

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**PRINCIPAL BENCH, NEW DELHI**

**Competition Appeal (AT) No. 43 of 2018**

**IN THE MATTER OF:**

**Manoj Gupta**  
**(Proprietor of M/s. Mahalaxmi Steels)** **...Appellant**

**Versus**

**Competition Commission of India & Ors.** **...Respondents**

**Present:**

**For Appellant : Mr. Gaurav Mitra with Mr. Kartik Nagarkatti,**  
**Mr. Adit Singh, Advocates.**

**For Respondent : Mr. Manish Vashist, Sr. Advocate with Ms.**  
**Avinash Sharma, Ms. Akanksha Kapoor, Mr.**  
**Siddhant Chaudhary, Advocates for CCI/R1.**  
**Mr. Davander Prasad, Dy. Director for CCI.**

**With**

**Competition Appeal (AT) No. 44 of 2018**

**IN THE MATTER OF:**

**Ecoman Enviro Solutions Pvt. Ltd. & Ors.** **...Appellants**

**Versus**

**Competition Commission of India & Ors.** **...Respondents**

**Present:**

**For Appellant : None**

**For Respondent : Mr. Manish Vashist, Sr. Advocate with Ms.**  
**Avinash Sharma, Ms. Akanksha Kapoor, Mr.**  
**Siddhant Chaudhary, Advocates for CCI/R1.**  
**Mr. Davander Prasad, Dy. Director for CCI.**

## With

**Competition Appeal (AT) No. 45 of 2018**

**IN THE MATTER OF:**

**Fortified Security Solutions,  
Through its Proprietor Bipin Vijay Salunke** **...Appellant**

## Versus

**Competition Commission of India & Ors. ...Respondents**

**Present:**

**For Appellant : None**

**For Respondent : Mr. Manish Vashist, Sr. Advocate with Ms. Avinash Sharma, Ms. Akanksha Kapoor, Mr. Siddhant Chaudhary, Advocates for CCI/R1. Mr. Davander Prasad, Dy. Director for CCI.**

## With

**Competition Appeal (AT) No. 46 of 2018**

**IN THE MATTER OF:**

**Raghunath Industry Pvt. Ltd. & Anr. ...Appellants**

## Versus

**Competition Commission of India & Ors. ...Respondents**

**Present:**

**For Appellant : None**

**For Respondent : Mr. Manish Vashist, Sr. Advocate with Ms. Avinash Sharma, Ms. Akanksha Kapoor, Mr. Siddhant Chaudhary, Advocates for CCI/R1. Mr. Davander Prasad, Dy. Director for CCI..**

**With**

**Competition Appeal (AT) No. 47 of 2018**

**IN THE MATTER OF:**

**Sanjay Agencies & Anr.**

**...Appellants**

**Versus**

**Competition Commission of India & Ors.**

**...Respondents**

**Present:**

**For Appellant : Ms. Aditi Sharma, Advocate**  
**For : Mr. Manish Vashist, Sr. Advocate with Ms.**  
**Respondent Avinash Sharma, Ms. Akanksha Kapoor, Mr.**  
**Siddhant Chaudhary, Advocates for CCI/R1.**  
**Mr. Davander Prasad, Dy. Director for CCI.**

**With**

**Competition Appeal (AT) No. 49 of 2018**

**IN THE MATTER OF:**

**Lahs Green India Pvt. Ltd. & Anr.**

**...Appellants**

**Versus**

**Competition Commission of India & Ors.**

**...Respondents**

**Present:**

**For Appellant : Mr. Gursat Singh, Mr. Pranav Khanna,**  
**Advocates**  
**For : Mr. Manish Vashist, Sr. Advocate with Ms.**  
**Respondent Avinash Sharma, Ms. Akanksha Kapoor, Mr.**  
**Siddhant Chaudhary, Advocates for CCI/R1.**  
**Mr. Davander Prasad, Dy. Director for CCI.**

**With**

**Competition Appeal (AT) No. 56 of 2018**

**IN THE MATTER OF:****Ecoman Enviro Solutions Pvt. Ltd. & Ors.****...Appellants****Versus****Competition Commission of India & Ors.****...Respondents****Present:****For Appellant : None**

**For Respondent : Mr. Manish Vashist, Sr. Advocate with Ms. Avinash Sharma, Ms. Akanksha Kapoor, Mr. Siddhant Chaudhary, Advocates for CCI/R1. Mr. Davander Prasad, Dy. Director for CCI.**

**With****Competition Appeal (AT) No. 57 of 2018****IN THE MATTER OF:****Raghunath Industry Pvt. Ltd. & Anr.****...Appellants****Versus****Competition Commission of India & Anr.****...Respondents****Present:****For Appellant : None**

**For Respondent : Mr. Manish Vashist, Sr. Advocate with Ms. Avinash Sharma, Ms. Akanksha Kapoor, Mr. Siddhant Chaudhary, Advocates for CCI/R1. Mr. Davander Prasad, Dy. Director for CCI.**

**With****Competition Appeal (AT) No. 58 of 2018****IN THE MATTER OF:**

**Fortified Security Solutions**

**...Appellant**

**Versus**

**Competition Commission of India & Ors.**

**...Respondents**

**Present:**

**For Appellant : None**

**For Respondent : Mr. Manish Vashist, Sr. Advocate with Ms. Avinash Sharma, Ms. Akanksha Kapoor, Mr. Siddhant Chaudhary, Advocates for CCI/R1. Mr. Davander Prasad, Dy. Director for CCI.**  
**With**

**Competition Appeal (AT) No. 59 of 2018**

**IN THE MATTER OF:**

**Raghunath Industry Pvt. Ltd. & Anr.**

**...Appellants**

**Versus**

**Competition Commission of India & Anr.**

**...Respondents**

**Present:**

**For Appellant : None**

**For Respondent : Mr. Manish Vashist, Sr. Advocate with Ms. Avinash Sharma, Ms. Akanksha Kapoor, Mr. Siddhant Chaudhary, Advocates for CCI/R1. Mr. Davander Prasad, Dy. Director for CCI.**  
**With**

**Competition Appeal (AT) No. 60 of 2018**

**IN THE MATTER OF:**

**Ecoman Enviro Solutions Pvt. Ltd. & Ors.**

**...Appellants**

**Versus**

**Competition Commission of India & Ors.**

**...Respondents**

**Present:****For Appellant : None**

**For Respondent : Mr. Manish Vashist, Sr. Advocate with Ms. Avinash Sharma, Ms. Akanksha Kapoor, Mr. Siddhant Chaudhary, Advocates for CCI/R1. Mr. Davander Prasad, Dy. Director for CCI..**  
**With**

**Competition Appeal (AT) No. 61 of 2018****IN THE MATTER OF:****Fortified Security Solutions****...Appellant****Versus****Competition Commission of India & Ors.****...Respondents****Present:****For Appellant : None**

**For Respondent : Mr. Manish Vashist, Sr. Advocate with Ms. Avinash Sharma, Ms. Akanksha Kapoor, Mr. Siddhant Chaudhary, Advocates for CCI/R1. Mr. Davander Prasad, Dy. Director for CCI.**  
**With**

**Competition Appeal (AT) No. 67 of 2018****IN THE MATTER OF:****LAHS Green India Pvt. Ltd. & Anr.****...Appellants****Versus****Competition Commission of India & Ors.****...Respondents****Present:****For Appellant :**

**For Respondent : Mr. Manish Vashist, Sr. Advocate with Ms. Avinash Sharma, Ms. Akanksha Kapoor, Mr. Siddhant Chaudhary, Advocates for CCI/R1. Mr. Davander Prasad, Dy. Director for CCI.**

**With**

**Competition Appeal (AT) No. 68 of 2018**

**IN THE MATTER OF:**

**Saara Traders Pvt. Ltd. & Anr.**

**...Appellants**

**Versus**

**Competition Commission of India & Ors.**

**...Respondents**

**Present:**

**For Appellant : Ms. Aditi Sharma, Advocate.**

**For Respondent : Mr. Manish Vashist, Sr. Advocate with Ms. Avinash Sharma, Ms. Akanksha Kapoor, Mr. Siddhant Chaudhary, Advocates for CCI/R1. Mr. Davander Prasad, Dy. Director for CCI..**

**JUDGEMENT**

**(23<sup>rd</sup> December, 2022)**

**JUSTICE RAKESH KUMAR, MEMBER (JUDICIAL)**

The aforesaid appeals were taken up for final hearing on 08.08.2022, 15.11.2022 and finally on 28.11.2022 after conclusion of hearing, Judgement was reserved. Despite the fact that on 08.08.2022 appellants counsel were appearing in Competition Appeal (AT) No.43/2018, 49/2018 and 67/2018, in other appeals there was no representation on behalf of the

appellants. Accordingly while partly hearing the appeals and deferring hearing to 15.11.2022 it was observed that if on the next date there is none appearance of either of the parties, the Court may proceed ex parte. Again on 15.11.2022 except in Competition Appeal (AT) No.43/2018, 47/20218, 49/2018 and 68/2018 there was none appearance on behalf of the appellant in remaining appeals. The aforesaid cases were again directed to be listed on 28.11.2022. However, on 28.11.2022 again except appearance of learned counsel for the appellants in Competition Appeal (AT) No.43/2018, 47/2018, 49/2018 and 68/2018, none appeared on behalf of the appellants in remaining appeals and after hearing learned counsel for the appellants in aforesaid appeals and learned counsel for the Respondents, judgement was reserved on 28.11.2022.

2. Of course by order dated 08.08.2022 it was indicated that if on next date there is none appearance by either side, the Court decided to hear ex parte but at the time of dictating judgement we thought it proper not to decide those appeals on merit in which there was none appearance on behalf of the appellants, otherwise there is possibility that party may think that without hearing the appellants their appeals were decided on

merit. Accordingly we propose to dismiss Competition Appeal (AT) No.44/2018, 45/2018, 46/2018. 56/2018, 57/2018, 58/2018, 59/2018, 60/2018, 61/2018 and 67/2018 due to non-prosecution.

3. The aforesaid appeals were preferred under Section 53B of the Competition Act, 2002 (hereinafter referred to as 'Act'). Except Competition Appeal (AT) No.68/2018, all the remaining surviving appeals were preferred against an order dated 1.5.2018 passed in Case No.50/2015 by the Competition Commission of India (hereinafter referred to as 'CCI'). Learned CCI by the impugned order considering applications filed on behalf of the appellants under Section 46 of the Act read with Regulation 5 of Regulations 2009 and also considering other evidences, both oral and documentary, firstly directed the opposite parties 1 to 4, 5,6, 7 before the CCI to cease and desist from indulging in any competitive conduct as noticed by the CCI in its finding in future. Besides issuance of direction of cease and desist the CCI also imposed monetary penalty.

3. The proprietorship firm of appellant in Competition Appeal (AT) No.43/2018 in view of his leniency application was granted 50% reduction in the penalty whereas the appellant in Competition

Appeal (AT) No.47/2018 was granted 40% reduction and appellant in Competition Appeal (AT) No.49/2018 was granted reduction in penalty to the extent of 50% penalty.

