Sharma of M/s Saraswati Sales Corporation in his statement has stated that Saraswati Sales had submitted bids at the request of Appellant No. 3, as a cover bid or supporting bid so that Appellant No. 1's bid does not get rejected due to insufficient number of bids. Further, Appellant No. 3 had decided the bid price quotation for the 2017 Tender and 2018 Tender for Bareilly and Moradabad divisions.

vii) *Fake experience certificates and work orders provided by Appellant No. 1 to rival bidders:* Appellant No. 1 had issued fake experience certificates to M/s Siddhi Vinayak and M/s Satish Kumar being the rival bidders and the same bore the same date and were issued despite the fact that these entities never had any soil testing experience or experience of working on ICP-OES machine. Further, Appellant No. 1 also issued fake work orders for conducting 50,000-55,000 soil samples to M/s Siddhi Vinayak and M/s Satish Kumar.

viii) *Fake invoices arranged by Appellant No. 1 to rival bidders and submission of fake Invoices in tender process*:

(a) Appellant No. 1 had arranged fake invoices of soil testing machinery for M/s Saraswati Sales. Further, invoices having completely identical account number, number of items, serial number and even time mentioned therein were submitted by the Appellant No. 1 and rival bidders namely M/s Siddhi Vinayak, M/s Satish Kumar and M/s Saraswati Sales during the tender process.

(b) Appellant No. 3 also submitted evasive replies to the questions regarding the similarity in the invoices for the purchase of lab consumables from M/s Today Tech Scientific Solutions and soil testing machine from M/s Thermo Fisher Scientific Pvt. Ltd. (Singapore) which were submitted by Appellant No. 1, M/s Satish Kumar, M/s Siddhi Vinayak and M/s Saraswati Sales in the 2018 Tender. Further, no actual sale of the soil testing machines was ever made to M/s Siddhi Vinayak, M/s Satish Kumar and M/s Saraswati Sales.

ix) Employees and Key Managerial Personnel of Appellant No. 1 submitted bids for rival companies: Mr. Anuj Sharma, Mr. Suraj Singh, Mr. Vivek Saxena, who were employees of Appellant No. 1, submitted various bids on behalf of M/s Siddhi Vinayak & M/s Satish Kumar for the 2018 tenders, Whereas Mr. Rachit Agarwal who was the General Manager of Appellant No. 1 assisted in submissions of bids to abovementioned entities.

x) *False undertaking given by Appellant No. 2 to the Department of Agriculture:* Appellant No. 4 who is Director of Appellant No. 2 had also submitted a false undertaking of having established a soil testing lab in order to show that it had complied with terms and conditions for submitting the tender bid, even though his company neither had the lab or the requisite machines.

xi) Common IP Address: As per records of e-bidding submitted by the National Informatics System, the bids of Appellant No. 1, M/s Siddhi Vinayak and M/s Satish Kumar and M/s Saraswati Sales were submitted from the same IP address in the Moradabad tender for the year 2018 and the bids of Appellant No. 1, M/s Siddhi Vinayak and M/s Satish Kumar were submitted from the same IP address in the Bareilly tender for the year 2018.

xii) The respondent submitted that appellants contention that they were not provided an opportunity of cross examination before the Commission is not correct in view of extant regulations. According to Regulation 41(5) of the CCI (General Regulation), 2009, the CCI has a discretion to grant the right to cross examination, only if the CCI deems it "necessary" or "expedient". However, in the present case, the Appellants never sought the right to cross examination and keeping in view the fact that, prima facie the DG and the CCI found palpable evidence (own admissions of the Appellants) along with ample circumstantial evidence, sufficient to hold that the Appellants were in contravention of the Act. It is submitted that per se the rule is applicable for Section 3 violations, which is rebuttable, and the onus is on the Appellants to prove that they did not violate the provisions of the Act, which in the present case, the Appellants failed to do so before the DG and the CCI.

xiii) Appellant No. 1 in complete violation of the tender conditions, had illegally sub-contracted the work illegally to M/s Siddhi Vinayak and M/s M/s Satish Kumar.

xiv) Common Appeal: It is also pertinent to note that Appellant No. 1 has contended that there was no collusive bidding with Appellant No. 2, however, the present appeal has been filed by both Appellant Nos. 1 and 2 together.

60. The counsel of the respondent submitted that it was only after the due consideration of the facts and evidence before the Commission, it held that Appellant No. 1, in collusion and through concerted efforts with other parties had contravened the provisions of the Act.

61. In regard to penalty imposed the counsel for respondents stated that the appellants have placed reliance on Excel Corp Limited v. Competition Commission of India and Others [(2017) & SCC 47), to which, the Commission rightly noted that there is no merit in these submissions and no narrow interpretation of the relevant turnover can be taken, as contended by the Appellants. In support, the Commission had placed reliance on its decision dated 03.02.2020 in Sue Moto Case No. 2 of 2020. Further, the Commission had considered both aggravating and mitigating factors while imposing the penalty at 5% on the Appellants, as the penalty

permissible under Section 27(b) of the Act is a maximum of 10% of the turnover and further, for violations under Section 3 of the Act, a penalty of up to three times of its profits for each year of the continuance of such agreement or ten percent whichever is higher. However, it is submitted that in cases of cartelisation, if the relevant turnover is to be considered qua the unlawful monies generated from act of cartelisation, which in the present case would be zero, then the entire purpose of the Act would be defeated.

62. Finally, the respondent submitted that Section 3 violations are considered the most egregious violations under the Competition Law regime. In so far as reliance on the decision of Excel Corp (supra) is concerned, it was nowhere held or otherwise declared that the relevant turnover should be limited to the turnover earned from the specified customer or tender. If such an interpretation is permitted, then it would frustrate the entire objective of the imposing penalty to deter cartelists, and this could not have been the intent of the Parliament or the Hon'ble Supreme Court.

Analysis of evidence and findings

63. We have considered the evidence on record and heard the counsels in details. We need to examine the evidence of key persons in the organisations identified in Set I and Set III of the companies by the DG to identify the relationship between these organisations. Set I included M/s Yash Solutions, M/s Saraswati Sales, M/s Satish Kumar, M/s Siddhi Vinayak and M/s Chaitanya Business Outsourcing and Set-III included M/s Yash Solutions and M/s Austere Systems.

64. Extracts from the statement of Sh. Naresh Kumar Sharma, Proprietor M/s Saraswati Sales Corporation Bareilly recorded on oath 05.12.2020.

"Q.3 What is your role and responsibilities in your firm M/s Saraswati Sales Corporation?

A. 3 Being the sole proprietor of my firm, all the decisions are taken by me and I am only responsible for the entire work of my firm

Q.7. Has your Firm ever bid in any tender for Soil Testing floated by Govt. of UP during 2017 & 2018? If yes, please provide details

A. 7. My firm has never participated in any tender related to soil testing floated by government of U P

Q. 18. Did your Firm has the necessary infrastructure such as Laboratory. Equipment, trained manpower etc. required for testing of soil samples?

A. 18. No.

Q. 19. Where was your Soil Testing lab situated and what machines & technical manpower were available?

A 19. I do not have any soil testing laboratory as I or my firm has never engaged in soil testing business/work

Q 20 What is an ICP-OES Machine?

A 20. I do not have any knowledge about this

Q 21 Did you purchase any Soil testing Machine (ICP-OES) for analysing soil samples?

A. 21. No my firm has never purchase any such machinery or equipment which is used for soil testing"

Q. 37 I am showing you authorization letter issued in respect of Shri Vivek Saxena to represent & sign on behalf of the firm Saraswati Sales Corporation for various Tenders. The said documents have been submitted in soil testing tenders in Bareilly and Moradabad division in 2018. I am showing you copies of Pan and Aadhaar cards of Shri Vivek Saxena which were submitted in these tenders.

A. 37 I have never authorized Shri Vivek Saxena to sign on behalf of my firm namely M/s Saraswati Sales Corporation to bid in soil testing tenders of UP. Government. My signatures may have been misused for submission of the said documents. The photograph affixed on the authorization letter does not belong to Sh Vivek Saxena who was working for my firm However, the photographs affixed on Pan and Aadhaar cards are of Vivek Saxena who was working for my firm.

Q.8 Who else was associated with you/your firm for Soil Testing work?

A. 8 Shri Parveen Agarwal, who is residence of Sahukara, Bajaria Moti lal, is a family friend and also my neighbour and he used to come regularly to meet me Shri Parveen Agarwal is involved in Jewellery related business Once he requested me to provide copies of my Pan Card, Aadhaar Card, Character Certificate and Experience certificate Shri Agarwal told me that he will be using these documents in some business being carried out by him

Shri Agarwal may have misused these documents in these Soil testing tenders.

Q. 9. Did you enquire from Sh. Agarwal as to which business or tender he is going to use these documents of your firm?

A. 9 I did not enquire from Sh. Agarwal about where is he going to use these documents

Q 10 Why did you not enquire from Sh. Agarwal as the documents belong to your firm and were being used by Sh. Agarwal for his business purpose?

A.10 I did not enquire as he is a close family friend and it was my mistake.

Q. 11. Did you enquire from Sh. Agarwal where he has used the aforementioned documents?

A. 11. No, I did not enquire from Mr. Agarwal after handing over copies of the aforesaid documents to him.

65. In his statement on 05 12 2020, Sh Naresh Kumar Sharma had feigned ignorance about the bids submitted by his firm in the 2018 soil testing tenders. However, when he was confronted with the records of the Earnest Money Deposit (EMD) submitted in the form of FDR and Tender fees submitted in the form of Demand craft, which were prepared from his own bank account and was submitted by his firm in the said tenders, he accepted in his statement recorded on 29.12.2020, that his firm had submitted bids in the said tenders.

> *"Q. 1 This is in continuation of your statement recorded on oath on 05.12.2020 copy shown to you as. As you had denied in your earlier statement dated 05.12 2020 that you had not*

submitted any bids in the soil testing tenders issued by Bareilly & Moradabad divisions of the Deputy Director Soil testing. Uttar Pradesh Government in 2018, I would request you to confirm the same.

A. 1. Yes, I admit that my firm had submitted bids in the UP Government Soil testing tenders for Bareilly and Moradabad Divisions during 2017 and 2018. Shri Vivek Saxena, who was my authorized signatory had discussed with me before bidding the above said tenders and the bid was submitted with my consent and full knowledge.

Q. 2 Why did you bid for the above said tenders when you did not have any experience, Infrastructure such as soil testing machine and manpower for conducting soil testing work?

A.2 Sh. Praveen Agarwal of Yash Solutions suggested that soil testing tenders are being issued by the Agriculture Department, U.P Government and accordingly he requested me to prepare the documents and EMD for submitting the same to the Agriculture department. Sh. Praveen Agarwal informed me that he needed a supporting bid/cover bid from my firm in support of his firm Yash Solutions so that his bid is not rejected due to insufficient number of bids. I had submitted supporting bids to help Sh. Praveen Agarwal's firm Yash Solutions during the tenders issued in 2017 and 2018."

Q.3 *How did Sh. Praveen Agarwal request you to help him?*

A. 3 During a personal meeting in 2017 when the soil testing tenders issued by UP Government, Sh. Praveen Agarwal requested me for submitting supporting bid/cover bid to help his firm Yash Solutions in the said tender

Q. 4. Why did you agree to submit supporting bids/cover bids to help Sh Praveen Agarwal's firm namely Yash Solution?

A.4. Because I had very long and good family relationship with Sh Praveen Agarwal, I decided to help him in the aforesaid tenders.

Q.6. I am showing you the financial bids submitted by your firm in Moradabad Divisions in 2018-2019 soil testing tenders Who decided the bid price to be submitted in these lenders.

A. 6. Sh. Praveen Agarwal decided the bid price to be submitted by my firm in the said tender. Further Sh Praveen Agarwal decided the bid price for all the tenders in which my firm had submitted its bids for soil testing tenders of UP Government. Sh. Praveen Agarwal got the entire bid documents prepared on the behalf of my firm and my firm submitted the said the bid documents along with the Demand draft and EMD from my bank account in the said tenders.

Q.7. Do you regret submitting supporting bids/cover bids in UP Government soil testing tenders in the year 2017 and 2018 to help Sh. Praveen Agarwal firm Yash Solution.

A.7. Yes, I regret my decision to submit supporting bids to help Sh Praveen Agarwal's firm Yash Solutions in the aforesaid tenders. The said action on my part to assist another bidder in a Government Tender, by way of forming a group and under a conspiracy was illegal and should not have happened.

Q.9. How did you procure experience certificate from M/s Austere System Pvt Ltd.?

A. 9. Experience Certificate were arranged by Sh. Praveen Agarwal and I have no knowledge from where the said certificate was arranged.

Q. 10. How did you procure Invoices for purchasing of ICP-OPs machine which is used for soil testing?

A. 10. The said invoices were arranged by Sh. Praveen Agarwal and 1 have no knowledge from where the said invoices were arranged.

Q. 11. Did you submit undertaking for establishment of soil testing lab in Bareilly and Moradabad tenders?

A. 11. The said undertakings were submitted on behalf of my firm however, the same were arranged by Sh. Praveen Agarwal and the same were submitted by my firm as a supporting/cover bid.

Q. 38. I am showing you the CDR between 16.05.2018 to 06.10.2018 which you had with Sh. Praveen Agarwal. During *the above telephonic discussion what exactly did you discuss with Sh. Praveen Agarwal ?*

A. 38. I admit that during the telephonic discussion with Sh. Praveen Agarwal, we used to discuss besides other things about the soil testing tenders floated by the Agriculture Department of UP Government and the bids to be submitted by my firm in support of Yash Solution.

66. The following conclusions emerge from the statement of Sh. Sharma sole Proprietor of Saraswati Sales Agency:

i) Sh Sharma admitted that his firm had submitted cover bids or supporting bids in the 2018 tenders, on the request of Sh Praveen Agarwal of Ms Yash Solutions as he had very long and good family relationship with Sh. Praveen Agarwal.

ii) Sh Sharma also confessed that the copy of the Invoice for purchase of ICP- OES machine, which was having the same Account and Machine Number as that mentioned in the Invoice submitted by M/s Yash Solutions in the 2018 tenders, were arranged by Sh Praveen Agarwal and that he had no knowledge from where the said fake documents were arranged. In this regard, it is seen that the Excise Department Haryana, has confirmed that the Invoices submitted by OP-4 for purchase of items related to soil testing, in the 2018 soil testing tenders wore altered and fake.

iii) Regarding common IP address for submission of E-bids in respect of M/s Saraswati Sales Corporation, M/s Siddhi Vinayak & Sons, M/s Satish Kumar Agarwal and M/s Yash Solutions in the 2018 Moradabad tenders. Sh. Naresh Kumar Sharma vide his affidavit dated 27.03.2021 submitted that the bids were submitted by Sh Vivek Saxena, his firm's Authorised Signatory and hence, he cannot say anything as to how the same IP address was used in submitting the said bid.

iv) All the aforesaid bidder firms are independent entitles having separate ownership, a common IP Address only proves that through collusion and cartelization M/s Yash Solutions. M/s Siddhi Vinayak & Sons. M/s Saraswati Sales Corporation and M/s Satish Kumar Agarwal in the said soil testing tenders of 2018

v) The evidence on record and the statement of Sh Naresh Kumar Sharma Proprietor, shows that M/s Saraswati Sales Corporation had no experience of soil testing work and had not acquired any soil testing machine soil testing lab and manpower to undertake any soil testing work and the Experience Certificate, Invoices and Undertaking submitted by Saraswati Sales Corporation in the said tenders were fake.

vi) Thus, there was no other reason for M/s Saraswati Sales Corporation to submit bids in the 2018 soil testing tenders of Moradabad, Bareilly and Aligarh with fake and manipulated documents, but to submit cover bids in support of M/s Yash

Solutions, on the request of Sh Praveen Agarwal, so that Government tenders are not cancelled due to insufficient number of bids. Sh Sharma has also admitted that his act of assisting Sh Praveen Agarwal by way of submission of cover bids/supporting bids in a Government Tender by forming a group was illegal and should not have happened.

67. In view of the above, it can be concluded that M/s Saraswati Sales Corporation submitted cover bids in support of M/s Yash Solutions, using fake documents provided by M/s Yash Solutions, in the soil testing tenders of the Bareilly, Moradabad & Aligarh divisions of the Agriculture Department, Uttar Pradesh in the year 2018, so that tenders are not cancelled due to insufficient number of bids.

68. Extracts from the statement of Sh. Satish Kumar Agarwal, Proprietor of M/s Satish Kumar Agarwal

M/s Satish Kumar Agarwal (OP-2) had submitted its bids in the soil testing tenders of Moradabad Division in the year 2017. It had also submitted bids in the 2018 tenders issued by Bareilly, Moradabad and Aligarh divisions

Q.3 What is your role and responsibilities in your firm M/s Satish Kumar Agarwal?

A.3. For both M/s Satish Kumar Aggarwal and M/s Siddhi Vinayak & Sons, I take care of all the business and all the responsibility rests with me only

Q.5. Has your Firm ever bid in any tenders floated by Govt. of UP? If yes, please provide details?

A.5. Yes, in the year 2017 & 18.

Q.6. Please explain your understanding of Government's Soil testing Program?

A. 6. No, I was not aware about the soil testing program as it was newly launched.

Q.7 Do you or your Firm have any experience in soil testing work?

A. 7. No, either of my firms have no any experience in soil testing

Q.8 What are the requirements for soil testing work?

A.8 I have no knowledge about the soil testing work

Q.9. Does your Firm have the necessary infrastructure such as Laboratory Equipment, trained manpower etc required for lasting of soil samples?

A.9. No, neither of my Firms have any experience in soil tasting work.

Q.10. Who else was associated with your firm for Soil Testing work?

A.10. I knew few persons who had some knowledge about the soil testing work. I do not remember their names

Q.11. Who are your competitors engaged in soil testing activities?

A. 11 business I have no knowledge about the firms who are in the soil testing business.

Q.12. Has either of your Firm ever bid in any tenders for Soil Testing floated by Department of Agriculture, Govt. of UP? If yes, please provide details.

A. 12. Yes, I had bid in the name of M/s "Satish Kumar Aggarwal and another tender in the name of my other firm namely M/s Siddhi Vinayak & Sons which is registered in the name of my wife Mrs. Sangeeta Agarwal.

Q. 13 What was the eligibility criteria for bidding in those tenders?

A 13 I had no information about eligibility criteria when I had bid in these soil testing tenders I had bid assuming that if my firm is found eligible, I will be given the contract then I will fulfil the contract

Q. 14 Who were the other bidders in the said tenders?

A 14 I do not remember

Q 15. Did your firms fulfil the technical eligibility criteria in the said tenders?

A 15 I did not examine the eligibility criteria for soil testing tender as it was first time such tenders were issued by UP Government

Q. 16. Details of any other related firms or sister concerns who may be engaged in soil testing work/business.

A. 16. My other firm registered in the name of my wife had also bid in these tenders. However, all the business-related work of M/s Siddhi Vinayak & Sons is looked after by me personally

Q18. Did your Firm have the necessary infrastructure such as a Lab? Laboratory Equipment, trained manpower etc. required for testing of soil samples?

A 18. No, both my firms namely M/s Satish Kumar Aggarwal and M/s Siddhi Vinayak & Sons did not have the necessary infrastructure such as Lab, Laboratory Equipment, trained manpower etc, required for testing of soil samples when I had submitted those bids.

Q. 19. I am showing you the "Undertakings submitted by your Firms Satish Kumar Agarwal & Siddhi Vinayak & sons to the Agriculture Department during the tender process for having established a lab for soil testing in Bareilly. Where in Bareilly was your Soil Testing lab situated and what machines were available?

A. 19. My both firms namely M/s Satish Kumar Aggarwal and M/s Siddhi Vinayak & Sons did not have any lab and other infrastructure which was required for soil testing work

Q. 20 I am showing the terms & condition laid down by the Department of Agriculture, Government of U.P for the soil testing work in the Bareilly & Moradabad tenders .

A. 20. Yes. I have seen it.

Q. 21. In clause no. 24 of the said terms & conditions of the Moradabad tenders, it is categorically mentioned that bidder/ company should have a functional soil testing lab nearest place to Moradabad. As you yourself have admitted on oath above that either of my firms did not have any *soil testing laboratory or any other infrastructure related to soil testing work, why did your firms submitted false undertaking along with your tender documents to the Agriculture Department of U.P Government?*

A. 21. I have nothing to say

Q. 22. Did you Purchase any Soil testing Machine (ICP-OES) for analysing soil samples?

A. 22. Both my firms namely M/s Satish Kumar Aggarwal and M/s Siddhi Vinayak & Sons had never purchased any Soil testing Machine (ICP-OES) that is before or after submitting the bids in soil testing tenders during 2017 and 2018.

Q. 23. I am showing you the Commercial Invoices for purchase of the ICP- OES machine by your firm Satish Kumar Agarwal. The sane were submitted by your firm during the soil testing tenders for Bareilly & Moradabad divisions.

A. 23. I do not remember.

Q. 24. Were the aforesaid Commercial Invoices issued by the seller to your firm?

A. 24. I do not know.

Q. 25. How is the said Invoice submitted by you in the Bareilly Moradabad tenders are having common Account Number 1532236 and Serial Number IC74DC173313 for Your firm & the Invoice of Siddhi Vinayak & Sons)?

A. 25. I do not know.

Q. 26. How is the said Invoice submitted by you in the Moradabad tenders is having same Account Number 1532236 and Serial Number IC74DC173313 for Your firm & the Invoice of Saraswati Sales Corporation submitted in the Bareilly & Moradabad tenders?

A. 26. I do not know.

Q. 27. How is the said Invoice submitted by you in the Moradabad tenders are having same Account Number 1532236 and Serial Number IC74DC173313 for Your firm & the Invoice of M/s Yash Solutions Pvt Ltd submitted in the Bareilly & Moradabad tenders?

A. 27. I do not know.

Q. 28. From where did you get the above-mentioned invoice?

A. 28. I do not know.

Q. 29. Who provided the said Invoice to you and why?

A. 29. I do not know.

Q. 30. I am showing the letter received from M/s Thermo Fisher Scientific India Private Limited confirming that no sale of any ICP-OES machine was made to either to M/s Satish Kumar Aggarwal and M/s Siddhi Vinayak & Sons. Why did you submit fake invoices for said machine in the tenders of soil testing in Moradabad and Bareilly Divisions during 2018?

A. 30. I had submitted the said fake invoices with an intention to service the contract if it was awarded to my firms

Q. 31. I am showing you the Invoice bearing no. 7000 dated 01.07.2017 raised by M/s Today Tech Scientific Solutions, Ambala

Cantt in favour of your Firm M/s Satish Kumar Agarwal for purchase of certain items, which was submitted by your Firm to the Department of Agriculture, Govt. of UP, during the tendering process in the year 2018-19 for Bareilly and Moradabad divisions.