4. Aggrieved with order dated 01.05.2018 the appellants have preferred the aforesaid appeals. The operative portion of the impugned order dated 01.05.2018 is reproduced hereinbelow:-

97. Thus, considering the totality of facts and circumstances of the present case, the Commission decides to impose penalty on OP-1, OP-2, OP-4, OP-5, OP-6 and OP-7 under Section 27 of the Act by taking into consideration the financial statements filed by them at the rate of 10 (Ten) percent of the average turnover of three financial years 2012-13, 2013-14 and 2014-15. The total amount of penalties imposed on the Ops are set out below:

Amount- in rupees

| S.No | Opposite Parties                         | Turnover for 2012-13 | Turnover for 2013-14 | Turnover for 2014-15 | Average Turnover for Three Years | 10% of average turnover |
|------|------------------------------------------|----------------------|----------------------|----------------------|----------------------------------|-------------------------|
| 1.   | Fortified Security Solutions (OP-1)      | 2,56,55,868          | 46,55,000            | 89,06,332            | 1,30,72,400                      | 13,07,240               |
| 2.   | Ecoman Enviro Solutions Pvt. Ltd. (OP-2) | 4,55,65,642          | 4,73,92,830          | 4,26,61,501          | 4,52,06,658                      | 45,20,666               |
| 3.   | Lahs Green India Pvt. Ltd. (OP-4)        | 2,87,03,056          | 3,86,10,060          | 5,87,02,356          | 4,20,05,157                      | 42,00,516               |
| 4.   | Sanjay Agencies (OP-5)                   | 14,88,53,862         | 14,42,12,012         | 16,01,27,863         | 15,10,64,579                     | 1,51,06,457             |
| 5.   | Mahalaxmi Steels                         | 43,99,75,649         | 29,27,32,614         | 27,59,01,706         | 33,62,03,323                     | 3,36,20,332             |

|    |                                           |               |             |             |              |           |
|----|-------------------------------------------|---------------|-------------|-------------|--------------|-----------|
| 6. | Raghunath<br>Industry Pvt.<br>Ltd. (OP-7) | Not available | 2,64,09,403 | 3,46,89,461 | 3,05,49,432* | 30,54,943 |
|----|-------------------------------------------|---------------|-------------|-------------|--------------|-----------|

\*Average of 2 years turnover considered. As per submissions, OP-7 was incorporated on 24.06.2013 and its financial year was 2013-14.

5. The short fact of the case is that in the year 2014 Pune Municipal Corporation, Respondent No.5 in Competition Appeal (AT) No.43/2018 had floated tenders pertaining to the 'design, supply, installation, commissioning, operation and maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant(s)' viz Tender Nos 34, 35, 44, 62 and 63 of 2014 for the period December 2014 to March, 2015.

6. Since aforesaid appeals pertains to Tender No.34, 35, 44,62 and 63 of 2014 we are firstly dealing with the appeals which are in relation to Tender No.34, 35, 44, 62 and 63/2014 and as such we are proposing to elaborate the facts and circumstances relating to Tender No.34, 35, 44, 62 only. Competition Appeal (AT) No.68/2018 is off suit of the Case No.50/2015. We will cursorily discussed the Case of Competition Appeal (AT) No.68/2018 subsequently.

7. One Retired Major General namely Mr S.C. N. Jatar in the capacity of authorised signatory of Nagrik Chetna Manch, a public charitable trust constituted under the provisions of Bombay Public Trust Act 1960 and Society registered under the Societies Registration Act, 1860 after gathering relevant information regarding omission and commission of misconduct by official of Pune Municipal Corporation in connivance with appellants filed a detailed information application before the CCI. In the complaint following facts were incorporated in details:

*"2. During April, 2015, Nagrik Chetna Manch had obtained information about tenders floated by Pune Municipal Corporation (PMC for short) pertaining to the "Design, Supply, Installation Commissioning. Operation and Maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant(s)" for tender numbers 34, 35, 44, 62 and 63 of 2014 for the period December 2014 to March 2015 from PMC's web site at <https://pmctenders.abcprocure.com/>*

*3. During the scrutiny of the tenders and award of the above-noted tenders, it was found by the Complainant that the Accused had colluded with each other and committed various irregularities in order to obtain the award of the tenders in their favour*

*4. Accused No. 1, Fortified Security Solutions ('Fortified' for short), is engaged in the business of electronic security systems, sales and service, health and medical, equipment and instruments, sale-purchases and services.*

*5. The Complainant does not know the business activity carried on by Accused no. 2, Ecoman Enviro Solutions Private Limited (Ecoman' for short).*

*6. The Accused have, jointly and severally, committed the offence under section 3 of the Competition Act Section 3 is reproduced herein below*

7. While bidding for tender numbers 34, 35, 44, 62 and 63 of 2014 floated by the Pune Municipal Corporation (PMC" for short), they eliminated competition and in order to grant legitimacy to achieving their nefarious design of scuttling competition, the Accused flouted the terms and conditions of the tender in collusion with PMC officials to qualify ineligible bidders

8. The modus operandi used by the Accused to give effect to their conspiracy to engage in collusive bidding strikes at the very root of fostering competition and protecting Indian markets against anti-competitive practices. This modus operandi has resulted in elimination of real competition and caused restricted participation in the bid process, adversely affecting public spending. The tender process has been vitiated by practices such as collusion, fraud and corruption at every stage of the tender process. By doing so, the bidders have eliminated competition and PMC has paid up to 30% more than its estimated value for the tenders. The Complainant presents both direct and circumstantial evidence of the existence of an agreement amongst the bidders that makes the entire process of selecting the winning bidder a sham making a mockery of the tendering process and thereby killing competition

a. Step 1: The Accused have ensured that they technically qualify two chosen bidders in addition to the predetermined winner to comply with PMC's Tender Process Guidelines that specify a minimum of three technically qualified bidders

b. Step 2: The Accused have ensured that the financial quotes of the two chosen bidders are more than that of the pre-determined winner

c. Step 3 The Accused have achieved, the above by ignoring the shortfalls in the technical bids and overlooking violations of the provisions of the Competition Act so that the chosen bidders qualify technically.

The Complainant submits that such bids were merely designed to give the appearance of genuine competitive bidding. On scrutiny of the bids, it is clear that Accused no. 2, Ecoman, becoming L1 was a foregone conclusion because it acted like a lead company

9. The net worth certificate of Accused no. 1, Fortified, for tender nos 34, 35 & 44-2014 shows Bipin Vijay Salunke as the owner of both Accused no 1, Fortified and Accused no. 2, Ecoman, with the same office address as shown in paragraphs 4 and 5 above.

*It is apparent that this person is the brain behind the violation of the Act in cohort with the other bidders and the Accused no. 3, the PMC. The Accused no.3 has allowed Accused no 1 and 2 to take part in the tender process with the full knowledge that there was a common owner. The Complainant draws kind attention of the Hon'ble Commission to the report in the Times of India, Pune dated 13 May 2015 wherein the head of the MSW Department of PMC. Accused no. 3 herein, has unabashedly accepted that it is not surprising for one person to own two different firms.*

*The Complainant submits that this is the strongest evidence of wilful collusive bidding by all the accused taken together for their personal gain to the exclusion of the Corporation and to obtain wrongful and unlawful gain which the accused would not have obtained but for acting in contravention of Section 3 of the Competition Act in which process they have caused wrongful and unlawful loss to the State Exchequer*

*10. An analysis of the bids of the companies qualified technically shows that none of the companies is technically eligible. It will be seen from the tender notice issued in the name of Accused no. 3 that certain pre-qualification and technical criteria had been specified in order to be eligible and qualified to bid. However, the MSW Department of the Accused no. 3, while purporting to act for Accused no 3 has technically approved companies that are not in the business of solid waste processing plants. A bare perusal of the Tender Notice would evince that the Accused No.2 did not even qualify the technical criteria because of lack of relevant experience.*

*It will be further seen that not a single bidder has given the experience in the form required in Exhibit-8. Evidently, this was done to ensure a minimum of three technically-qualified bidders as mandated by paragraph 24.5 of PMC Commissioner's Office order No. D/661 dated 23/03/2011. It is submitted that this strategy was adopted by the accused to avoid further extension of time. Time extension and/or fresh tenders would have enabled better competition with larger response and lower prices*

*There is thus conspiracy and collusion by Accused nos, 1 and 2 along with the technically ineligible companies (nevertheless qualified) on the one hand and personnel of the PMC Accused no 3, on the other. As a result of, and by giving effect to, this fraud, the Accused no. 2 became L1 in five tenders in 2014 bagging contracts worth Rs 14,82,94,580/- while the internal estimate was Rs. 11.45 Crores e 30 % lower.*

11 There existed an agreement in these tenders amongst the bidders & the PMC in pursuance of which and In pursuit of their personal aggrandisement. they have together pre-determined the winner i.e. Accused no 2 and thus eliminated competition Hence, other bidders in these five tenders became proxies of the nexus formed by Accused nos 1 and 2

12. It is clear that all the accused were driven by sharing of a certain percentage of profits of the successful bidder not only with the unsuccessful bidders but also with officials and office-bearers acting for Accused no 3 while being in a position to influence the outcome of the bids. These persons belonged to the parent MSW department who carried out the technical screening, to the Vigilance Department who vetted the proposal, the recommending authorities (the Additional Municipal Commissioner and Commissioner of PMC) and ultimately the Standing Committee comprising councillors who finally approved the proposal. These persons have overreached their authority and aided and abetted the bidders in violating the Competition Act by consciously taking calculated risks of awarding tenders to unqualified bidders The Complainant reiterates that the estimated value of the five tenders was Rs.11.45 crores while the competent authority entertained the L1 bid of Accused no.2 at Rs. 14,82,94,580/

13.The Complainant submits that paragraphs 14, 15, 16 and 17 hereinbelow describe in detail the evidences, both direct and circumstantial, in support of the allegations. With each and every piece of evidence in the following paragraphs, whether considered singly or with others, the Complainant seeks to establish the manner in which the accused have pre-determined the bid and the bidder, limiting the investment and services to be provided and adversely affected domestic/local competition

14 A perusal of Accused no 2's IT return for AY 2012-13 shows net taxable income of Rs 1,97.910/- and tax plus interest as Rs.2,07,091/- i.e. more than 100% of the taxable income. The turnover as per the certificates from the Chartered Accountants is between Rs 4.50 to Rs 4.75 Crores for the period 2012-13 and 2013-14

It is evident that the Accused no 2 did not have the financial strength to implement five projects worth Rs 14.82.94.580/ almost simultaneously. Additionally, tax plus interest paid for A Y 2012-13 and thirteen-fold jump in income in just one year in A.Y 2013-14 should have been legitimate subjects of enquiry warranting due diligence and most probably elimination of Accused no 2 resulting in re-evaluation of the bids or a re- tender

*This indicates that Accused no. 2 as L1 was pre-determined thus violating Section 3 of the Act*

*The Complainant submits that a bare perusal of the company profile of Lahs Green India Pvt Ltd (Lahs for short) establishes that it is not in the business of processing plants for MSW. A perusal of the Statement of Profit and Loss of Lots for year ending 31/03/2014 shows that its turnover is about Rs.3.86 crores only with a small paid-up share capital of less than Rs.10 Lakhs. Nevertheless, Accused no. 3 has shortlisted this company for tender numbers 34, 35 and 44 of 2014 in order to have at least three technically qualified bidders on paper and with the ultimate aim of awarding the contract to Accused no. 2 in violation of the Competition Act. The other two bids were from Accused nos 1 and 2, both being owned by Mr Bipin Vijay Salunke. Furthermore, the two qualified bidders: Sanjay Enterprises and Mahalaxmi Steels, in tender nos 62-2014 and 63-2014, are wholesalers in medicines and dealers in cement/iron/steel tubes, pipes, etc. respectively. Therefore, it is crystal clear that the bids in Tenders 34, 35, 44, 62 & 63-2014 are flawed to the core*