A. 31. Yes, I have seen it.

Q. 32. Why were the aforesaid items procured by your firm?

A. 32. I do not know.

Q. 33. Were the aforesaid Commercial Invoices issued by the seller to your firm?

A. 33. Yes.

Q. 34. How is the invoice submitted by your firm and that of M/s Yash Ornaments having same time i.e. 02:37 PM?

A. 34 I do not know.

Q. 35. How is the invoice submitted by your firm and that submitted by M/s Siddhi Vinayak & Sons in the Bareilly & Moradabad tenders having same time i.e. 02:37 PM?

A. 35. I do not know.

Q. 36. Who provided the said Invoices to you and why?

A. 36. I do not know.

Q. 37 I am showing you the letter by Dy. Excise & Taxation Commissioner(ST) dated 30.06.2020 confirming that against the above said invoices raised by M/s Today Tech Scientific Solutions, Ambala Cantt in favour of both your firms namely M/s Satish Kumar Agarwal *and M/s Siddhi Vinayak & Sons for purchase of certain items, that no sales were made to both your aforesaid firms.*

A. 37. Yes, I have seen it.

Q. 38. Why were the said Invoices submitted after alteration in the bids of Soil testing tenders issued by the Uttar Pradesh Agriculture department?

A.38. Yes, it was a mistake on my part to submit fake documents/invoices.

Q. 39. When your firm did not have any Machine or Lab, why did you submit a false Undertaking?

A. 39. It was a mistake on my part to submit such fake documents in the soil testing tenders.

Q. 40. I am showing you the copy of "Work Orders submitted in the Bareilly & Moradabad tenders issued by M/s Yash Solutions another bidder in the said tenders, to your firm namely M/s Satish Kumar Agarwal for conducting 50,000-55,000 soil samples and also to M/s Siddhi Vinayak & Sons for conducting 50,000 to 60,000 soil samples for Bareilly and Moradabad divisions.

A. 40. Yes, I have seen it

Q. 41. I am showing you the "Experience Certificates" dated 02.11.2017 and 05.12.2017 issued by M/s Yash Solutions in favour of your Firm Satish Kumar Agarwal which was submitted by your firm in the Moradabad, Bareilly & Aligarh tenders. Why the aforesaid fake "Work Orders & "Experience Certificates for conducting Soil Sample testing *were issued to both of your firms namely Mis Satish Kumar Agarwal and M/s Siddhi Vinayak & Sons by Yash Solutions?*

A. 41. I have nothing to say.

Q. 42. M/s Yash Solutions have certified that your Firm had conducted 52000 sample tests for them. How did your Firm receive this work as a sub- contract from M/s Yash Solutions as the original contract for 2017 was allotted by Department of Agriculture, Govt. of UP to M/s Yash Solutions?

A. 42. I do not know

Q 43. How did your Firm conduct those sample tests in absence of any soil testing machinery or Lab required for the work?

A. 43. I have nothing to say.

Q.44 Why M/s Yash Solutions Pvt. Ltd. issued a false "Experience Certificate dated 05.12 2017 in favour of your Firm?

A. 44. I do not know.

Q 45. How did you decide your firm's financial bids for tenders floated by Department of Agriculture, Govt. of UP during 2018 for Soil testing?

A. 45. My employees suggested me the rates which are to be quoted in the above said tender.

Q. 46 Can you tell the names of those employees?

A. 46. I do not remember the names of those employees.

Q. 47. I am showing you the comparative statement of financial bids for 2017-18 for Moradabad Division, for 2018 for Bareilly Division tender and for 2018-19 tender for Moradabad Divisions

A. 47. Yes, I have seen it

Q. 48 Why did you bid separately for M/s Satish Kumar Aggarwal and M/s Siddhi Vinayak & Sons in the aforementioned tenders when both firms were in your direct control?

A. 48. 1 bid separately for both the firms just to show that there is enough competition and to avoid the cancellation of tenders because of lack of participation of firms.

Q. 49. Your firm quoted Rs 146.50 & Rs 98,50 for 12/6 parameters, in the Bareilly tender date of bid opening 18.06.2018, whereas in the Moradabad Tender having date of bid opening 19.06.2018, you quoted Rs 145 & Rs 97 for 12/6 parameters respectively. Why different rates were quoted when the tenders had opened at nearly the same time?

A. 49. I have no justification for the same.

Q. 50 Your other firm namely M/s Siddhi Vinayak & Sons quoted Rs 146.0 & Rs 98.0 for 12/6 parameters, in the Bareilly tender date of bid opening 18.06.2018, whereas in the Moradabad Tender having date of bid opening 19.06.2018, you quoted Rs 148 & Rs 98 for 12/6 parameters respectively. Why different rates were quoted when the tenders had opened at nearly the same time?

A. 50. I have no justification.

Q. 51. I am showing you the character certificate issued to Mrs. Sangeeta Agarwal by office of the district magistrate Bareilly dated 25.07.2016. In column no. 6 of the said certificate, mobile number of some Mr. Rachit Agarwal is given. How the mobile no. of Mr. Rachit

Agarwal appeared on the character certificate issued to your wife Mrs. Sangeeta Agarwal?

A 51. Mr. Rachit Agarwal helped in procuring the said character certificate and he must have given hi mobile number

Q. 52. I am showing you the authorization letter and other documents issued by M/s Yash Solutions in favour of Mr. Rachit Agarwal as their Authorised Signatory, which was submitted in the Jhansi tender having the same mobile number as mentioned in the character certificate of Mrs. Sangeeta Agarwal. How did it happen?

A. 52. I have no idea how did it happen.

Q. 53. How are documents submitted by your firms namely order for soil testing, experience certificate, character certificate are linked with your rival bidder M/s Yash Solutions?

A. 53. Yes, I agree they are linked. However, I have no information as to how this has happened.

Q. 54. Do you have any information about M/s Yash Solution or M/s Yash Ornaments and its owners?

A. 54. I have no information about M/s Yash Solution or M/s Yash Ornaments.

Q. 55. Do you or any of your employees have any interaction/discussion with any employee/partner of any other firm participating in soil testing tenders floated by Department of Agriculture, Govt. of UP for soil testing before or after quoting bid?

A. 55. I had no interaction/discussion with any employee/partner of any other firm participating in soil testing tenders floated by Department of Agriculture, Govt. of UP for soil testing before or after quoting a bid.

Q.56. Do you know Mr. Praveen Agarwal, partner of M/s Yash Solution /M/s Yash Ornaments?

A 56. No, I do not know Mr. Praveen Agarwal.

Q. 57. I am showing you CDR of your number 9837758888 which shows that you were in communication with Sh. Praveen Agarwal (Partner of M/s Yash Solutions) during the period of processing of soil testing tenders of Moradabad and Bareilly divisions in 2018.

A. 57 Yes, I know Mr. Praveen Agarwal who is in the jewellery business and I admit to having regular interactions with him on telephone.

Q 59 Do you know Mr. Nitish Agarwal (CEO of Yash Solutions)?

A. 59. Yes, I know Mr. Nitish Agarwal and I am in regular touch with him.

Q. 60 I am also showing you CDR of Sh. Rachit Agarwal (Authorised Signatory of M/s Yash Solutions) which shows that you were in regular communication with him during the period of processing of the said tenders. What did you discuss during those calls?

A. 60. Yes, I know Mr. Rachit Agarwal and I used to take his help in completing and submitting the tender documents of both my firms.

Q.61. Who was your Authorised Signatory in the Bareilly & Moradabad tenders for both of your Firms namely M/s Satish Kumar Aggarwal and M/s Siddhi Vinayak & Sons?

A. 61. I do not remember.

Q. 62 I am Showing you the authorization letter issued by your firm M/s Siddhi Vinayak & Sons in favour of Mr. Vivek Saxena and copy of Aadhar of Mr. Vivek Saxena

A. 62. Yes, I have seen it

Q.63. I am showing you the authorization letter issued by M/s Saraswati Sales Corporation, Bareilly in favour of Mr. Vivek Saxena 'and Copy of Aadhar of Mr. Vivek Saxena

A. 63, Yes, I have seen it.

Q. 64. Is Mr. Vivek Saxena the same person in the both the cases?

A. 64. Yes, he is the same person.

Q. 65. How can the same person namely Mr. Vivek Saxena also became an authorized signatory for your rival bidder M/s Saraswati Sales Corporation?

A 65. I do not know how he became the authorized signatory of M/s Saraswati Sales Corporation. However, Mr. Naresh Sharma who has authorized Mr. Vivek Saxena as his Firm's authorized signatory, is known to me and he is in the business of electric contracts.

Q. 66. I am showing you the authorization letter & Aadhar issued by M/s Team-1 Data Management Ltd. in favour of Mr. Suraj Singh and Copy of Aadhar of Mr. Suraj Singh who is also the authorized signatory *of your Firm Siddhi Vinayak & Sons in Moradabad & Bareilly tenders of 2018.*

A. 66. Yes, I have seen it.

Q. 67 How can the same person namely Mr. Suraj Singh also became an authorized signatory for your rival bidder M/s Team-1 Data Management Ltd.?

A. 67. I do not know how he became the authorized signatory of M/s Team-1 Data Management Ltd. also. Mr. Suraj Singh as well as Mr. Vivek Saxena came into my contact through some of my other employee.

Q. 68. I am showing you affidavit submitted by your firm M/s Siddhi Vinayak & Sons in the Aligarh Soil testing tender for the year 2018. The said affidavit mentioned that "Yash Ornament Pvt. Ltd. Company incorporated in terms of the provision of the Companies Act 1956." How it is possible that in your firm's affidavit the name of Yash Ornaments Pvt. Ltd which is a rival bidder of your firm in the soil testing tenders is mentioned.

A. 68. I do not know.

Q. 69. Has any of your Firms namely M/s Satish Kumar Aggarwal or M/s Siddhi Vinayak & Sons ever been blacklisted by the UP Government?

A. 69. Yes. The Agriculture Department of U.P Government blacklisted both my firms namely M/s Satish Kumar Aggarwal and M/s Siddhi Vinayak & Sons for two years questioning the genuineness of the *documents submitted by my Firms along with my Bids for the soil tenders.*

Q. 70. Whether you had appealed the backlisted done by U.P Government.

A.70. No, as I was well aware that my firms have submitted manipulated documents in these tenders hence, I did not want to escalate the matter further and appeal in the court.