*15 Incidentally, Accused no 1. Sanjay Enterprises and Mahalaxmi Steels are registered under the Shops & Establishment Act and as such are not prima-facie competent to design, supply, install, commission, operate & maintain MSW processing plants without any past experience.*

*16 The Complainant submits that, as evident in these bids, the bidders seem to be intimately connected with each other. The bidders are apparently from one family as there is linkage amongst directors, suppliers and institutions in these five bids. The distributors, model numbers, notanos banks, etc are interconnected. Furthermore, there are similarly styled mistakes in the quotations apart from common addresses. All of the above are extra-ordinary and unbelievable coincidences at best and illegal acts done in pursuance of well-orchestrated design to dupe fair competition, at worst. Furthermore, they also point to the fact that the designated bid winner had prepared all the bids of the losers and establish collusive bidding violating the provisions of the Competition Act, 2002, entalling cancellation of the tenders and penal actions in terms of the Act. Documents in support of the above are as below*

*a) Lahs and Accused no, 2 have both quoted the same Model no. F-125*

*b) in tender nos: 34 and 44-2014, the Accused no. 2 and Lahs have the same notary, same bank for demand draft and in 44-*

2014, the serial numbers of demand drafts are one after another showing collusion.

c) Accused no. 1 has submitted the PAN card and IT returns of the owner, ie Bipin Vijay Saltinke (who also owns Accused no 2) and not of the company The certificate from the CA is also not for the Company

The inescapable conclusion is that the company are either non-existent or not audited for fear of revealing unpalatable facts. All these eventualities are highly questionable

d in all the affidavits and indemnity bonds (except for Accused no 2). the name of the person signing the affidavit or the indemnity bond is not mentioned and the signatures are also not decipherable. This is an effort to hide identity to facilitate the same person signing differently for different companies

e)Mahalaxmi Steel is authorised by Raghunath Industry Pvt Ltd as it's distributor in bid no. 63-014 Raghunath Industry Private Limited has, on its board, a person called Sonali Vijay Salunke who appears to be related to Bipin Vijay Salunke This person "S V Salunke has signed documents such as affidavit of Accused no. 2

Further Raghunath Industry Private Limited has its email ID as accounts@ecomn in showing its link with Accused no.2

f)Mahalaxmi Steel has placed an order on Labs in tender no. 62-2014, clearly showing complementary efforts amongst the bidders.

g)None of the outstation bidders e.g. Lahs are registered with PMC for LBT, which is one of the basic conditions for qualifying.

h Accused nos 1 and 2 along with Lahs have made a common error in quoting for 500 kg/day waste processing capacity plant in the technical bid for tender no. 44-2014 while the requirement is for 5000 kg/day showing common filling of the tender forms.

i)Nevertheless, all three bidders have quoted for 5000 kg/day in the price bid. Despite failing to meet the technical eligibility criteria, the Accused no. 3 has approved the technical bid of all the three bidders

j)In tender no 34-2014, Lahs has, vide affidavit dated 19/12/2014, quoted for Prabhaag 508 while the lender was for Prabhaag 58B

k) Mechanical Equipment Lease & Supply Company Ltd ("Mels" for short) has provided equipment to Accused no. 1 in its tender nos 34, 35 and 44 and to Sanjay Agencies in tender no. 62-2014 showing a common supplier

l) In tender numbers 62 and 63 of 2014, the Demand Drafts (DD) for Earnest Money Deposit (EMD) of both Accused no.2 and Mahalaxmi are from Bank of Maharashtra, Pune Main Branch and numbers are serially close (025818 & 025819 for Accused No 2 and 02582 and 025822 for Mahalaxmi) strongly indicating collusive bidding

m) Tender numbers 62 and 63 of 2014 have the same Notary for the affidavits of all the three bidders (Accused no.2. Mahalaxmi and Sanjay) who have together produced affidavits of the same date again strongly indicating collusive bidding

n) Raghunath Industry Pvt Ltd, so-called manufacturer of all composting machines for Accused No 2 which PMC has purchased, authorized different companies in different tenders. In Initial tender nos, 21, 28 of 2014, it authorised Accused No. 2 in tender nos. 34 and 35 of 2014, it authorised Accused No. 1 and in tender nos: 62 and 63 of 2014, it authorised Mahalaxmi Steel.

o) As per the Ministry of Corporate Affairs, the owner/director of Raghunath Industry is the father of Mr. Bipin Vijay Salunke. He is also the owner/director of Fortified Security Solutions. Accused no.1 herein and Ecoman, Accused no.2 herein Sonali Sahasrabudhe, nee Sonali Vijay Salunke is the sister of Mr. Bipin Vijay Salunke. Hence, Raghunath Industry Private Limited, Accused No 1 and Accused No.2 are all owned by/related to the same owner and have participated in different tenders through different companies to rig the bids

p) A South Korean company by the name Eco-wiz authorized Sanjay Agency for tender nos. 62 & 63 and had earlier given a similar certificate in tender nos, 34 & 35 to LAHS Green. A careful scrutiny of the signatures points to the signature being copied on to the other document

q) All the experience certificates submitted by Accused no.2 are from PMC. Only to show it's compliance with the technical requirement of having past experience with Other Municipal Councils, Accused no 2 has annexed documents purporting to be experience certificates, while in reality being more work orders. The Accused No.2 has also failed to submit any document to evince one year's operation & maintenance experience as mandated in the Tender Notice at Exhibit 8(Supra). The zeal of awarding tender to Accused no 2 is gauged from the fact that the

*one year requirement of operational and maintenance experience has been done away with without any reason or justification*

*r)The Complainant, by his email dated 25 April 2015, to the then Municipal Commissioner, Mr Kunal Kumar. sent a report of the same date informing him that Nagrik Chetna Manch had established a prima facie case and strongly urged upon him to consider taking appropriate action as found imperative from paragraphs 11 to 14 of the Report Briefly these actions envisaged the Municipal Commissioner to suspend / freeze the approvals to the tenders, to relieve the officers concerned of their current duties. re-tender after a review of the terms and conditions. blacklist the companies that bid for the above tenders and review the actions once preliminary inquiry was complete. However, the Municipal Commissioner chose not to act, for reasons best known to him and continued unabated the flawed process of approval of the tenders by the Standing Committee of the PMC As a result, the Complainant was compelled to send an email dated 01/05/2015 to the Mayor and the Municipal Secretary (for Chairperson of the Standing Committee and the members) enclosing the report dated 25/04/2015 and requested for necessary action in public interest and to stall corruption and daylight loot of public money. In it's roots. The Complainant marked a copy of the email dated 01/05/2015 to prominent local MLAs and MPs Though the allegations, in themselves, were serious enough warranting an immediate probe to begin with, the Complainant's representations made strictly to safeguard public interest, were conveniently swept under the carpet and Accused No 2 was rewarded for it's corrupt practices with award of contracts. The Complainant submits that the involvement of accused no.3 in the conspiracy to award tender to unqualified bidders is only corroborated from this tact of playing dead, dumb and blind by design despite being communicated by the Complainant of the attempt of accused nos. 1 and 2 of thwarting the provisions of the Competition Act*

*17. The Complainant submits its email ID for receipt of reply from the Hon'ble Commission with respect to this Complaint and the same is furnished as: [scniat@gmail.com](mailto:scniat@gmail.com)*

*18In view of the submissions made hereinabove, the Complainant most humbly prays this Hon'ble Commission for the following reliefs*

*a Order an inquiry by the Director General into the tender process of the tender numbers 34, 35, 44, 62 and 63 of 2014 of MSW Department of Pune Municipal Corporation under Section 19 of the Act*

*b. Direct Accused nos 1 and 2 to discontinue and not to re-enter such agreement,*

*c. Impose a penalty of ten per cent of the average of the turnover for the last three preceding financial years upon each person and enterprises, which are parties to such agreements:*

*d. if it is established that the agreement has been entered into by a cartel, impose upon each entity included in that cartel, a penalty of ten per cent of its turnover for each year of the continuance of such agreement, whichever is higher*

*e) Refer matters pertaining to corruption in the tender process to the Anti Corruption Bureau, Maharashtra State*

*f) Direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any:*

*g. Pass such other orders or issue such directions as the Commission may deem fit in public interest”*

8 After receipt of aforesaid information application, the CCI examined the same and on 29.09.2015 exercising power under Section 26(1) of the Act observed as follows:

*“18. The Commission has perused the above stated circumstantial and material evidences as submitted by the Informant. On examination of the evidences submitted by the Informant and consideration of the circumstances of the matter, the Commission, prima facie, convinced that there were meeting of minds amongst OP1, OP2, M/s Sanjay Enterprise and M/s Mahalaxmi Steel in response to tender numbers, 34,35,44,62 and 63 of 2014 floated by OP3 during December, 2014 to March, 2015 for ‘Design, Supply, Installation, Commissioning,*

*Operation and Maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant(s)". Apparently, the facts on record as outlined above indicate that in response to said tenders OP1, OP2, M/s Sanjay Enterprise and M/s Mahalaxmi Steels had colluded with each other to make OP2 as the winner. Thus, the Commission is of the, prima facie, opinion that OP 1, OP2, M/s Sanjay Enterprise and M/s Mahalaxmi Steels have indulged in the practices of bid rigging and collusive bidding in response to the said tenders of OP3 which is in contravention of the provision of section 3(3) of the Act.*

*19. The Commission further observes that there could be role of some of the officials of OP3 in facilitating such collusion amongst OP1, OP2, M/s Sanjay Enterprise and M/s Mahalaxmi Steels to pre-determine the winner of the bids, which may be a case of corruption.*

*20. In view of the foregoing the Commission is of the prima facie opinion that OP1, OP2, M/s Sanjay Enterprise and M/s Mahalaxmi Steels, by seeking to stifle competition in the market through the above said collusive practices, have indulged in anti-competitive practices which is in violation of the provisions of Section 3(3) read with Section 3(11) of the Act.*

*21. Accordingly, the Commission, under section 26(1) of the Act, directs the DG to cause an investigation into the matter and to complete the investigation within a period of 60 days from the*

*date of receipt of this order. During the course of investigation, if involvement of any other party is found, the DG shall investigate the conduct of such other parties also. The DG is also directed to investigate the role (if any) of the persons who were in charge of and were responsible for the alleged conduct of such companies.”*

9. After the order passed under Section 26(1) of the Act by the CCI, the DG conducted thorough investigation. During investigation petition under Section 46 of the Act read with Regulation 5 of Regulation 2009 were filed by almost all the opposite parties before the CCI, which are appellants before this Tribunal. The DG in its investigation report concluded as follows:-

*“It is seen that there was meeting of minds amongst M/s Fortified Security Solution (OP-1), M/s Ecoman Enviro Solutions Pvt Ltd (OP-2), M/s Lahs Green India Pvt Ltd (OP-4), M/s Sanjay Agencies (OP-5) and M/s Mahalaxmi Steels (OP-^ ) in response to tender nos 34, 35, 44, 62 and 63 of 2014 floated by Pune Municipal Corporation (OP-3) for making OP-2 as the winner of the bid in the said cartel. Thus it is concluded that these Ops have indulged in bid-rigging and collusive bidding in response to the said tenders of OP-3 which is in contravention of provisions of Section 3(3)(d) r.w..s3(1) of the Act.”*

10. The DG during investigation also examined the involvement of officials of Pune Municipal Corporation and observed as follows and finally recorded conclusion in its report at Chapter IX which is reproduced hereinbelow:-

### **“Conclusion**

*9.1 The present information was filed under Section 19(1)(a) of the Competition Act, 2002 by Nagrik Chetna Manch ("the Informant": 'IP) against M/s Fortified Security Solutions (OP- 1). M/s Ecoman Enviro Solutions Pvt. Ltd. (OP-2), Pune Municipal Corporation (OP-3), M/s Lahs Green India Pvt. Ltd. (OP-4), M/s Sanjay Agencies (OP-5), M/s Mahalaxmi Steels (OP-6) and M/s Raghunath Industry Pvt. Ltd (OP-7) alleging contravention of the provisions of section 3 of the Act.*

#### *02 Gist of allegations*

*The Informant alleged that, during the period from 2014 to 2015 a number of tenders for Design, Supply, Installation, Commissioning. Operation and Maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant(s) were floated by OP-3 and identified five of such tenders where the OPs had participated and allegedly colluded to make OP-2 the L1 bidder. The gist of allegations of the Informant with respect to contravention of section 3 of the Act, inter alia, was as below:*

*OPs had colluded with each other and committed various irregularities in order to obtain the bids floated by OP-3 vide its tender nos. 34, 35, 44, 62 and 63 of 2014 during December, 2014 to March, 2015.*

*The OP's colluded to have a pre-determined winner i.e., OP-2 of the said bids, and others only participated as proxy bidders. It was ensured that they cause/make technically qualify two chosen bidders in addition to a pre-determined winner to comply with the tender process*

*guidelines that specify a minimum of three technically qualified bidders for each bid.*

*The OPs had further ensured that the financial quotes of the two chosen bidders are more than that of the pre-determined winner i.e., OP-2.*

### **9.3 Existence of cartel and modus operandi**

*During the investigation, several evidences were gathered and statements on oath were recorded which indicated the existence of cartel to rig the bid in tender nos. 34, 35, 44, 62 and 63 of 2014 pertaining to solid waste management.*

**The main person in this cartel was Shri Bipin Vijay Salunke**, who is the director in M/s Eenman Enviro Solutions Pvt. Ltd. (OP-2), the LI bidder and the sole proprietor of M/s Fortified Security Solutions (OP-1), a co-bidder in the said tenders. The motive of this cartelization and bid-rigging in the said tenders was to make M/s Ecoman Enviro Solutions Pvt. Ltd. (OP-2) emerge the L1 bidder by arranging proxy/cover bidders and thereby bag the said tenders. In order to do so. Shri Bipin Vijay Salunke ensured that there were three eligible bidders so as to comply with the tender process guidelines that specified a minimum of three technically qualified bidders for each bid. For doing so, Shri Bipin Vijay Salunke, approached the directors/partners/proprietors of other OPs-M/s Lahs Green India Pvt. Ltd. (OP-4), M/s Sanjay Agencies (OP-5) and M/s Mahalaxmi Steels (OP-6) to provide relevant documents for filing the tender.

Since, the proxy/cover bidders did not have any experience or background in solid waste management, Shri Bipin Vijay Salunke arranged for authorization certificates as distributors from M/s Raghunath Industry Pvt. Ltd. (OP-7) in which his father Shri Vijay Raghunath Salunke is a Director, for them as being the authorized distributor of its composting machine. Further, Shri Bipin Vijay Salunke prepared the bank demand drafts for earnest money deposit for these proxy/cover bidders, uploaded the relevant documents for the tender online and also quoted the bid rates for the tenders on their behalf. All of this was orchestrated by Shri Bipin Vijay Salunke so that M/s Ecoman Enviro Solutions Pvt.) Ltd. emerged LI:

### **9.4 Evidences gathered during the investigation**

Several evidences were gathered during the course of investigation indicating that Shri Bipin Vijay Salunke is the key person behind this cartelization and bid rigging of the tenders. These evidences are broadly highlighted below:

The phone numbers given as contact person detail for various bidders in the tenders were-9823766068 and 9822676668 which belong to Shri Parimal Salunke who is an executive director in M/s Ecoman Enviro Solutions Pvt. Ltd. (OP-2).

The bank demand drafts for earnest money deposit for various bidders in the tenders were prepared by either depositing cash by Shri Bipin Vijay Salunke or by debiting his account.

A substantial amount (Rs. 10 lakhs) was transferred from the bank account of M/s Mahalaxmi Steels to the joint account held by Shri Vijay Raghunath Salunke and Smt. Salabha Salunke (parents of Shri Bipin Vijay Salunke) for preparation of bank draft for earnest money deposit on behalf of M/s Mahalaxmi Steels

The IP address used for uploading the documents for the tenders is the same for various bidders

The statement of Shri Bipin Vijay Salunke was recorded on oath wherein he confessed to being the main person in the cartel.

The confessional statements submitted by Shri Manoj Kumar Gupta (proprietor of Mis Mahalaxmi Steels); Shri Sanjay S. Gugle (partner of Ms Sanjay Agencies) and Shri Saiprasad S. Prabhukhanolkar (Managing director of M/s Labs Green India Pvt. Ltd.) confirmed that they colluded with Shri Bipin Vijay Salunke for rigging the bid in the above tenders

The corroborative statement on affidavit was received from Shri Parimal Salunke He accepted that he assisted Shri Bipin Vijay Salunke in the bid-rigging cartel whereby he coordinated with other bidders for arranging the relevant documents and or procuring the digital keys and also prepared the bank drafts for earnest money deposit on their behalf.

## 9.5 Role and complicity of individuals

*Shri Bipin Vijay Salunke is the kingpin in the cartel and he was assisted by other persons Shri Parimal Salunke and Shri Vijay Raghunath Sahnke, for angining the relevant documents and preparation of bank drafts. Further Shri Saiprasad S. Prabhukhanolkar (Managing director of M/s Labs Green India Pvt. Ltd.), Shri Sanjay S. Gugle (partner of M/s Sanjay Agencies) and Shri Manoj Kumar Gupta (proprietor of M/s Mahalaxmi Steels) acquiesced to his request and provided the relevant documents to be the proxy cover bidders in tender nos. 34, 35, 44, 62 and 63 of 2014. Thus they aided in abetment of the cartelisation and bid rigging.*

#### *9.6 Role of officials of Pune Municipal Corporation (OP-3)*

*Issues of systemic failure on the part of OP-3 have already been pointed out. Taking appropriate measures regarding these by PMC could have prevented the cartel. Further, the report suggests that role of some of the officials of OP-3 Le. Shri Sanjay Atmaram Gawade (Assistant Municipal Commissioner) Shri Ravindra Krishna Mulay (Branch Engineer) and Shri Suresh Jagtap (Joint Municipal Commissioner, who telephonically conversed with Shri Bipin Vijay Salunke Shri Parimal Salunke should be examined vis-à-vis their locus standi if they were required to telephonically speak to Shri Bipin Vijay Salunke and/or Shri Parimal Salunke in connection with operation/maintenance/supervision of organic solid waste management plants installed earlier.*

*Furthermore, the documents of M/s Ecoman Enviro Solutions Pvt. Ltd. were uploaded from one of the computer device of OP-3 (using IP address-114.143.199.34) in tender no. 21 of 2013. As such, there could be some assistance offered by some official of OP-3 to Shri Bipin Vijay Salunke which should also be examined by Pune Municipal Corporation (OP- 3).*

#### *9.7 Claim of confidentiality*

*No confidentiality has been claimed by the OPs vis-à-vis submissions, evidences etc. which were a part of this investigation proceedings and which have been recorded in this report. Accordingly, a single version of the report is submitted to the Commission for consideration.*

11. During investigation since DG noticed involvement of other players by order dated 28.06.2016, the appellant Lahs Green

India Pvt Ltd, Sanjay Agency, Mahalaxmi Steel and Raghunath Industries Pvt Ltd were included as opposite parties and thereafter on 23.11.2016 the DG submitted its investigation report.

12. After receipt of the investigation report the CCI in compliance with the Rules of Natural Justice and providing opportunity to all the parties passed the impugned order. The CCI in its order has categorically noticed the said penalty applications filed by the opposite parties/appellants herein. The opposite party 6 had filed lesser penalty application and accepted that it has submitted cover bid to aid opposite Party No.2 to Tender No.62 and 63 of 2014. Opposite party No.4 and 5 on 4.8.2016 filed their lesser penalty application in which OP 5 accepted its involvement in cartel in respect of participation in Tender No.62 and 63 of 2014. OP 4 in its lesser penalty application disclosed that he had agreed to bid as a proxy bidder to assist OP2 to win the tender No.34, 35, 44 of 2014. Thereafter on 5.8.2016 OP No.2 and 7 also filed lesser penalty application. OP No.2 accepted that it had arranged proxy bidder to ensure that Tender period in tender No.34, 25, 44, 63, 64 of 2014 were not extended and the tenders were awarded to OP No.2. It also provided documents and evidence in support of

its submission. OP No.7 in its lesser penalty application accepted that it has provided authorisation letters to OP no.1 and OP 6 to fulfil eligibility criteria enabling them to participate in the PMT Tender. However, at much belated stage i.e. on 20.09.2016 OP No.1 filed application under lesser penalty application accepting therein that it had submitted cover bids in Tender No.34, 35 and 44 of 2014. It also provided documents in support thereof.

13. The Learned CCI also discussed the profile of the opposite parties/appellants. It was noticed that OP No.1/Fortified Security Solutions was a proprietary concern of Mr Bipin Vijay Salunke which was engaged in the business of sales and service of electrical security system, health and medical equipment whereas OP No.4/Lahs Green India Pvt Ltd was engaged in solar water heating, lighting and water and purifying sales and equipment for residential and commercial applications whereas OP No.5 Sanjay Agency was a pharmaceutical dealer and stockist of drugs. OP 6 Mahalaxmi Steel being proprietorship firm was engaged in the steel trading business. The CCI in its order impugned elaborately discussed different issues which establishes categorical case of cartelisation in the alleged bid by the appellants. Even during enquiry by the CCI statement of appellant Manoj Kr, Proprietor of

Respondent No.6/appellant in Competition Appeal (AT) No.543/2018, statement of OP5, OP No.4, OP No.7, statement of Mr Bipin Vijay Salunke, Proprietor of OP No.1-Director of Opposite Party No.2 was recorded wherein all the parties accepted their involvement. The CCI also examined the lesser penalty application filed by the appellants and thereafter the impugned order was passed, operative portion of which has already been quoted hereinabove.