69. It can be seen from the statement on oath and documents on record that:

i) Sh Satish Kumar Agarwal was having complete control and responsibility in respect of his firm M/s Satish Kumar Agarwal as well as his other firm M/s Siddhi Vinayak & Sons, in which his wife Smt. Sangeeta Agarwal is the Proprietor.

ii) He had submitted bids for both M/s Satish Kumar Agarwal and M/s Siddhi Vinayak & Sons, in the soil testing tenders issued by Agriculture Department, Government of Uttar Pradesh Government in the year 2017 & 2018.

iii) Mrs Satish Kumar Agarwal and M/s Siddhi Vinayak & Sons had submitted Experience Certificate of soil testing work, issued by his rival firm M/s Yash Solutions. Sh. Satish Kumar Agarwal had admitted that both his firms had no experience of soil testing work and his firms did not have any soil testing lab or had purchased any soil testing machines. He had no answers when questioned as to why such a false certificate was issued by M/s Yash Solutions.

iv) Sh Satish Kumar Agarwal submitted invoices for purchase of soil testing machine ICP-OES, having common Account number and machine number with the invoice submitted by M/s Yash Solutions in the Soil testing tenders. However, Sh Agarwal continuously submitted evasive replies "I do not know and provided no explanation as to how this could be possible and who provided the invoices.

v) As per reply received from M/s Thermofisher the vendor for the soil testing machine, it was confirmed that the Invoices submitted by M/s Satish Kumar and M/s Siddhi Vinayak & Sons in the 2018 soil testing tenders were altered and fake.

vi) Sh Satish Kumar Agarwal also submitted invoices for purchase of various items related to soil testing, issued by M/s Today Tech Scientific Solutions, Ambala Cantt which had exactly the same number of items, amount and time mentioned therein, as mentioned in the invoices submitted by M/s Yash Solutions. Sh Agarwal admitted that the said invoices were fake/altered however, evasively replied "I do not know when questioned as to who provided the said invoices and for what purpose. The Excise Department Haryana, confirmed that the Invoices submitted by M/s Satish Kumar & M/s Siddhi Vinayak & Sons purchase of items related to soil testing, in the 2018 soil testing tenders were altered and fake.

vii) Sh Satish Kumar Agarwal admitted that there was clear linkage between the bid documents submitted by his firms with M/s Yash Solutions including False Experience Certificate issued by Yash Solutions, fake Invoices for purchase of ICP-OES machine fake Invoice for purchase of soil testing items, name of Yash Solutions appearing in the Affidavit submitted by M/s Siddhi Vinayak & Sons, phone number of the Authorised Signatory of M/s Yash Solution in the Character Certificate issued to Smt Sangeeta Agarwal, etc but continuously submitted evasive replies "I do not know" or "I do not remember and submitted no explanation for the linkage.

viii) Sh Satish Kumar Agarwal initially denied knowing Sh Praveen Kumar Agarwal, Managing Director, M/s Yash Solutions, however when confronted with the CDR of his Mobile number, he admitted having regular interactions with Sh Praveen Kumar Agarwal.. He also admitted to be in regular communication with Sh Nitish Agarwal, CEO as well as Sh Rachit Agarwal (GM), of M/s Yash Solutions. Sh Agarwal admitted that he used to take Sh Rachit's help in completing and submitting tender documents of both his firms.

ix) Sh Satish Kumar Agarwal confessed that he had bid separately for both the firms just to show that there is enough competition and to avoid the cancellation of tenders because of lack of participation of firms.

x) Sh Satish Kumar Agarwal also confessed that the Agriculture Department of UP Government had blacklisted both his firms namely M/s Satish Kumar Aggarwal and M/s Siddhi Vinayak & Sons questioning the genuineness of the documents submitted by his firms in the soil testing tenders and he had not appealed against that order as he did not want to escalate the matter further and appeal in the court, as he was well aware about the fact that both his firms have submitted manipulated documents in the said tenders.

xi) It is seen that despite the fact that neither Sh Satish Kumar Agarwal himself nor any of the firms controlled by him namely M/s Satish Kumar Agarwal and M/s Siddhi Vinayak & Sons, had any experience or infrastructure for soil testing work, both the firms had submitted bids in the soil testing tenders of Agriculture Department Uttar Pradesh Government during 2017 and 2018. However, none of his firms was L-1 in any the bids and hence did not win any contract. Sh Agarwal could not even provide any justification for the price bids submitted by his firms and admitted to have taken help of Sh Rachit Agarwal (General Manager) of M/s Yash Solutions in completing and submitting the tender documents of both his firms.

xii) The documents submitted by both M/s Satish Kumar Agarwal and M/s Siddhi Vinayak & Sons in the soil testing tenders, like the Experience Certificate. Invoices. Affidavit, Authorised Signatory clearly shows a nexus with M/s Yash Solutions however, during his statement Sh Satish Kumar Agarwal has only submitted evasive replies like "I do not know" or "I do not remember to a number of questions regarding who provided the said documents and for what purpose.

xiii) The Electronic bids submitted by M/s Saraswati Sales Corporation, M/s Siddhi Vinayak & Sons, M/s Satish Kumar Agarwal and M/s Yash Solutions, in the 2018 Moradabad tenders, were having the same IP Address.

xiv) Further, the bids submitted by M/s Siddhi Vinayak & Sons, M/s Satish Kumar Agarwal and M/s Yash Solutions in the 2018 Bareilly tenders, were also having same IP address. The bid submitted by Siddhi Vinayak & Sons in both the above tenders were having Login Id acs.yopl@gmail.com, which is a mail Id of M/s Yash Solutions.

xv) M/s Satish Kumar Agarwal vide his affidavit dated 27.03.2021 submitted that being non-technical person he is totally unaware about the IP address used by him or his firm's Authorised representative. Although all the aforesaid bidder firms are independent entities having separate ownership & addresses, a common IP Address for uploading bids OP-1, OP-2, OP-3 & OP4 as well as usage of Login Id of OP-1 by OP-3, only indicates that, parties had colluded in the submission of bids with a common intention to rig bids in the soil testing tenders of 2018.

xvi) In view of the above, it is clear that the submission of bids by M/s Satish Kumar Agarwal and M/s Siddhi Vinayak & Sons in the 2017 & 2018 soil testing tenders had no other locus, but to submit cover bids, as has already been admitted by Sh Satish Kumar Agarwal. The nexus with M/s Yash Solutions makes it evident that the cover bids were issued in support of M/s Yash Solutions, to ensure that tenders are not cancelled due to lack of bids.

70. Smt. Sangeeta Agarwal Proprietor of M/s Siddhi Vinayak and Sons in her statement on oath stated that her firm is a contractor/ supplier of vegetables. Her husband manages the entire affairs of her firm and her role is to only sign documents on behalf of the firm as she is the sole proprietor.

71. DG during the course of investigation found the M/s Team- 1 Data Management (P) Ltd., Lucknow had also submitted bids for soil testing tender floated by the Agricultural Department, U.P, Bareilly Division, during the year 2017. It was also seen that one Sh. Suraj Singh was authorized signatory of M/s Team- 1 besides other firms like M/s Satish Kumar Agarwal and M/s Siddhi Vinayak & Sons in the 2017 & 2018 tenders.

72. In this regard, the DG obtained a statement of Sh Saurabh Shant Srivastava, Director M/s Team- 1 Data Management (P) Ltd. who stated clearly that he is the head of the organization and he or none of the members from his team had bid for any such tender of Agricultural Department, U.P. and if any such bid has been submitted the same would be a forged bid. He further stated that the EMD of Rs. 1 lakh deposited on behalf of his firm was never submitted from any of the bank accounts by him other official and employee. He produced the bank records of the firm to confirm that no such payment was made by his firm. He also stated that signature from the documents along with the bid appear to be forged. Accordingly, the aforesaid firm was dropped from the investigation and bid on its behalf was found to be a forged bid.

73. As per records Sh Suraj Singh had submitted bids in the 2017 soil testing tenders as an Authorised Signatory for M/s Team-1 Data Management Pvt Ltd and M/s Satish Kumar Agarwal in the Bareilly and Moradabad tenders. respectively. He also submitted bids in the 2018 tenders for M/s Siddhi Vinayak and Sons in the Bareilly, Aligarh and Moradabad tenders.

Extracts of the Statement of Sh Suraj Singh, S/o Sh. Shyam Singh Employee of M/s Yash Solutions/Chaitanya Business Outsourcing Pvt Ltd recorded on 01.03.2021:

> *Q3. Did you submit any bids in any soil testing tenders of 2017 & 2018 issued by UP Government, as an Authorised Signatory?*

A. 3. Yes, in 2017 I was working with one Mr. Jafri for his company in Lucknow. The company was doing data entry work or NPR related work and I was data entry operator. During 2018 I worked for hotel Bareilly palace situated at station road Bareilly which is owned by Shri Satish Kumar Agarwal. I had submitted tenders for companies of Shri Jafri as well as Shri Satish Kúmar Agarwal in the soil testing tender issued by Agriculture Department Government of U.P

Q.4 I am showing you the Bid application of Team-1 Data Management Pvt. Ltd submitted in soil testing tender issued by Bareilly division floated by Department of Agriculture, Govt. of UP in 2017-18, bearing your signature as you were authorized by Team-1

A.4 Yes, I had submitted the bid application as shown to me above

Q.7 I am showing you the bids submitted for M/s Siddhi Vinayak & sons in 2018 for Aligarh and Moradabad Division as well as M/s Satish Kumar Agarwal in 2017 for Moradabad Division.

A.7 Yes, I have seen and admit that I had signed all the above mentioned documents as an authorised signatory for the above mentioned firms and submitted to the Agriculture Department of U.P Government. I had signed the documents.

Q. 9. Whether you had worked in Team 1 data Management company in Lucknow.

A.9. No I never worked for any company called Team 1 data Management. I was employed with M/s Jafri Computer in Lucknow *and its owner was Mr. Jafri. The company was situated in Chowk area of Lucknow and I was doing NPR data entry work.*

Q.10. Did you submit the EMD of Rs.1.00 lakh via FDR no. 86536171 dated 29.07.2017 for Team 1 in the Bareilly tenders of 2017?

A.10. Yes. The said EMD was handed over to me by Sh. Jafri and I submitted the same as per his directions

Q.16. Shri Suraj Singh submitted the following documents which includes emails received from psg@sbl.co.in to his Email surajsingh959@gmail.com having details of salary credited to his account in the month of September, October, November and December 2017 and for June July, August and September 2018

What are these documents?

A.16 These are documents related to credit of salary to my account from my employer M/s Chaitanya Business Outsourcing Pvt Ltd. I was working for Chaitanya Business Outsourcing Pvt Ltd/Yash Ornaments Pvt Ltd since the year 2015-16

Q.17. Shri Suraj Singh also submitted emails dated 07.02.2015 & 18.02.2015 received from email id asc.yopl@gmail.com and mail dated 07.05.2016 received from cbo2idea@gmail.com on his Email ID surajsingh959@gmail.com Whose email ids are mentioned above?

A.17. The email id asc.yopl@gmail.com belong to Yash Ornaments & cbo2idea@gmail.com belong to Chaitanya Business Outsourcing Pvt Ltd. I was working since 2015 for Yash Ornaments/Chaitanya

Business Outsourcing Pvt Ltd. I am still employed with M/s Chaitanya Business. Outsourcing.

Q.18. It means that you had told a lie to the investigation that you were working for some M/s Jafri Computer in Lucknow?

A. 18. Yes, I had told a lie. I had never worked for any company known as Jafri Computer in Lucknow and I am sorry for telling a lie on oath. Since 2015-16 I am only employed with M/s Chaitanya Business Outsourcing/Yash Ornaments and apart from this I have never worked for any other firm/Company since 2015-16.

Q.19. Why did you submit bid documents in Moradabad tender in 2017 for M/s Satish Kumar Agarwal and for M/s Siddhi Vinayak & Sons during 2018?

A. 19. Yes, I agree that I had submitted the bid documents for M/s Satish Kumar Agarwal in 2017 for Moradabad and for M/s Siddhi Vinayak & Sons during 2018 soil testing tender for Moradabad, Bareilly and Aligarh tenders. as per directions of my employer Chaitanya Business Outsourcing/Yash Ornaments Pvt Ltd.

Q. 20 Did you submit the Team-1 bid in the 2017 Bareilly tender?

A 20. Yes. I had submitted the Team-1 bid in the 2017 Bareilly tender on the directions of my employer M/s Chaitanya Business Outsourcing Pvt Ltd.

Q.21. Do you know any of the Directors/Proprietors/Partners/Employees of any other firms which had submitted bids in the soil testing tenders?