14. Though in the present appeal there was no need to go into the merit of the case in view of order dated 16.07.2018 passed by this Tribunal, however, for clear appreciation of the fact we have noticed and discussed aforesaid facts. On 16.07.2018, Competition Appeal (AT) No. 43, 44, 45, 46 and 47 was taken and a Bench of this Tribunal had recorded the order which is reproduced hereinbelow:-

**“16.07.2018:** *Mr. Rajshekhar Rao, learned counsel appearing on behalf of the appellants submitted that the appellants have accepted the ‘cartel’ during the inquiry, they co-operated with the Director General and also the Competition Commission of India (for short, ‘the Commission’) to come to a conclusion of violation of Section 3(3) of the Competition Act, 2002. The only submission is that in the facts and circumstances of the case,*

*the appellant having accepted the bid rigging in respect of Tenders No. 34, 35 and 44 of 2014 and having admitted the opposite party was the proxy bidder, lesser penalty should have been imposed on the appellants. **Let Notice be issued on the Commission as to why the Appellate Tribunal will not interfere with the quantum of penalty imposed by the Commission in view of the stand taken by the appellants.***

*Mr. Navdeep Singh, Deputy Director of the Commission who is present in the Court accepts notice on behalf of the Commission and submits that Commission will engage a lawyer to assist the Court. Therefore, no further notice need be issued on it. Commission may file reply within two weeks and rejoinder if any maybe filed by the appellant within seven days thereof. Let notice be issued on rest of the respondents by Speed Post. Requisite alongwith process fee, if not filed, be filed by 18th July, 2018. If the appellant provides e-mail address of the respondents, let notice be also issued through e-mail. Post the appeals for 'admission' on 6th August, 2018. In the meantime, M/s. Mahalaxmi Steels, Ecoman Enviro Solutions Pvt. Ltd., Fortified Security Solutions and Raghunath Industry Private Limited will pay 10% of the respective penal amount within four weeks. The individual appellants will pay full penalty imposed on them within the aforesaid period of four weeks, subject to the decision of the appeal".*

15. In view of aforesaid order there was very limited scope for advancing argument by learned counsel for the appellant on merit. However, learned counsel for the appellants at the time of final hearing had also argued on merit of the case. Since there was rider on argument on the point of merit in view of order dated 16.07.2018, we feel it not appropriate to discuss all aforesaid submissions. However, Mr. Gaurav Mitra, learned counsel for the appellant in Competition Appeal (AT) No.43/2018 has emphatically argued that learned CCI contrary to the law laid down by Hon'ble Supreme Court in Excel Crop Limited has considered the turnover. According to learned counsel for the appellant the penalty imposed by the CCI on the basis of three years turnover was incorrect. Mr. Mitra, learned counsel for the appellant has specifically referred to para 71 to 74 on the point of turnover which are reproduced hereinbelow:-

*71) We have given our serious thought to this question of penalty with reference to 'turnover' of the person or enterprise. At the outset, it may be mentioned that Section 2(y) which defines 'turnover' does not provide any clarity to the aforesaid issue. It only mentions that turnover includes value of goods or services. There is, thus, absence of certainty as to what precise meaning should be ascribed to the expression 'turnover'. Somewhat similar position appears in EU statute and in order to provide some clear directions, EU guidelines on the subject have been issued. These guidelines do refer to the concept of 'relevant turnover'. Grappling with the same very issue, the judgment of the Competition Appeal Court of South Africa in the case of Southern Pipeline Contractors Conrite Walls (Pty) Ltd. v.*

*The Competition Commission 20 provides the answer in the following manner:*

*“51. The concept of ‘turnover’ is not defined in the Act and is only referred to in Section 59(2), being annual turnover. There is thus some uncertainty as to the precise meaning of ‘turnover’.*

*There is thus some uncertainty as to the precise meaning of turnover. However, Section 59(3) refers on more than one occasion to the contravention’, in particular, in dealing with the nature, duration, gravity and extent ‘of the contravention’, the loss or damage suffered as a result of the ‘contravention’ the market circumstances in which ‘the contravention’ the market circumstances in which ‘the contravention’ took place and the level of profit derived from ‘the contravention’. Thus there is a legislative link between the damage caused and the profits which accrue from the cartel activity. The inquiry, in terms of Section 59(20), appears to envisage that consideration be given to the benefits which accrue from the contravention: that is to amount to affected turnover. By using the baseline of affected turnover’ the implications of the doctrine of proportionality that is between the nature of the offence and benefit derived therefrom, the interests of the consumer community and the legitimate interests of the offender can be taken more carefully into account and appropriately calibrated.”*  
*[Emphasis supplied]*

*72) Judgement in the case of Southern Pipeline Contractors Conrite Walls (Pty) Ltd.<sup>19</sup> reveals that the Court therein was concerned with the provisions of Section 59(20) of the Competition Act, 1998 of South Africa which also provides for maximum penalty of 10% of the annual turnover. The Court held that the appropriate amount of penalty had to be determined keeping into consideration the damage caused and the profits which accrue from the cartel activity. The Appeal Court used the words ‘affected turnover’. It determined the amount of penalty on the basis of these guidelines issued by the European Union (EU) and the Office of Fair Trade (OFT). In that case the concerned company Southern Pipeline Contractors was a multi-product company and the ‘affected turnover’ was comparatively small.*

*73) It is interesting to note that the parties on either side are resting their cases on the same principle of statutory interpretations. Pertinently, Section 27(b) of the Act while*

*prescribing the penalty on the ‘turnover’, neither uses the prefix ‘total’ nor ‘relevant’. It is in this context, taking aid of the applicable and well-recognised principle of statutory interpretations we have to determine the issue.*

*74) In the absence of specific provision as to whether such turnover has to be product specific or entire turnover of the offending company, we find that adopting the criteria of ‘relevant turnover’ for the purpose of imposition of penalty will be more in tune with ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties. For arriving at this conclusion, we are influenced by the following reasons:*

*(a) Under Section 27(b) of the Act, penalty can be imposed under two contingencies, namely, where an agreement referred to in Section 3 is anti-competitive or where an enterprise which enjoys a dominant position misuses the said dominant position thereby contravening the provisions of Section 4. In case where the violation or contravention is of Section 3 of the Act it has to be pursuant to an ‘agreement’. Such an agreement may relate to a particular product between persons or enterprises even when such persons or enterprises are having production in more than one product. There may be a situation, which is precisely in the instant case, that some of such enterprises may be multi-product companies and some may be single product in respect of which the agreement is arrived at. If the concept of total turnover is introduced it may bring out very inequitable results. This precisely happened in this case when CCI imposed the penalty of 9% on the total turnover which has already been demonstrated above.*

*(b) Interpretation which brings out such inequitable or absurd results has to be eschewed. This fundamental principle of interpretation has been repeatedly made use of to avoid inequitable outcomes. The Canadian Supreme Court in Ontario vs. Canadian Pacific Ltd.<sup>21</sup> wherein the expression ‘use’ occurring in Environment Protection Act was given restricted meaning. The principle that absurdity should be avoided was explained in the following manner:*

*“The expression “for any use that can be made of the natural environment has an identifiable literal or “plain” meaning when viewed in the context of the EPA as a whole, particularly the other paragraphs of [s. 13\(1\)](#). When the terms of the other*

paragraphs are taken into account, it can be concluded that the literal meaning of the expression “for any use that can be made of the natural environment” is “any use that can conceivably be made of the natural environment by any person or other living creature”. In ordinary circumstances, once the “plain meaning” of the words in a statute have been identified there is no need for further interpretation. Different considerations can apply, however, in cases where a statute would be unconstitutional if interpreted literally. This is one of those exception cases, in that a literal interpretation of [s. 13\(1\)\(a\)](#) would fail to meet the test for overbreadth established in *Heywood*. The state objective underlying s. 13(1)(a) EPA is, as [s. 2](#) of the Act declares, “the protection and conservation of the natural environment”. This legislative purpose, while broad, is not without limits. In particular, the legislative interest in safeguarding the environment for “uses” requires only that it be preserved for those “uses” that are normal and typical, or that are likely to become normal or typical in the future. Interpreted literally, [s. 13\(1\)\(a\)](#) would capture a wide range of activities that fall outside the scope of the legislative purpose underlying it, and would fail to meet s.7 overbreadth scrutiny. There is, however, an alternative interpretation of s.13(1)(a) that renders it constitutional. [Section 13\(1\)\(a\)](#) can be read as expressing the general intention of [s. 13\(1\)](#) as a whole, and paras. 13(1)(b) through (h) can be treated as setting out specific examples of “impairment(s) of the quality of the natural environment for any use that can be made of it”. When viewed in this way, the restrictions place on the word “use” in paras. (b) through (h) can be seen as imported into (a) through a variant of the *eiusdem generis* principle. Interpreted in this manner, s.13(1)(a) is no longer unconstitutionally overbroad, since the types of harms captured by paras. (b) through (h) fall squarely within the legislative intent underlying the section. In light of the presumption that the legislature intended to act in accordance with the constitution, it is appropriate to adopt this interpretation of s.13(1)(a). Thus, the subsection should be understood as covering the situations captured by

*paras. 13(1)(b) through (h), and any analogous situations that might arise.”*

We would also like to quote the following observations from [State of Jharkhand and Another v. Govind Singh](#)<sup>22</sup>:

*“20. While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse deemed necessary. [See CST v. Popular Trading C. : (2000) 5 SCC 511 : AIR 2000 SC 1578]. The legislative casus omissus cannot be supplied by judicial interpretative process.”*

Likewise, following passages from the judgment of this Court in [Commissioner of Income Tax, Bangalore v. J.H. Yadagiri](#)<sup>23</sup> shed light of similar nature.

*“45. In the case of K.P. Varghese v. ITO [(1981) 4 SCC 173 : 1981 SCC (Tax) 293 : (1981) 131 ITR 597] this Court emphasised that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided.*

*46. Where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the Legislature, the Court might modify the language used by the Legislature so as to achieve the intention of the Legislature and produce a rational construction. The task of interpretation of a statutory provision is an attempt to discover the intention of the Legislature from the language used. It is necessary to remember that language is at best an imperfect instrument for the expression of human intention. It is well to remember the warning administered by Judge Learned Hand that one should not make a fortress out of dictionary but remember that statutes always have some purpose or object to accomplish and sympathetic and imaginative discovery is the surest guide to their meaning.*

*47. We have noted the object of [Section 16\(3\)](#) of the Act which has to be read in conjunction with [Section 24\(2\)](#) in this case for the present purpose. If the purpose of a particular provision is easily discernible from the whole scheme of the Act which in this case is, to counteract the effect of the*

*transfer of assets so far as computation of income of the assessee is concerned then bearing that purpose in mind, we should find out the intention from the language used by the Legislature and if strict literal construction leads to an absurd result i.e. result not intended to be subserved by the object of the legislation found in the manner indicated before, and if another construction is possible apart from strict literal construction then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction. Furthermore, in the instant case we are dealing with an artificial liability created for counteracting the effect only of attempts by the assessee to reduce tax liability by transfer. It has also been noted how for various purposes the business from which profit is included or loss is set off is treated in various situations as assessee's income. The scheme of the Act as worked out has been noted before.*

*In Southern Motors vs. State of Karnataka and Others* 24, the Court explained the task that is to be undertaken by a Court while interpreting such statutes:

*“33. The following excerpts from Tata Steel Ltd. (supra), being of formidable significance are also extracted as hereunder.*