A 21. Yes, I know Sh. Satish Kumar Agarwal of M/s Satish Kumar Agarwal which supplies fruits and vegetables to Army and is also owner of Hotel Bareilly Palace.

Q 22 How did you submit the bids for M/s Satish Kumar Agarwal and M/s Siddhi Vinayak & Sons, when you were employed with M/s Chaitanya Business/ Yash Ornaments during 2017 & 2018?

A. 22. I received Bid documents in respect of M/s Satish Kumar Agarwal and M/s Siddhi Vinayak & Sons from my employer M/s Yash Solutions/ M/s Chaitanya Business Outsourcing which were submitted by me after duly signing the bid documents as per their directions, to the Agriculture Department, UP Government in the Soil testing tenders 2017 & 2018.

Q.23. Sh Suraj Singh also submitted a mail dated 25.08.18 from globus saxena@gmail.com having an attachment which has names, father's name, date of birth and Aadhar of certain persons mentioned. Who is Vivek Saxena S/o Sh Santosh Kumar Saxena and what are the details mentioned in the attached file related to?

A. 23. Sh Vivek Saxena was also employed with M/s Yash Solutions and these details are in respect of employees of M/s Yash Solutions.

Q.24. Sh Suraj Singh also submitted a mail dated 19.07.18 from anuj.ksharma111@gmail.com having an attachment which has names, of certain persons mentioned who is Anuj Sharma S/o Prakash Sharma as mentioned in the list and what are the details mentioned in the attached file related to?

A. 24. Sh Anuj Sharma was also employed with M/s Yash Solutions and the list relates to employees of M/s M/s Yash Solutions.

Q. 25. Sh Suraj Singh submitted a mail dated 31.10.2018 from his mail surajsingh959@gmail.com having an attachment which has names, of Lab Staff. what are the details mentioned in the attached file related to?

A. 25. These relates to the employees deployed at the soil testing lab of Yash Solutions.

Q. 26 Sh Suraj Singh submitted a mail dated 31.10.2018 from his mail surajsingh959@gmail.com to globus.saxena@gmail.com ofSh Vivek Saxena having an attachment which has names of persons with heading Insurance Lists. What are the details mentioned in the attached file related to?

A. 26. The said list is having names of the owner and employees of Yash Solutions.

74. The following points emerge from the statement of Sh Suraj Singh and the documents on record:

i) Sh Suraj Singh's statement clearly show that he was an employee of M/s Chaitanya Business Outsourcing/ M/s Yash Solutions and had never worked for any company by the name of M/s Team -1 Data Management Pvt Ltd. Further, the bid submitted by him as an Authorised Signatory of M/s Team-1 Data Management Pvt Ltd, was submitted on the directions of his employer M/s Yash Solutions/M/s Chaitanya Business Outsourcing.

ii) Sh Suraj Singh also confessed that he had submitted bids for M/s Satish Kumar Agarwal and M/s Siddhi Vinayak & Sons in the 2017 & 2018 soil testing tenders on the directions of his employer M/s Yash Solutions/M/s Chaitanya Business Outsourcing.

iii) Sh Suraj Singh's statement also reveals that both Sh Vivek Saxena & Sh Anuj Sharma were employees of M/s Yash Solutions. As per evidence on record Sh Vivek Saxena & Sh Anuj Sharma had submitted bids for rival bidders namely M/s Saraswati Sales Corporation, M/s Satish Kumar Agarwal and M/s Siddhi Vinayak and Sons in the 2017 & 2018 soil testing tenders.

75. Extracts of the Statement of Sh Nitish Agarwal, Director of M/s Chaitanya Business Outsourcing Pvt Ltd, recorded on 18.03.2021

Q3 What is your role and responsibilities in your firm M/s Chaitanya Business Outsourcing Pvt. Ltd.?

A.3 I am responsible for the entire affairs of my firm and all decision are taken by me

Q5. Has your Firm ever bid in any tenders for Soil Testing floated by Govt. of UP? If yes, please provide details?

A5 Yes, my firm M/s Chaitanya Business Outsourcing Pvt. Ltd had participated in the tenders for Bareilly division in 2017, as very few companies were present in the business of soil testing. Hence we had submitted our bids along with M/s Yash Solutions, as we were apprehensive that tender may be cancelled due to lack of bids. However, my company had been disqualified on technical basis in the *said tender. Further, in 2018 only M/s Yash Solution had submitted bids, as in 2017 tenders M/s Yash had got the contract being the L-1 party. Therefore, M/s Chaitanya Business had not participated in any future tenders as both were group companies.*

Q.6. Did your firm purchase soil testing machine before submission of bids in 2017 tenders.

A 6. No machine was purchased by M/s Chaitanya Business Outsourcing (CBO)

Q.7 Did you or your Firm had any experience in soil testing work when you had bid in the Soil testing tenders of UP Government during 20177

A.7 No prior soil testing work experience.

Q. 8. Did your firm fulfil the technical eligibility criteria in the said tenders. when you had no prior soil testing experience?

A. 8. No

Q.9. Where was your company's soli testing Lab situated?

A. 9. There was no Lab

Q11. I am showing you the "Undertaking dated 01.08.2017 submitted by your Firm to the Department during the tender process for having established a lab for soil testing in Bareilly. Why you submitted the said Undertaking when you had no Lab?

A.11. I do not know.

Q. 12 When your firm did not have any Machine or Lab, why did you submit a false Undertaking?

A. 12. I do not know

Q. 13. Who is Mr. Rachit Agarwal and what position he was holding in your company?

A. 13 Yes, Rachit Agarwal is one of our ex-employee who is presently working with Yash Ornaments.

Q. 14. You were Director in M/s Chaitanya Business Outsourcing Pvt. Ltd as well as CEO & Authorised Signatory of M/s Yash Solutions, in the 2017 and 2018 soil testing Tenders. How you were holding positions in two rival firms at the same time, which are submitting bids in a Public Procurement tender?

A. 14. I was the founder director of CBD since 2013 and CEO of Yash Ornaments since 2018.

76. The following emerges from the statement of Sh. Nitish Agarwal and evidence on record:

i) Sh Nitish Agarwal submitted that he is responsible for the entire affairs of the company and all decisions are taken by him. of his

ii) Sh Agarwal admitted that his company had no soil testing Lab and had not purchased any soil testing machines however, he evasively replied "I do not Know" as to why his company had submitted a false "Undertaking" to the Agriculture department in the said tender, for having established a lab for soil testing in Bareilly.

iii) Sh Agarwal submitted that besides being a Director of M/s Chaitanya Business Outsourcing Pvt. Ltd since 2013, he is also a CEO of M/s Yash Solutions since 2016. As per record Sh Nitish Agarwal was the Authorised Signatory for M/s Yash Solutions and had submitted bids in the Bareilly & Moradabad tenders of 2017 as well as the Bareilly, Moradabad, Aligarh & Meerut tenders of 2018

iv) Sh Agarwal admitted that the reason his company M/s Chaitanya Business Outsourcing Pvt. Ltd had participated in the soil testing tenders for Bareilly division in 2017 was that, as very few companies were present in the business of soil testing hence, they had submitted their bid along with M/s Yash Solutions, due to an apprehension that the Government tenders for soil testing may get cancelled due to lack of bids. Further, in 2018 only M/s Yash Solution had submitted bids, as it had already received soil testing contracts from the Agriculture Department Bareilly & Moradabad divisions in 2017 hence, his group company M/s Chaitanya Business did not participate in any further tenders after 2017 Bareilly tenders.

v) On the basis of the evidence on record and the statement of Sh Nitish Agarwal. It is clear that M/s Chaitanya Business Outsourcing Pvt. Ltd. and M/s Yash Solutions were group companies with Sh Nitish Agarwal being the CEO and the Authorised Signatory for submitting bids of M/s Yash Solutions as well as the Director of M/s Chaitanya. Further. Smt Komal

Agarwal wife of Sh Praveen Kumar Agarwal being the single largest shareholder (50%) in M/s Chaitanya.

vi) M/s Chaitanya Business Outsourcing had no intention to submit any competitive bids in the 2017 Bareilly soil testing tenders and had submitted cover bids in favour of group company M/s Yash Solutions, to ensure that the tender does not get cancelled, due to lack of bids.

vii) Submission of false Undertaking by M/s Chaitanya Business Outsourcing to the Agriculture department clearly shows that the colluding firms had rigged the bids by submitting false documents, just to ensure tender conditions are fulfilled and sufficient number of bids are submitted so that tenders are not cancelled.

77. Extracts from the statement on oath of Sh Praveen Kumar Agarwal, Managing Director of M/s Yash Solutions (A Unit of Yash Ornaments), recorded on 18.03.2021

Q.3 What is your role and responsibilities in your firm M/s Yash Ornaments?

A 3. I am responsible for the entire affairs of the business of my firm and all decision are taken by me. My wife is a house wife and she is only a name sake director of the firm M/s Yash Ornaments Pvt. Ltd.

Q.4 Has your Firm ever bid in any tenders for Soil Testing floated by Govt. of UP? If yes, please provide details?

A. 4. Yes, in Moradabad and Bareilly in 2017 and in 2018 Bareilly, Moradabad, Jhansi, Saharanpur and Aligarh.

Q.6. Name of your competitors who are engaged in soil testing activities.

A.6. None. During 2017-18 the Government Authority Agriculture Department requested me take up this work because there were no other soil testing agencies available in the state of U.P. I invested approximately Rs. 3 crores for purchase of soil testing machine and other equipment's so that I can take up this project.

Q.9. Did you or your Firm have any experience in soil testing work when you had bid in the Soil testing tenders of UP Government during 2017?

A.9. No, my company did not have any soil testing work experience before the bids of 2017.

Q. 10. How did your firm fulfil the technical eligibility criteria in the said tenders, when you had no prior soil testing experience?

A.10. Our company had become eligible as it had fulfilled all the eligibility criteria fixed by the tender issuing agency.

Q. 12. When was your lab set up?

A. 12. In 2017 before U.P Government issued the soil testing tenders.

Q. 13. What equipment were available in your Lab for soil testing?

A. 13. Soil testing machine and other equipment's. Technical staff and Lab in-charge was also appointed for the Lab before issuance of the tenders.

Q. 14. Did you purchase any soil testing machine? If yes when and from where was the machine purchased?

A. 14. Yes, in 2017.

Q 15. As per copy of the Invoice shown as, your company had purchased a soil testing machine vide invoice dated 04.07.2017. Why was this machine purchased and where was it installed?

A. 15. Yes, I have seen. As I wanted to bid in the soil testing tenders to be issued by Government of U.P. I invested in soil testing machine which was installed at Lucknow road, Bareilly.

Q. 16. The public notice for inviting tenders for soil testing by Bareilly division was issued on 26.07.2017, why did you purchase a machine just 22 days prior to this public notice?

A. 16. I had come to know about the soil testing tenders to be issued by the U.P Government through my sources in Directorate of Agriculture, Lucknow.

Q. 18 Your Company had submitted Bids in soil testing tenders issued by Aligarh, Bareilly, Moradabad, Jhansi, Saharanpur & Meerut floated by Department of Agriculture, Govt. of UP in 2017 & 2018, which is being shown to you as

A. 18. Yes, I have seen it

Q 19. The bidder in the said tender was Yash Solutions however, all the required documents like ITR, CA Certificate of Turnover, Balance Sheets and P & L account were in the name of Yash Ornaments ?

Why were documents of Yash Ornaments submitted instead of Yash Solutions?