*Xxx xxx xxx*

*“25. In Oxford University Press v. Commissioner of Income Tax [MANU/SC/0052/2001]:(2001) 3 SCC 359, Mohapatra, J. has opined that interpretation should serve the intent and purpose of the statutory provision. In that context, the learned Judge has referred to the authority in State of T.N. v. Kodaikanal Motor Union (P) Ltd. [MANU/SC/0127/1986] : (1986) 3 SCC 91 wherein this Court after referring to K.P. Varghese v. ITO [MANU/SC/0300/1981] : (1981) 4 SCC 173 and Luke v. IRC (1964) 54 ITR 692 has observed:*

*The courts must always seek to find out the intention of the legislature. Though the courts must find out the intention of the statute from the*

*language used, but language more often than not is an imperfect instrument of expression of human thought. As Lord Denning said it would be idle to expect every statutory provision to be drafted with divine prescience and perfect clarity. As Judge learned Hand said, we must not make a fortress out of dictionary but remember that statutes must have some purpose or object, whose imaginative discovery is judicial craftsmanship. We need not always cling to literalness and should seek to endeavour to avoid an unjust or absurd result. We should not make a mockery of legislation. To make sense out of an unhappily worded provision, where the purpose is apparent to the judicial eye 'some' violence to language is permissible.*

*"26. Sabharwal, J. (as His Lordship then was) has observed thus:*

*...It is well-recognised Rule of construction that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. It was held that construction suggested on behalf of the Revenue would lead to a wholly unreasonable result which could never have been intended by the legislature. It was said that the literalness in the interpretation of [Section 52\(2\)](#) must be eschewed and the court should try to arrive at an interpretation which avoids the absurdity and the mischief and makes the provision rational, sensible, unless of course, the hands of the court are tied and it cannot find any escape from the tyranny of literal interpretation. It is said that it is now well-settled Rule of construction that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the court may modify the language used by the legislature or even "do some violence" to it, so as to achieve the obvious intention of the legislature and produce a rational construction. In such a case the court may read into the statutory provision a condition which, though not expressed, is implicit in construing the basic assumption underlying the statutory provision....*

*34. As would be overwhelmingly pellucid from hereinabove, though words in a statute must, to start*

*with, be extended their ordinary meanings, but if the literal construction thereof results in anomaly or absurdity, the courts must seek to find out the underlying intention of the legislature and in the said pursuit, can within permissible limits strain the language so as to avoid such unintended mischief.”*

(iii) The principle of strict interpretation of a penal statute would support and supplement the aforesaid conclusion arrived at by us. In a recent Constitution Bench judgment in the case of [\*Abhiram Singh and Others v. C.D. Commachen \(Dead\)\*](#) by L.Rs. and Ors. 25, this Court scanned through the relevant case law on the subject and applied this principle even while construing “corrupt practice” in elections which is of a quasi criminal nature. We would like to reproduce following discussion from the said judgment :

“98. Election petitions alleging corrupt practices have a quasi-criminal character. Where a statutory provision implicates penal consequences or consequences of a quasi-criminal character, a strict construction of the words used by the legislature must be adopted. The Rule of strict interpretation in regard to penal statutes was enunciated in a judgment of a Constitution Bench of this Court in [\*Tolaram Relumal v. State of Bombay\*](#) [(1951) 1 SCR 158 = AIR 1954 SC 496] where it was held as follows:

“...It may be here observed that the provisions of [\*Section 18\(1\)\*](#) are penal in nature and it is a well settled Rule of construction of penal statutes that if two possible and reasonable constructions can be put upon a penal provision, the Court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the Court to stretch the meaning of an expression used by the Legislature in order to carry out the intention of the Legislature. As pointed out by Lord Macmillan in *London and North Eastern Railway Co. v. Berriman*, “where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language.

This principle has been consistently applied by this Court while construing the ambit of the expression ‘corrupt practices’. The Rule of strict interpretation has been

adopted in [Amolakchand Chhazed v. Bhagwandas](#); MANU/SC.0086/1976 : (1977) 3 SCC 566. A Bench of three Judges of this Court held thus:

*“12....Election petitions alleging corrupt practices are proceedings of a quasi-criminal nature and the onus is on the person who challenges the election to prove the allegations beyond reasonable doubt.”*

(iv) In such a situation even if two interpretations are possible, one that leans in favour of infringer has to be adopted, on the principle of strict interpretation that needs to be given to such statutes.

(v) 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’.

(vi) Even the doctrine of ‘proportionality’ would suggest that the Court should lean in favour of ‘relevant turnover’. No doubt the objective contained in the Act, viz., to discourage and stop anti-competitive practices has to be achieved and those who are perpetrators of such practices need to be indicted and suitably punished. It is for this reason that the Act contains penal provisions for penalising such offenders. At the same time, the penalty cannot be disproportionate and it should not lead to shocking results. That is the implication of the doctrine of proportionality which is based on equity and rationality. It is, in fact, a constitutionally protected right which can be traced to [Article 14](#) as well as [Article 21](#) of the Constitution. The doctrine of proportionality is aimed at bringing out ‘proportional result or proportionality stricto sensu’. It is a result oriented test as it examines the result of the law in fact the proportionality achieves balancing between two competing interests: harm caused to the society by the infringer which gives justification for penalising the infringer on the one hand and the right of the infringer in not suffering the punishment which may be disproportionate to the seriousness of the Act.

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 CCI's contention, if accepted, would bring about anomalous results. In the case of *M/s. Excel Crop Care Limited*, average of three years' turnover in respect of APT, in respect whereof anti-competitive agreement was entered into by the appellants, was only 32.41 crores. However, as against this, the 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 252.44 crores by the 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, i.e., turnover of the particular product which is to be taken into consideration and not total turnover of the violator.

(vii) The doctrine of 'purposive interpretation' may again lean in favour of 'relevant turnover' as the appropriate yardstick for imposition of penalties. It is for this reason the judgment of Competition Appeal Court of South Africa in the *Southern Pipeline Contractors Conrite Walls*<sup>19</sup>, as quoted above, becomes relevant in Indian context as well inasmuch as this Court has also repeatedly used same principle of interpretation. It needs to be repeated that there is a legislative link between the damage caused and the profits which accrue from the cartel activity. There has to be a relationship between the nature of offence and the benefit derived therefrom and once this correlation is kept in mind, while imposing the penalty, it is the affected turnover, i.e., 'relevant turnover' that becomes the yardstick for imposing such a penalty. In this hue, doctrine of 'purposive interpretation' as well as that of 'proportionality' overlaps.

In fact, some justifications have already appeared in this behalf while discussing the matter on the application of doctrine of proportionality. What needs to be repeated is only that the purpose and objective behind the Act is to discourage and stop anti-competitive practice. Penal provision contained in [Section 27](#) of the Act serves this purpose as it is aimed at achieving the objective of punishing the offender and acts as deterrent to others. Such a purpose can adequately be served by taking into

*consideration the relevant turnover. It is in the public interest as well as in the interest of national economy that industries thrive in this country leading to maximum production. Therefore, it cannot be said that purpose of the Act is to 'finish' those industries altogether by imposing those kinds of penalties which are beyond their means. It is also the purpose of the Act not to punish the violator even in respect of which there are no anti-competitive practices and the provisions of the Act are not attracted.*

*We may mention that Mr. Kaul, learned Additional Solicitor General had referred to the statutory regimes in various other countries in his endeavour to demonstrate that it is the concept of total turnover which was recognised in other jurisdictions as well. The attempt was to show that the principle of 'total turnover' was prevalent across the globe wherever such laws are enforced. On the contrary, the learned counsel for the appellants pointed out the provision contained in similar statutes of some countries where the concept of relevant turnover had been adopted. South Africa is one such example and, in fact, COMPAT has referred to the judgment of Southern African Competition Appeal Court in this behalf, i.e., Southern Pipeline Contractors Conrite Walls (Pty) Ltd. 19 case. In such a scenario, it may not be necessary to deal with the statutory provisions contained in different countries. In view of interpretation that is given by us to the provision at hand, we would, however, like to comment that in some of the jurisdictions cited by Mr. Kaul, learned Additional Solicitor General, the guidelines are also framed which ensure that the penalty does not become disproportionate, for example, in the UK, the Office of Fair Trade (OFT) has 'guidelines as to the appropriate amount of penalty'. In contrast, there are no similar guidelines issued as far as India is concerned and in the absence thereof imposition of penalty, taking into consideration total turnover, may bring about disastrous results which happened in the instant case itself with the imposition of penalty by the CCI.*

*Thus, we do not find any error in the approach of the order of the COMPAT interpreting [Section 27\(b\)](#)."*

16. He further submits that the learned CCI in imposing penalty has exercised its discretion indiscreet manner. He submits that it is true that as per provisions contained in Section 26(b) of the Act, the CCI was competent to impose penalty upto 10% of the average

of the turnover of the last three preceding financial years, the Learned CCI without giving detailed reason for taking higher 10% of the average turnover has committed serious error, particularly in view of the fact that most of the appellants were either proprietorship firm or a small company. He submits that discretion is also required to be exercised in accordance with law. He submits that according to him the discretion has incorrectly been exercised by CCI. On the point of exercising discretionary power jurisdiction, Mr. Mitra, learned counsel has placed reliance on para 85 to 89 of the Excel Crop Care Ltd case (supra). On aforesaid ground it has been argued that neither on merit impugned order is sustainable nor the penalty imposed can be considered as reasonable.

17. The Learned counsel for appellants in remaining appeals adopting the arguments of Mr. Mitra, learned counsel have also argued that even though the appellants had filed lesser penalty applications, same were not considered in accordance with law as well as provisions contained in Regulation 2009.

18. Besides making oral submission, learned counsel for the appellant in Competition Appeal (AT) No.49/2018 has also filed Notes of Written submission which is reproduced hereinbelow:

*“1. The Appellants herein have filed Appeal No. 49/2018, being aggrieved by the impugned order dated 1.5.2018 passed by the Ld. Commission in Case No. 50 of 2015, whereby the Ld. Commission has erred in its findings that the Appellant No. I along with other Appellants in connected appeals before this Hon'ble Tribunal, has indulged in bid-rigging, thereby violated Section 3 of the Competition Act, 2002 ["Act"]. The said findings have been given in the context of Tender Nos. 34, 35 and 44 ["Subject Tenders"] issued by the Pune Municipal Corporation for design, supply, installation, commissioning, operation and maintenance of organic and inorganic Solid Waste Processing Plants. The L.d. Commission has imposed penalties on the Appellants to the tune of Rs. 21.18.471/-. It is submitted that the Appellant No. I has deposited the sum of Rs. 10,00,000/- as directed by this Hon'ble Tribunal vide its Order dated 18.7.2018 as a condition for stay of the penalty imposed*

*2. Appeal No. 67/2018 before this Hon'ble Tribunal has been preferred by the Appellants herein aggrieved by the impugned order dated 31.5.2018 of the Ld. Commission in Case No. 4 of 2016 whereby the Ld. Commission again erred in its finding that the Appellants to have violated Section 3(3)(d) of the Act in respect of Tender No. 59 issued by the Pune Municipal Corporation for design, supply, installation, commissioning, operation and maintenance of organic and inorganic Solid Waste Processing Plants. The Ld. Commission has relied upon its Order dated 1.5.2018 to arrive at a conclusion of violation of Section 3(3)(d) of the Act on the part of the Appellants. The Ld. Commission has not imposed any penalty on the Appellants vide this order, in view of the fact that penalty had been already imposed in Case No. 50/2015 which pertained to the same period. The Appellants herein are aggrieved by the finding of violation of Section 3(3)(d) of the Act, arrived at by the Ld. Commission.*

**THE SUBMISSIONS OF THE APPELLANTS IN SUPPORT OF APPEAL NO. 49/2018 ARE AS FOLLOWS:**

1. The Appellant No. 1 is a private limited company registered under MSME Act dedicated to "Swachh Bharat Abhiyan Mission" engaged in the business of solar water heating, lighting and water purifying solutions and equipment for residential and commercial applications. It also specialises in zero waste management, in which wet and dry garbage is treated which results in zero dumping.