A. 19 M/s Yash Solution is a unit of M/s Yash Ornaments. As the eligibility criteria prescribed a minimum turnover of the company as well as minimum years of operation, last three years IT return, we decided to bid the name of M/s Yash Solutions as a unit of M/s Yash Ornaments so that the eligibility criteria is fulfilled

Q. 20. Do you know the Owner/Director or Employee of any of the other Firms who participated in the soil testing tenders for 2017 & 2018?

A. 20. Yes, I know Sh. Satish Kumar Agarwal.

Q. 21. I am showing you the Work Order dated 02.11.2017 & "Experience Certificate dated 05.12.2017 issued by your company M/s Yash Solutions to M/s Siddhi Vinayak & Sons for analyzing 55,300 soil samples for your company which was submitted by the said firm in the tenders of Aligarh, Bareilly and Moradabad in the year 2018.

A. 21 company. Yes, the said orders and experience certificate were issued by my company.

Q. 22. I am showing you the Work Order dated 02.11.2017 & "Experience Certificate dated 05.12. 7 issued by your company M/s Yash Solutions to M/s Satish Kumar Agarwal for analyzing 52,000 soil samples for your company which was submitted by the said firm in the tenders of Aligarh, Bareilly and Moradabad in the year 2018.

A. 22. Yes, the said orders and experience certificate were issued by my company.

Q. 23. Why did you sublet the work of Soil testing to the aforesaid firms?

A. 23 I do not know.

Q. 24. Before giving sub-contract to M/s Siddhi Vinayak & Sons and M/s Satish Kumar Agarwal, did you ever visited their soil testing labs to ensure if they have all the necessary infrastructure such as Machine, and trained manpower to conduct the Soil Samples testing?

A. 24. No.

Q.25. Where is/was their soil testing labs situated?

A. 25. I do not know.

Q. 26. Did your Firm entered into any agreement or MoU with M/s Siddhi Vinayak & Sons and M/s Satish Kumar Agarwal, for carrying out the soil testing work for your Firm?

A. 26. I do not know.

Q. 27. I am showing you the relevant extracts of the statement dated 12.01.2021 i.e. Q. 18, 19 & 22, submitted by Sh. Satish Kumar Agarwal, Proprietor of M/s Satish Kumar Agarwal.

A. 27. Yes, I have seen,

Q. 28. In view of the above said statement on oath by Sh. Satish Kumar Agarwal it is clear that your Firm had issued fake "Experience Certificates" to M/s Satish Kumar Agarwal and M/s Siddhi Vinayak & Sons for conducting soil sample tests for your Firm. Why did your firm issue fake certificate to both the said firms?

A. 28. I do not know why such fake experience certificate and work orders were issued to both these firms. However, I have no justification for issuing such fake certificates to my rival bidders.

Q 29 Why did your Firm submit a fake report to the government of UP. without conducting any sample tests for the above said soil samples?

A.29. I cannot comment.

Q.30 I am showing you the Invoice bearing no. 7000 dated 01.07 2017(2:37PM) issued in favour of M/s Satish Kumar Agarwal. Invoice bearing no. 7017 dated 17.07.2017(2:37PM) in favour of M/s Siddhi Vinayak & Sons & Invoice bearing no. 7001 dated 07.07.2017(2:37PM) in favour of M/s Yash Ornaments raised by M/s Today Tech Scientific Solutions, Ambala Gantt, for purchase of disposable items for running Soil testing labs, which were submitted by the aforesaid Firms to the Department of Agriculture, Govt. of UP, during the Soil tendering process in the year 2018

A.30. Yes, I have seen.

Q.31. How are the items, total Invoice amount and the time mentioned in the said invoices exactly the same?

A. 31. I do not know.

Q. 32. I am showing you the Commercial Invoices of purchase of Soil Testing Machine submitted during tendering process in the year 2018-19 by your Firm as well as the Invoices submitted by the other bidder firms namely M/s Saraswati Sales Corporation, M/s Satish Kumar

Aggarwal and M/s Siddhi Vinayak & Sons in the Bareilly and Moradabad tenders of 2018.

A. 32 Yes, I have seen.

Q. 33 How are the aforesaid Invoices having same Account Number i.e. 1532236, by all four firms?

A. 33. I do not know

Q. 34. How all the aforesaid Invoices having same material number BRE0002947 and Serial Number IC74DC173313 in respect of all the aforesaid 04 Firms?

A. 34. I do not know.

Q.35 I am also showing you the relevant extracts of the statement dated 29.12.2021 i.e., Question no. 10, of Sh Naresh Kumar Sharma, Sole Proprietor of M/s Saraswati Sales Corporation Bareilly. Please submit your comments.

A 35 Yes, I have seen. I agree whatever Sh. Naresh Sharma has submitted in his statement.

Q. 36. Why and how did you supply the Invoice for purchase of ICP-OES Machine to Saraswati Sales Corporation?

A 36 No comments.

Q. 37 I am showing you the relevant extracts of the statement dated 29.12.2021 le Question no. 2 & 4, of Sh Naresh Kumar Sharma., Sole Proprietor of M/s Saraswati Sales Corporation Bareilly. Please submit your comments.

A. 37. Yes, I have seen. However, I have nothing to say.

Q.38. I am showing you the relevant extracts of the statement dated 29.12.2021 i.e. Question no. 6, of Sh Naresh Kumar Sharma., Sole Proprietor of M/s Saraswati Sales Corporation Bareilly. Please submit your comments.

A. 38. Yes, I have seen. However, I have nothing to say.

Q.39. Why did you request Sh Naresh Kumar Sharma to submit cover bids in support of your firm in the UP Government Soil testing tenders?

A. 39. I have no comments to submit.

Q. 40. I am showing you the Bank statement of Sh Suraj Singh S/o Sh Shyam Singh for 2017-18 & 2018-19 who is having his account with SBI Cantt Branch Bareilly, wherein it is seen that he is being paid regular sum of money every month since May 2017. Why are you crediting the said amount regularly to his bank account?

A. 40. Yes, the amount is being credited regularly because he was doing Aadhar related work for my firm and the amount was towards his salary.

Q. 41. I am showing you the relevant extract of the statement dated 01.03.2021 le reply to question no. 16 to 19 of Sh. Suraj Singh who is an employee of M/s Yash Solutions/ M/s Chaitanya Business Outsourcing

A 41 Yes, I have seen.

Q. 42. Why did you direct Sh. Suraj Singh to submit bids of your rival Firms namely M/s Satish Kumar Agarwal in the Moradabad tenders of 2017 and for M/s Siddhi Vinayak & Sons for the 2018 soil testing *tenders for Bareilly, Moradabad and Aligarh divisions, when he was your employee during the period the said bids were submitted?*

A. 42 I have no comments about the same.

Q. 43. I am showing you the relevant extracts to the statement of Sh. Suraj Singh to question nos. 20 to 22.

A. 43. Yes, I have seen.

Q. 44. Why was bid of Team -1 submitted by Sh Suraj Singh on your directions?

A. 44. I have no comments to submit.

Q. 45. I am showing you the relevant extracts to the statement of Sh. Suraj Singh to question nos. 23 to 24

A. 45. Yes, I have seen.

Q. 46. When Sh Vivek Saxena and Sh. Anuj Sharma were your employees, why did they submit bids of rival bidders namely M/s Saraswati Sales Corporation, M/s Siddhi Vinayak & Sons and M/s Satish Kumar Agarwal in the 2017 & 2018 soil testing tenders

A. 46. I have no comments to submit.

Q. 47 I am showing you the relevant portion of statement Sh. Naresh Kumar Sharma, Proprietor of M/s Saraswati Sales Corporation on oath on 29.12.2020, (Q. 7) .

A. 47 Yes, I have seen.

Q. 48. In view of the above statement of Sh. Naresh Kumar Sharma, who else were there in the said group?

A. 48. I am not aware. I have no comments to submit on the statement of Sh. Naresh Sharma.

Q. 49. Is Mr Rachit Agarwal your employee?

A. 49. Yes, he is a senior employee in my company since 2015-16.

Q. 50. I am showing you the character certificate issued to Mrs. Sangeeta Agarwal, Sole Proprietor of M/s Siddhi Vinayak & Sons by office of the District Magistrate, Bareilly dated 25.07.2016 which has been submitted by the said firm the Moradabad tenders of 2018. In column no. 6of the said certificate, a mobile number is mentioned as 7055701523 which is of Mr Rachit Agarwal (General Manager) of your company.

A. 50. Yes, I have seen.

Q. 51. I am showing you the authorization letter and other documents issued by your company M/s Yash Solutions in favour of Mr. Rachit Agarwal as your company's Authorised Signatory, which was submitted in the Jhansi tender, which is having the same mobile number as mentioned in the character certificate issued to Mrs. Sangeeta Agarwal Proprietor of M/s Siddhi Vinayak and sons which was your rival bidder in the 2018 tenders.

A. 51. Yes, I have seen.

Q. 52. How the mobile no. of Mr. Rachit Agarwal, who is Authorized Signatory of your company, appearing on the character certificate issued to Mrs. Sangeeta Agarwal?

A. 52. I do not know.

Q. 53. I am showing you the extract of the statement of Sh Satish Kumar Agarwal i.e. Q 51 & 60?

A. 53. Yes, I have seen.

Q. 54. Why did Sh Rachit Agarwal General Manager and Authorised Signatory of your firm for the soil testing tenders, assisted your rival bidder/competitor in the soil testing tenders in procuring Character Certificate?

A. 54. The action of Sh. Rachit Agarwal in submitting bid documents of my rival bidder cannot be justified and illegal also.

Q. 55. When M/s Chaitanya Business Outsourcing is your sister concern having common Director/Employees, why two separate bids were submitted by related firms in the 2017 Bareilly tenders?

A. 55. As in 2017 very few companies were operative in soil testing business that is why we decided to submit separate bids on behalf of both these companies just to show competition in the soil testing market. Although I was fully aware that the bid of M/s Chaitanya Business Outsourcing will be rejected on the technical grounds.

Q 57. Your company had quoted a price of Rs 122/ 81.50 in the Aligarh tenders of 2018 respectively however, in the tenders of Meerut & Saharanpur you had bid Rs 147.25/Rs.98.25 and Rs 148.6/Rs98.5 for the 12/6 parameters respectively. A copy of the comparative bids of the respective divisions is being shown as.

A. 57 Yes, I have seen.

Q. 58. Why an increase of Rs 26.6/17 (21.8%7/20.8%) between Aligarh and Saharanpur bids of 2018?

A. 58. As I was not interested in getting the contract for Saharanpur that is why my firm had quoted high price in the above said two tenders.

Q. 59. Why an increase of Rs 25.25/16.75 (20.7/20.5%) between Aligarh and Meerut bids of 2018?

A. 59. As I was not interested in getting the contract for Meerut that is why my firm had quoted high price in the above said two tenders.

Q. 60. Your company had quoted a price of Rs 144.5/96.5 and Rs 145/97 in the Moradabad & Bareilly tenders of 2018 respectively. However, in the tenders of Meerut & Saharanpur you had bid Rs147.25/Rs.98.25 and Rs 148.6 /Rs98.5 for the 12/6 parameters respectively. A copy of the comparative bids of the respective divisions is being shown as. What is the rationale for increase in price bids for Meerut & Saharanpur tenders?

A. 60. I was not interested in getting the contract for Meerut and Saharanpur as I had no links in that region hence, my firm had quoted high price in the above said two tenders.