2. The Appellants are highly reputed in their business circle due to their commitments and ethical practices towards Swachh Bharat Abhiyan Mission and have no antecedents of any violation in its business.

3. It is submitted that the Ld. Commission has failed to appreciate that the actions of the Appellant No. 1 have had no appreciable adverse effect" ["AAE"] on competition in India, so as to amount to contravention of Section 3 of the Act. It is submitted that the presumption as to AAE in the case of Section 3(3)(d) is a rebuttable presumption, as can be seen from Section 19(3) of the Act. It is submitted that the Ld. Commission has erred in concluding at paragraph 86 at pg. 172 in the impugned order that the Appellants have failed to rebut the presumption. While arriving at the said erroneous finding, the Ld. Commission has not considered that as a matter of fact, from 2013 to 2015, there were insufficient participants in similar tenders of the PMC, due to which the dates had to be extended. It also finds mention in the Appellant No. 1's LPR Application at pg. 384 @ 395-6, Vol. II. However, no comment whatsoever has been made by the Ld. Commission on this.

4. It is submitted that the Ld. Commission has not considered that the evidence placed by the Appellants on the anvil of the factors for consideration of the question of AAE, as set out in Section 19(3) of the Act. It is submitted that the Ld. Commission has based its order on an incorrect interpretation of the Act, while concluding that the Appellants have violated Section 3(3)(d) of the Act. It is submitted that the Act prohibits agreements referred to in Section 3(1), one category of which agreements is provided in Section 3(3). Furthermore, the conclusion as to violation of Section 3(1) must be based on a factual finding as to AAE on competition in India having occurred. Section 3(3) states a presumption of law that certain categories of agreements shall be presumed to have AAE on competition in India. Section 19(3), which refers to the entirety of Section 3. provides for the factors to be considered while

carrying out an inquiry into the question of AAE. Section W3 equally applies to Section 3(3). Therefore, while inquiring agreements of the categories referred to in Section 3(3), the factors set out in Section 19(3) are relevant, and must be considered.

5. The Ld. Commission, in paragraph 84 at pg. 171 has relied upon Section 3(3)(d) to conclude that in case of the said section, there is a presumption as to AAE. In the subsequent paragraphs thereafter, the Ld. Commission then proceeded to (erroneously, as demonstrated in para 3 above) conclude that the Appellants have failed to discharge the onus to rebut the presumption. It is submitted that the Ld. Commission has not even discussed the factors relevant under Section 19(3). The interpretation therefore placed by the Ld. Commission would amount to rendering Section 19(3) otiose.

6. The decision (pg. 180) to award maximum penalty to Appellant No. 1 is devoid of any reason or discussion as to mitigating factors etc. [Ref:

*Excel Crop Care Limited v. CCI & Ors.* 2017(8)SCC 47 @ para 113

*Judgment of CompAT dated 25.2.2013 in MDD Medical Systems India Pvt. Ltd. v. Foundation for Common Cause and People Awareness & Ors.* @paras 19-21, 24-28].

7. The several mitigating factors which have not been considered by the Commission are:

i) That the Appellant No. 1 had no antecedents of violation of the Act, nor had the Appellant No. 1 derived any commercial benefit from the actions:

ii. That the Appellant No. 1 has co-operated and in fact provided vital disclosures to enable the investigation, at the first instance itself;

iii. That even as recorded by the Commission, the Appellant No. 1 was the one to disclose the modus operandi of the cartel (para 116@pg. 186);

iv) That as a matter of fact, from 2013 to 2015, there were insufficient participants in similar tenders of the PMC, due to which the dates had to be extended.

However, no comment whatsoever has been made by the Ld. Commission on the above. It is submitted that this aspect,

*which has been ignored by the Commission, also has a bearing on the question of 'appreciable adverse effect'*

*8. The Ld. Commission failed to take note that the Appellants had another business with Mr. Bipin Vijay Salunke i.e. the Appellants were acting as a dealer for Mr. Bipin Vijay Salunke's company named Ecoman Enviro Solutions Private Limited, a leading company in a field of decentralized solid waste management having an advanced technology in composting. Accordingly, Mr. Bipin Vijay Salunke had access to all the details of the Appellants which have been misused by him.*

*9. The investigation by DG revealed / found that the phone number specified in the tender documents belonged to Mr. Bipin Vijay Salunke. Even the DDs were prepared by Mr. Bipin Vijay Salunke himself from the bank accounts of his parents. It was further observed that the IP address used for uploading the documents for tenders were registered in the name of Mr. Bipin Vijay Salunke only.*

*10. The Ld. Commission failed to consider the position of the Appellants who did not have any idea or control over the activities of Mr. Bipin Vijay Salunke. Even the Ld. Commission failed to consider the various disclosures made during DG's Investigation by the Appellants. Further, there is no evidence to show that there was any agreement between the Appellants and others and any consideration has been accepted by the Appellants*

*11. A proxy bid for Appellant No. 1 was submitted by Mr. Bipin Vijay Salunke only for Tender Nos. 34, 35 and 44 ("Subject Tenders"),*

*12. The LPR Application of the Appellant No. 1 was the first LPR Application in respect of the Subject Tenders. The finding at para 100 @pg. 184 regarding the participants in the respective tenders and the order of LPR Applications is perverse.*

*13. The ingredients of Regulation 4 of the LP Regulations, which governs grant of lesser penalty are:*

*i)The Applicant is the 1" to make a vital disclosure;*

*ii. By submitting evidence of a cartel:*

*iii which enables the Commission to form a prima facie opinion regarding existence of a cartel:*

*iv. and the Commission was not possessed of sufficient evidence to form such an opinion.*

*The parameters for exercise of discretion of the Commission are set out in*

*Regulation 3(4) and are as follows:*

- a. the stage at which applicant comes forward;*
- b. the evidence already in possession of Commission;*
- c. the quality of information provided;*
- d. entire facts & circumstances:*

*14. It is submitted that the burden to be discharged by an Applicant under the LPR Regulations is to show the existence (as opposed to conclusive proof) of the cartel so as to form a prima facie view. It is submitted that the information set out by the Appellant No. 1 in its LPR application (reproduced in paragraph 7 above) was sufficient to show the existence of the cartel.*

*15. Appellant No. 1 was the 1st in respect of the Subject Tenders to disclose all the bids were submitted by Mr. Bipin Salunkhe himself. This formation was the vital disclosure so as to form a prima facie opinion as to cartelisation. As a matter of fact, it can be seen from the DG Investigation report (pg. 415, Vol. II @ pg. 442, 448 & 455) that the fact that the bids were submitted from a common IP address for the Subject Tenders was discovered by the DG vide PMC's letters dated 25.8.2016 & 14.9.2016 ie. much later than the LPR Application by the Appellant No. 1.*

*16. The Ld. Commission has observed at para 115 at pg. 185/186, Vol. 1 that by the time the Appellant No. 1 herein approached Ld. Commission with its LPR Application, the Commission already had some evidence which showed involvement of OP-4 in the cartel. viz:*

*i) Consecutive or very closely numbered DDS submitted by OP-4 and other bidders towards EMD;*

*(ii) Preparation of DDS by OP-4 by debiting the account of Shri. Bipin Vijay Salunke;*

*(iii) Call Data Records of Appellant No. 2 and Bipin Vijay Salunke and Shri Parimal Salunke showing exchange of several calls between them and use of common IP address for uploading of tender documents.*

*In this regard, it is submitted that the above details were not sufficient to reach any prima facie conclusion as to cartelization, especially in view of the specific statement of the Appellant No. 2 before the DG that the Appellant No. 2 and Bipin Salunkhe were involved in other businesses together [See pg. 411, Vol. II]. So,*

*the vital information towards the modus operandi were provided by the Appellant No. 1 only.*

*17. The Commission has observed in paragraph 117 of the impugned order that:*

*"117. The Commission is satisfied with the cooperation extended by OP-4 and observes that it furnished evidence, viz. copy of email exchange whereby the role of other persons, such as Shri Ashwin Jagtap and Ms. Nishida documents were transferred to Shri Bipin Vijay Salunkhe and disclosed dhon, However, evidence of IP addresses and preparation of DD for EMD for Tender No. 34. 35 and 44 of 2014 were not disclosed by OP-4. These may not have been available with OP-4 as his role was limited to Providing the documents."*

*It is submitted that as a matter of fhet, the evidence of IP addresses was obtained much later, as can be seen from the DG Report (pg. 415 @pg. 442. 448. Vol.II). It is submitted that prior to the receipt of the said information, the Appellant No. had provided sufficient material for the Commission to arrive at a prima facie view of cartelization. The findings of the Commission in paragraph 118 of the impugned order are also relevant in this regard.*

*18. Notwithstanding all of the above findings, the Commission has granted only 50% reduction in penalty to the Appellant No. 1. It is submitted that the Appellant had provided the most vital piece of disclosure (ie. the modus operandi) for arriving at a prima facie view of cartelization. In this view of the fact. 100% reduction in penalty ought to have been granted to Appellant No, I by the Ld. Commission.*

*19. It is submitted that the consideration for 100% reduction is that the disclosure must enable formation of a prima facie opinion. It is submitted that even without the details of the IP addresses, the information submitted vide the Appellant No. I's LPR Application was sufficient for formation of prima facie opinion. The details of IP address etc, are merely corroborative.*

*20. The legal submissions in respect of the interpretation of Section 3(3), 27(b) and the Lesser Penalty Regulations of the Appellants in Appeal Nos. 43-47/ 2018 are sought to be adopted and reiterated in support of the present appeal.*

***The submissions of the Appellants in paragraphs 3, 4 and 5 hereinabove, are reiterated in support of Appeal No. 67/2018 filed by the Appellants herein.***

*In view of the above submissions, it is most respectfully prayed that this Hon'ble Tribunal may be pleased to allow Appeal No. 49/2018 and Appeal No. 67/2018 thereby setting aside the Orders impugned therein.*

*And if the above Appeals are not allowed, the Appellants who are registered under MSME Act, considered to be backbone of the Indian economy, committed towards "Swachh Bharat Abhiyan Mission" will have to face irreparable loss and damage of their image and reputation in their business circle and society at large.*