Q. 61. Has your company namely M/s Yash Solutions ever been blacklisted by the U.P Government?

A. 61. Yes, it was blacklisted because of collusion among bidders in the soil testing tender.

Q. 62. Which other companies have been blacklisted by UP Government?

A. 62. I have no information.

Q. 63. Has the Department of Agriculture, UP Government sent you recovery notice of the payment which you had received towards soil testing work?

A. 63. My dues for the year 2017-18 and 2018-19 have not been released by the U.P Government and the contract for the soil testing cancelled in September 2018.

Q. 64. Any other Information you would like to submit with regards to this matter.

A. 64. No.

Q. 65 Do you have any regrets?

A 65. Yes, I am ready for whatever punishment is appropriate

78. The following points emerge from the above statements of Sh Praveen Kumar Agarwal and concerned parties on oath and evidence on record:

i) M/s Yash Solutions (A Unit of Yash Ornaments) had submitted its bids in the soil testing tenders of Agriculture Department, Government of Uttar Pradesh, Moradabad and Bareilly divisions in the year 2017 and in the Bareilly. Moradabad, Jhansi, Saharanpur and Aligarh division in 2016. The financial bids for the Jhansi division in 2018 were not opened and the tenders were cancelled. M/s Yash Solutions had won contracts in the

Bareilly and Moradabad division tenders in the year 2017 and Bareilly, Moradabad and Aligarh division tenders in the year 2018.

ii) Sh Praveen Kumar Agarwal admitted that, as very few companies were operative in soil testing business in the 2017, he had decided to submit separate bids on behalf of both his group companies namely M/s Yash Solutions as well as M/s Chaitanya Business Outsourcing in the 2017 Bareilly tender, with a view to show competition.

iii) Sh Nitish Agarwal, Director, M/s Chaitanya Business Outsourcing, had also submitted that the reason for participation in the soil testing tenders of Bareilly division in 2017 was that, since very few companies were present in the business of soil testing therefore, they had submitted their bid along with their group company M/s Yash Solutions, due to an apprehension that the Government tenders for soil testing may get cancelled, due to lack of bids. Thus, Sh. Nitish Agarwal had concurred with Sh Praveen Agarwal.

iv) Sh Nitish Agarwal had also stated that M/s Chaitanya Business had not participated in any future tenders since M/s Yash Solutions a group company had already got the soil testing contract in 2017 tenders. Thus, M/s Chaitanya Business Outsourcing had submitted cover bids in the 2017 Bareilly tenders in support of its group company M/s Yash Solutions.

v) Although the 2017 soil testing tenders for Bareilly & Moradabad divisions did not prescribe any prior soil testing experience in their eligibility conditions, the 2018 soil testing tenders for Bareilly, Moradabad and Aligarh divisions had prescribed experience of analysing 50,000 soil samples. The said tenders also required bidders to conduct tests on ICP-OES soil testing machine. Sh Praveen Kumar Agarwal accepted that fake work orders and experience certificates were issued to rival bidders M/s Satish Kumar Agarwal and M/s Siddhi Vinayak and Sons in the 2018 soil testing tenders for Aligarh, Bareilly and Moradabad divisions however, he submitted that, he does not know why such fake experience certificates and work orders were issued by his company to rival bidders. Sh Agarwal submitted that there is no justification for the issuing fake experience to rival bidders.

vi) Sh Agarwal gone evasive replies to questions regarding similarity in the invoices, for purchase or disposable lab items from M/s Today Tech Scientific Solutions and Soil testing machine from M/s Thermo Fisher, which were submitted by M/s Yash Solutions, M/s Satish Kumar Agarwal, M/s Siddhi Vinayak and Sons and M/s Saraswati Sales Corporation in the 2018 tenders.

vii) M/s Thermo Fisher in their reply dated 14.04.2020 stated that M/s Yash Solution had purchased soil testing machines however, no sale was made by their company to M/s Satish Kumar Agarwal, M/s Siddhi Vinayak and Sons and M/s Saraswati Sales Corporation, which implies that the invoices submitted by these firms in the soil testing tenders of 2018 were fake.

viii) Further, Excise Department Haryana vide their letter dated 30.06.2020 stated that no sale was made by M/s Today Tech Scientific to M/s Satish Kumar Agarwal and M/s Siddhi Vinayak & Sons meaning thereby that the invoices submitted by M/s Satish Kumar Agarwal and M/s Siddhi Vinayak & Sons were also fake.

ix) Sh Satish Kumar Agarwal in his statement had confessed that he had submitted fake documents and bid separately for both his firms M/s Satish Kumar Agarwal, M/s Siddhi Vinayak and Sons in the 2017 Moradabad and 2018 Aligarh, Moradabad and Bareilly tenders, just to show that there is enough competition and to avoid cancellation of tenders due to lack of participation.

x) Sh Naresh Kumar Sharma in his statement on record had submitted that the fake invoices for purchase of ICP-OES soil testing machine submitted by his firm in the soil testing tenders of 2018 were arranged by Sh Praveen Kumar Agarwal. Sh Praveen Kumar Agarwal in his statement on oath agreed with the aforesaid statement of Sh Naresh Kumar Sharma.

xi) It is seen from the records that Sh Suraj Singh, Sh Vivek Saxena and Sh. Anuj Sharma on the directions of Sh Praveen kr. Agarwal, had submitted bids on behalf of rival bidders in the 2017 and 2018 tenders. Further, Sh Agarwal stated that there is no justification for the actions of his senior employee Sh. Rachit Agarwal (General Manager) in assisting in the submission of bids of rival bidder M/s Siddhi Vinayak & Sons.

xii) Sh. Suraj Singh had also submitted the bid in 2017 Bareilly tender on behalf of a company Team 1 Data Management Pvt. Ltd., Lucknow which was a vendor of Yash Ornament for data entry work. The Director of company on record proved that the said bid was not filed by any authorised officer of a company. The EMD of the bid was also not submitted from the company's end. He stated that it was a forged bid.

xiii) Therefore, it is clear that fake documents were arranged/provided by M/s Yash Solutions, M/s Satish Kumar Agarwal, M/s Saraswati Sales and M/s Siddhi Vinayak & Sons. with a view to ensure their technical eligibility and submission of cover bids, in favour of M/s Yash Solutions in the 2017 tenders for Bareilly, Moradabad divisions and the 2018 tenders issued by Bareilly, Moradabad and Aligarh divisions.

xiv) In response to DG's report mentioning that same login id was used by competitors for filing the bids. The contention of Appellant 1 was that their login id was ceo.yopl@gmail.com. The email-id acs.yopl@gmail.com used by the M/s Siddhi Vinayak does not belong to them. However, we have seen the invoice of soil testing machine issued by M/s Thermo Fisher to the Appellant 1 where the email address of Yash Solutions is given as acs.yopl@gmail.com. Sh. Suraj Singh an employee of M/s Chaitanya Business Outsourcing (Appellant 2) has also confirmed that the aforesaid email address belongs to Yash Ornaments (parent company of Yash Solutions).

xv) As per records of the E-bidding submitted by National Informatics System, the bids of M/s Yash Solutions, M/s Siddhi Vinayak & Sons and M/s Satish Kumar Agarwal were submitted from the same IP Address in the Bareilly tenders of 2018. Further, in the Moradabad tenders of 2018, the bids of M/s Yash Solutions, M/s Siddhi Vinayak & Sons, M/s Saraswati Sales Corporation and M/s Satish Kumar Agarwal were also submitted from the same IP Address. In response to the notice of the investigation dated 25.03.2021 regarding common IP address with for submission of E-bids Praveen Kumar Agarwal vide his affidavit dated 27.03.2021 submitted that being technically incapable, he cannot submit any clarification in the matter.

xvi) Although all the aforesaid bidder firms are independent entities having separate ownership, a common IP Address only proves that, through collusion and cartelization M/s Yash

Solutions, M/s Siddhi Vinayak & Sons, M/s Saraswati Sales Corporation and M/s Satish Kumar Agarwal had rigged bids in the soil testing tenders of 2018.

xvii) Government of U.P. had black listed M/s Austere Systems and M/s Yash Solutions for bid rigging and collusion for the aforesaid soil testing contracts in late 2018.

79. It can be seen from the discussion in the foregoing paras that M/s Yash Solutions (Appellant 1) in collusion and through concerted efforts with other parties, namely, M/s Siddhi Vinayak & Sons, M/s Saraswati Sales Corporation and M/s Satish Kumar Agarwal, had indulged in bid rigging in the 2017 & 2018 Government soil testing tenders. The group company Chaitanya Business Outsourcing was also used to provide supporting bids so that the tender does not fail due to inadequate participation.

80. In view of the above and the evidence on record Sh. Praveen Kumar Agarwal, Managing Director, M/s Yash Solutions is also individually responsible for colluding and bid rigging in the soil testing tenders of U.P. Government issued in 2017 & 2018.

81. Similarly, Sh. Nitish Agarwal, Director, Chaitanya Business Outsourcing Pvt. Ltd. and CEO Yash Solutions is individually responsible for colluding and bid rigging in the soil testing tenders of the Uttar Pradesh Agriculture Department, issued in the year 2017 & 2018.

82. The commission has also found that M/s Yash Solutions and M/s Austere Systems guilty of bid rigging by geographically dividing the area

for soil testing amongst them to examine this, we consider the statement of Sh. Rahul Gajanan Teni, Director of M/s Austere Systems.

83. Extracts from the statement of Mr. Rahul Gajanan Teni, Director of M/s Austere System Pvt. Ltd, Pune, recorded on 19.02.2021.

Q1. What is your role and responsibilities in your firm M/s Austere System Pvt. Ltd?

A. 1. My responsibility is mainly related to managing the business as well as technology/technical part. Shri Piyush Gupta Son of Shri Suresh Kumar Gupta who was a strategic investor in our company looks, after finance matter of the company. Shri Shikhir Gupta, another Director looks after the business development work.

Q. 65. Your Company had submitted bids in Soil testing tenders issued by Bareilly Division in 2018, as per the Tender Summary report which is being shown to you as

A 65. Yes, I have seen.

Q. 66. Why was your bid rejected in the Bareilly division 2013?

A. 66. I do not know.

Q. 67. As per technical bid chart of Bareilly division tenders of 2018, Austere's technical bid in the soil testing tender was rejected on the grounds that, 3 years' balance sheet not submitted, Annual turnover is not Rs 3 cr, last 3 years IT Returns with Profits not submitted, Lab In-charge with 3 years' experience not available and Proof of availability of ICP machine/Undertaking for establishment of Lab not submitted. Whether the said grounds for rejection were correct for your bid?

A. 67. It could have been a mistake & I was also not keen for Bareilly tender.

Q. 68. Why were you not keen for Bareilly but for other divisions?

A. 68. I do not know.

Q. 69. Why your company did not submit bids in the soil testing tenders of Moradabad and Aligarh Divisions in the year 2018?

A. 69. As we were having limited resources.

Q 70 Why your company submitted bids in Meerut & Saharanpur divisions soil testing tenders of 2018?

A. 70. As we were having limited resources

Q. 71. I am showing you a copy of the Experience Certificates for analysing soil samples, issued by M/s Austere Systems Pvt Ltd to M/s Saraswati Sales Corporation, Bareilly which has been submitted by them in the soil testing tenders of Moradabad & Bareilly Divisions in the year 2018. How and why did your company issue the said certificate to M/s Saraswati Sales Corporation?

A. 71. I admit that the aforesaid experience certificates issued on my company's letter head and I also admit that these certificates bear my signature & stamp of my company. However, I never issued these certificates to M/s Saraswati Sales Corporation as I do not know M/s M/s Saraswati Sales Corporation or any of its Owner or Employees.

Q. 74 Whether your company M/s Austere Systems Pvt Ltd, has been blacklisted and your contract for soil testing cancelled by the Uttar Pradesh Government?

A. 74. Yes, Austere Systems was blacklisted & Soil testing Contract was cancelled by UP Government.

Q. 75. On what grounds your contract was cancelled by the UP Government?

A. 75. Because of Collusion & Bid Rigging by the bidders.

Q. 76. Whether any recovery notice for the payments made to your company for soil testing was issued by UP Government?

A. 76. Yes, our company received the recovery notice

Q. 77. Which other companies were also blacklisted by the UP Government in the matter of soil testing tenders?

A. 77. M/s Austere System and Yash Solution.

Q. 78. Whether any action has been initiated by the UP Government against its employees in A Matter?

A. 78. Yes

84. The following points emerge from the statement of Sh. Teni and evidence on record:

i) M/s Austere Systems Pvt Ltd. had submitted its bid in the 2018 Bareilly tenders which was technically rejected due to non-submission of its 3 years balance sheet, last 3 years IT Returns, Lab In charge with 3 years' Experience not available, ICP machine not available.

ii) In response to a question whether the grounds for rejection of its 2018 Bareilly bid were correct, Sh Teni submitted that it could have been a mistake and that he was not keen for the

2018 Bareilly division tender although, he gave no reasons for the same.

iii) Further, Sh Teni could also not provide any rational explanation for not submitting bids in the Aligarh & Moradabad tenders of 2018 although, his company had submitted bids in Meerut and Saharanpur tenders, which were floated after the tendering process of Aligarh & Moradabad was completed.

iv) Sh. Rahul Teni submitted evasive replies with regards to the reasons for not submitting bid in Moradabad Division soil testing tender in 2017 although, it had already won a contract for soil testing from Meerut division.

v) Although, Yash Solutions had already won contracts in the Bareilly, Moradabad and Aligarh tenders of 2018, Sh Praveen Agarwal MD, Yash Solutions in his statement has submitted that, his firm submitted high price bids in the 2018 Meerut and Saharanpur tenders, as he was not interested in those tenders.

vi) Sh Agarwal's statement is self-contradictory as in the first place he accepts that he had no interest in getting the contract however, at the same time he could not explain as to why his company submitted high price bids in the said tenders. It can therefore be concluded that there was no other explanation for submission of high price bids by M/s Yash Solutions, except that they were cover bids in support of M/s Austere Systems Pvt Ltd.

vii) In view of the above & the fact that as only three bidders namely M/s Austere Systems, M/s Yash Solutions & M/s Delicacy Continental had submitted bids in the 2018 Meerut & Saharanpur tenders, it can be concluded that M/s Austere Systems Pvt Ltd under an arrangement/understanding, with M/s Yash Solutions and M/s Delicacy Continental Pvt ltd, had rigged the bids of said soil testing tenders in 2018.

viii) Sh Praveen Kumar Agarwal in his statement could not submit any justification for quoting high price bids in the Saharanpur and Meerut soil testing tenders of 2018. Sh Agarwal submitted that he was not interested in getting the contract from the said divisions as he had no links in that region hence, he had submitted high price bids.

ix) Sh Agarwal's statement is self-contradictory as in the first place he accepts that he had no interest in getting the contract however, at the same time he could not explain as to why his company submitted high price bids in the said tenders. Therefore, there could be no other reason for the submission of high price bids in the 2018 Meerut and Saharanpur tenders by M/s Yash Solutions, except the fact that under an arrangement/understanding with rival company M/s Austere Systems Pvt Ltd, which had already won soil testing contracts for Meerut & Saharanpur divisions in the year 2017, M/s Yash

Solutions had submitted cover bids in support of M/s Austere Systems Pvt Ltd.

x) Sh Rahul Teni Director M/s Austere Systems Pvt Ltd in his statement has submitted that he was not keen for the 2018 Bareilly division tender although he gave no reasons for the same. Further, Sh Teni could also not provide any rational explanation for not submitting bids Aligarh & Moradabad tenders of 2018 although his company had submitted bids in Meerut and Saharanpur tenders, which were floated after the tendering process of Aligarh & Moradabad was completed.

xi) Sh. Rahul Teni submitted evasive reply with regards to the reasons for not submitting bid in Moradabad Division soil testing tender in 2017 although, it had already won a contract for soil testing from Meerut division.

xii) In response to a question whether the grounds for rejection of its 2018 Bareilly bid were correct, Sh Teni submitted that it could have been a mistake and that he was not keen for the 2018 Bareilly division tender although, he gave no reasons for the same.

85. In view of the above it can be concluded that Yash Solutions and M/s Austere Systems Pvt Ltd through an understanding/arrangement between them, had geographically allocated the soil testing tenders issued by the UP Government in the year 2017 & 2018 and were either not

bidding in each other's area/divisions or submitting supporting bids for each other.

86. The appellants have relied on the Judgment passed by the Hon'ble High Court of Bombay in S K Translines Private Limited v. The Maharashtra State reported in ANU/MH/2073/2016 (W.P. No. 3393 of 2016), wherein it was held that (para 38) "...xxx... Merely a singular instance of a party filling in the tender from the same I.P. address as the other tenders would be too slender a consideration to come to a conclusion of the said person forming a cartel....". However, use of same IP address is by rival bidders is only one of the activities in bid rigging. The practice of collusion and bid rigging has been established in the instant case, through evidence on record and statements of the persons involved.

87. In their legal submissions the Appellant have stated that Impugned Order was passed without considering any of the ingredients of Section 19(3) while considering whether there is an appreciable adverse effect on competition, before coming to the conclusion that the Appellant entered into anticompetitive practices since there was presence of no agreement, whether oral or written, as mentioned under section 19 (3) of the Act in view of the Hon'ble Supreme Court of India in the matter of *Rajasthan Cylinders and Containers Ltd. v. Union of India and Others*, (supra). The very para 75 cited by appellants clearly mentions that for the cases under Clauses (a) to (d) Section 3 (3) of the Act, the enquiry under Section 19 (3) would not be necessary. The relevant portion of the judgment is extracted below:

"75. We may also state at this stage that Section 19(3) of the Act mentions the factors which are to be examined by CCI while determining whether an agreement has an appreciable adverse effect on competition under Section 3. However, this inquiry would be needed in those cases which are not covered by clauses (a) to (d) of sub-section (3) of Section 3. Reason is simple. As already pointed out above, the agreements of nature mentioned in sub-section (3) are presumed to have an appreciable effect and, therefore, no further exercise is needed by CCI once a finding is arrived at that a particular agreement fell in any of the aforesaid four categories."

88. The Hon'ble Supreme Court in further paras 81 & 84 of Judgment supra has made the following observations:

"81. There may not be direct evidence on the basis of which cartelisation or such agreement between the parties can be proved as these agreements are normally entered into in closed doors. The standard of proof which is required is one of probability.

84. Even in the absence of proof of concluded formal agreement, when there are indicators that there was practical cooperation between the parties which knowingly substitute the risk of competition, that would amount to anti-competitive practices."

89. It is clear from the aforesaid judgment that in cases of alleged cartelization or anti-competitive practices, direct evidence of an agreement between parties is not required. Instead, a probabilistic standard of proof is sufficient, meaning that the existence of a cartel can be inferred from

circumstantial evidence or behaviors, which is implicit by the facts of this case. Thus, it is a clear case of anti-competitive practices.

90. Regarding the punishment, both the appellant and commission have cited the judgement of Hon'ble SC in Excel Crop Care (supra). The contention of the appellants being that the penalty is to be imposed based on the relevant turnover. The commission, however, disagreed with the contention of the appellant and stated that such a narrow interpretation of relevant turnover would allow the OPs who are involved in pernicious practice of bid rigging/collusive bidding to go scot-free. This was never the intention of Hon'ble SC nor of the legislature, while enacting the Competition Act.

91. In this context, we looked into the aforesaid Judgment of Excel Corp Care (supra) closely, regarding the facts of the case and whether the aforesaid ratio applies squarely to the present appeal.

92. In the Excel Crop Care matter (supra) the matter related to procurement by FCI for Aluminium Phosphide tablets (for short APT) of 3 gm each between the year 2007-2009. The relevant para of the judgement are extracted below:

> *3.2. There were only four manufacturers of APT, namely, M/s Excel Crop Care Ltd.. M/s UPL, M/s Sandhya Organics Chemicals (P) Ltd. (which are the three appellants herein) and Agrosynth Chemicals Ltd.*
>
> *3.3. It was noted that FCI had adopted the process of tender, which is normally a global tender. The tender concerned had two-bid*

system, that is, first techno-commercial and then the financial bid. On the basis of the bids, the rate running contracts are executed with successful bidders. The DG found that there was also a committee comprising of responsible officers for evaluation of technical and price bids. As per the practice, the lowest bidder is invited by the Committee for negotiations and after negotiations, the Committee submits the report giving its recommendations and the contracts are awarded and after that the payment for the purchased tablets is released by the regional offices concerned.

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

93. It can be seen that the aforesaid companies were in the same business since 2002, and their balance sheets had segment wise reporting, which made it possible to segregate the turnover from the APT business for

each year of operation. In such cases, the ratio laid down by Hon'ble SC regarding imposition of penalty on the basis of relevant turnover is a very logical and correct way of calculating the penalty, as it brings in the doctrine of proportionality to the penalty for the offences under the Act.

94. In the present case, the appellant 1 was acting as the leader of the cartel and had provided support to other members of the cartel for bidding in the tenders. Appellant 2 is a group company of Appellant 1 and it provided cover bid for the successful bidder Appellant 1. In view of peculiar facts and circumstances of the present case, where all the bidders for soil testing are first time bidders and relevant turnover of firms from the aforesaid business is NIL, the concept of relevant turnover in such cases would not be correct, as it would lead to NIL penalty and allow the parties involved to go scot-free. Hence, we agree with the Commission's approach of taking the total turnover for computation and imposition of penalty.

95. The appellant's have also relied on the Judgment of Competition Appellate Tribunal in MDD Medical Systems India Private Limited (supra) [Para 25 to 29] which have been quoted earlier. This case was the first instance of the parties involved being found guilty of such practices, with no prior allegations in this regard. The Commission in the instant case did not pass a reasoned order, while fixing the penalty at 5%, therefore, reduced the penalty to 3%. However, in the instant case Commission has given a detailed justification for imposing a penalty of 5% of annual turnover.

96. In the same competition matter Suo Moto Case No. 1 of 2020 in appeals filed by two other bidders viz. M/s Delicacy Continental Pvt. Ltd. and M/s Toyfort who provided only the cover bid, we have reduced the penalty to 3% of average annual turnover, instead of 5% as imposed by the Commission, keeping in mind the fact that they were not the winning bidders. In this case the appellant 1 is the leader of the pack, who has organised the bid rigging and collusion, and was the winning bidders in 5 tenders. The Appellant 2 is a group company of Appellant 1 where the wife of the owner is majority shareholder and the Director of Appellant 2 is the CEO of Appellant 1. Sh. Praveen Kumar Agarwal (Appellant 3) and Sh Nitish Agarwal (Appellant 4) have also been individually found responsible for collusion and bid rigging. Accordingly, we find no reason to reduce the penalty imposed by the Commission against the petitioners in this appeal.

97. In view of the above discussion, we uphold the order of the Commission. The Appeal is dismissed. The pending IAs if any, are accordingly disposed of.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Indevar Pandey]
Member (Technical)

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