19. In all the appeals, Mr. Manish Vashist, learned senior counsel has appeared on behalf of the Respondent/CCI. However, other respondents who were proforma respondents have preferred not to appear and participate in the argument. Mr Vashist, learned senior counsel for the CCI emphasised that in view of the fact that all the appellants had filed leniency application under Section 46 of the Act read with Rule 5 of the Regulation 2009 it will be deemed that all the appellants had admitted their guilt and as such they were not entitled to raise issue on the merit of the case. Besides bar of raising dispute on merit in view of leniency application they were not entitled to argue on merit in view of order dated 16.7.2018 passed by this Appellate Tribunal at the time of admission of the appeal. Learned counsel for the appellant himself has fairly admitted that after accepting guilt the appeal survives only on the point of penalty. Learned senior counsel for the CCI submits that

imposition of penalty is within the discretion of the CCI. He submits that if an authority is given discretionary jurisdiction and exercising the same if any decision is taken, such discretion is not open for any criticism. According to him such discretion which has been authorised by a Statute may not be questioned subsequently. In support of his submission he has placed reliance on a Judgement of Hon'ble Supreme Court reported in (1997) 2 SCC 567, Harbans Kaur (Smt) Vs CWT Jullundur, and he has referred to para 5 to 8, 10 and 11 which are quoted hereinbelow:

*"5.If the conditions stipulated in the section are satisfied Commissioner has a discretion in the matter. In exercise of that discretion, Commissioner can either reduce the amount of the penalty or he may even waive the entire penalty. It is for the Commissioner to decide on the facts of a particular case whether a waiver in entirety or a reduction alone is warranted.*

*6.The words "the Commissioner may in his discretion.....reduce or waive the amount of penalty" in [Section 18-8](#) of the Act are clear enough to show that the power conferred on the Commissioner is to be exercised by him in such manner as he deems just and proper. When a discretion is conferred on an authority the same must be exercised fairly and not arbitrarily, justly and not fancifully vide [S.G. Jaisinghani vs. U.O.I. & others](#): AIR 1967 SC 1427.*

*7.Even if the legislature has not used the words "in his discretion" in Section 18(B)(1) Commissioner could have exercised only a discretionary power in view of the employment of the word "may". Now when the Parliament used both expressions "may" and "in his discretion" together, the position is placed beyond the pale of any doubt that legislature wanted an officer of the rank of the Commissioner to be reposed with the discretionary power to choose between entire waiver or reduction in any proportion.*

8. Of course when the Commissioner, instead of giving a complete waiver, chooses to give only a reduction for the penalty amount he must indicate in his order that he has applied his mind in that regard. In this view, there is no warrant for the proposition that the Commissioner, if satisfied of the compliance of conditions, has only one choice i.e. to waive the penalty in entirety. Otherwise, it may mean that Commissioner can in a case where conditions are not satisfied, reduce the penalty amount. When conditions are not satisfied, Commissioner cannot do either. Only when the said conditions are satisfied that the occasion arises for the Commissioner to exercise his discretion - not before.

10. [Section 18-8](#) is analogous to [section 273-A](#) of the Income Tax Act, 1961 where under also a similar discretion has been conferred on the Commissioner of Income Tax for either reducing the penalty or granting waiver of the entire penalty. It is understood in clear terms that the said discretion in [Income Tax Act](#) is to be exercised in a reasonable and fair manner. The decision of the Bombay High Court [[Purshottam Thackersey vs. K.N. Anantrama Ayyar](#) (1985) 154 ITR 438] cited before us only shows that the order of the Commissioner declining to waive the penalty without advancing any reason whatsoever cannot be supported and the matter was remitted to the Commissioner for passing an order afresh.

11. In the cases on hand, the Commissioner has indicated his own reasons for resorting to the power of reduction of the penalty in preference to granting full waiver of the penalty. We cannot say that the reasons indicated in the orders are in any manner unjust or irrelevant. We, therefore, find no ground to interfere with the impugned order and the judgments of the High Court. The appeals are dismissed.”

20. Further it was submitted by Mr. Vashist, learned senior counsel for the CCI that the order impugned is based on evidences and also admission of the appellants. Accordingly they may not be permitted to resile from their own admission. To substantiate his submission on the point of admissibility he has placed reliance on a judgement of Hon’ble Supreme Court reported in AIR 1960 SC 100, Narayan Bhagwantrao Gosavi Balajiwale Vs Gopal Vinayak

Gosavi & Others and referred to para 12 which is quoted hereinbelow:

*“12. In the present case, the burden of proof need not detain us for another reason. It has been proved that the appellant and his predecessors in the title which he claims, had admitted on numerous occasions that the public had a right to worship the deity, and that the properties were held as Devasthan inams. To the same effect are the records of the revenue authorities, where these grants have been described as Devasthan, except in a few cases, to which reference will be made subsequently. In view of all these admissions and the revenue records, it was necessary for the appellant to prove that the admissions were erroneous, and did not bind him. **An admission is the best evidence that an opposing party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous.** We shall now examine these admissions in brief and the extent to which they went and the number of times they were repeated.”*

21. Besides making prayer for dismissal of the appeal on both the count i.e. on merit as well as on penalty, he further argued that it was a clear cut case of connivance in between the officials of Municipal Corporation, Pune as well as the appellants. He submits that during investigation the DG had noticed that one of the senior

officer of the Municipal Corporation was in regular touch with one of the main player in the present case regarding which phone details were also collected. Those circumstances suggest that there was a conspiracy for illegal gain to the main player which was loss to public exchequer. Accordingly he submitted that besides dismissing the aforesaid appeals it is also required to issue some direction to conduct an enquiry regarding commission of criminal offence, if any by the parties.

22. Besides making oral submissions on behalf of CCI a summary Note of Notes of Written Submissions has been filed which is reproduced hereinbelow:

*"1. In terms of the order dated 16" July 2018, limited notice was issued with regard to the quantum of penalty imposed by the R-1/CCI only.*

*2. The aforesaid Appeals have been preferred by the Appellants with regard to the final order dated 01 May 2018 passed by the R-1/CCI in Case No. 50/2015 titled Nagrik Chetna Manchya Fortified Security Solutions & Others. [Impugned Order]*

*3. Briefly stated, on the basis of an Information filed by Nagrik Chetna Manch [Respondent No. 2 herein] against Fortified Security Solutions [Respondent No. 3 herein]. Ecoman Enviro Solutions Pvt Ltd [Respondent No. 4 herein] and Pune Municipal Corporation (PMC) [Respondent No. 5 herein]*

*4. After perusing the Information, the CCI was of prima facie view that the case involved bid rigging and/ or collusive bidding in violation of Section 3(3) read with Section 3(1) of the Competition Act, 2002 Therefore, the CCI vide its order dated 29 September 2015 passed under Section 26(1) of the Competition Act, 2002, directed the Director General ("DG") to investigate the matter. Copy of the order dated 29 September*

2015 is already annexed as Annexure A-4 [Page 263 to 273] of the Appeal No. 43/2018 [Volume 2] Subsequently, on the request received from the DG, four entities i.e. Lahs Green India Pvt Ltd [Respondent No. 6 herein] Sanjay Agencies [Respondent No. 7 herein]. Mahalaxmi Steels (Appellant herein] and Raghunath Industry Pvt Ltd [Respondent No. 8 herein] were also included as Opposite Parties in the matter vide order dated 28th June 2016.

5. The DG, after completing the investigation submitted the Investigation Report to the CCI on 23rd November 2016. Copy of the DG Report is already annexed as Annexure A 13 [Page 336 to 476] of the Appeal No. 43/2018 [Volume 3] During investigation, in August September 2016, Lesser Penalty Applications were filed by the Parties under Section 46 of the Competition Act, 2002. For details of the Lesser Penalty Applications filed by the Parties, kindly see, Para 5 to 8 of the Impugned Order, for summary of DG's Investigation, kindly see, Para 17 to 37 of the Impugned Oder, annexed as Annexure A-1 of the Appeal No. 43/2018 [Volume 11].

6. In the present case, the CCI has considered the submissions of the parties [Kindly see, Para 38 to 66 of the Impugned Order], and made detailed analysis (Kindly see Para 67 to 93 of the Impugned Order] After detailed analysis, the CCI proceeded with "Computation of Penalty [Para 94 to 99 of the Impugned Order], "Evaluation of Lesser Penalty Applications [Para 100 to 134 of the Impugned Order], and finally "Remedies including imposition of fines [Para 135 to 140 of the Impugned Order] In fact, a bare perusal of the Para 97 onwards of the Impugned Order would show that the CCI has made detailed analysis as to the penalty which could have been imposed, evaluation of lesser penalty applications filed by the parties, and reduction in penalties ranging from "NIL" to "50%"] considering the respective lesser penalty applications filed by the parties.

7. While considering the lesser penalty applications, one of the crucial/ determinative factor adopted by the competition authorities is the timing of the leniency application. Whether it was filed at the threshold which could enable the CCI to pass an order for investigation after having prima facie view? Or such leniency application has been filed during the course of investigation when the DG already have found material evidence and information/evidence provided by leniency applicant improves the investigation further? These rationale/ justifications are quite evident from the language of Section 46 of the Competition Act, 2002 read with CCI (Lesser Penalty) Regulations, 2009 which provides for different sets of

*reductions for the first, second, third/ subsequent lesser penalty applications.*

*8. In the instant case, it is to be noted that the tenders were floated by the PMC during the period December 2014 to March 2015. The Information was filed before the CCI on 11th June 2015, that after 3 months from the date of last tender. The CCI found prima facie case and ordered for investigation on 29th September 2016. It was only almost a year from the date of order of investigation when the DG investigation was about to be concluded (DG Report is dated 23 November 2022) that the concerned Opposite Party(ies) moved their respective Lesser Penalty Applications in August-September 2016, hence, it is quite clear that the applicants moved their respective applications quite later/ belatedly, hence, they cannot claim more waiver in their respective penalties imposed by the CCI. Accordingly, the penalty imposed by the CCI cannot be said to be excessive, perverse, illegal or disproportionate. Accordingly, the Appeals filed by the Appellants are liable to be dismissed with heavy costs.*

*9. Even otherwise, alternatively, if the penalty is found to be excessive, this Hon'ble Tribunal, have all the powers of the trial court to reverse, modify, enhance, reduce the penalty, while exercising its appellate jurisdiction under Section 53-A and 53-B of the Competition Act, 2002.*

*10. It will not be out of place to mention here that in the aforesaid 5 tenders in question, public money worth several crores were involved [See Para 19 of the Impugned Order] and as the DG investigations reveals the Opposite Parties were successful in sabotaging/ defrauding the state exchequer fraudulently by having/ putting proxy bidders in all the aforesaid tenders. Hence, apart from the contravention under the provisions of the Competition Act, 2002, it also attracts various provisions of the Indian Penal Code and Prevention of Corruption Act for which the requisite cognizance may be taken.”*

23. Besides hearing learned counsel for the parties we have minutely perused the entire materials available on record which include information application filed by the informant, leniency application, Investigation Report submitted by the DG and also

the impugned order passed by the CCI. On examination of entire material we are of the opinion that sufficient evidence were brought on record to show forming cartelisation by the appellants in influencing tender. It was specific case of contravention of Section 3(3)(d) of the Act read with Section 3(1) of the Act. Besides evidence by way of filing leniency application all the appellants have already accepted their guilt. Most of the appellants on the strength of their leniency application have also got reduction in the penalty which is reflected from the relevant portion of the impugned order which we have quoted in the present order. We are of the opinion that disclosure made in leniency application admitting involvement amounts to confession. If confessional statement is also corroborated even by some sort of evidence one is precluded to assail an order imposing penalty/punishment on such confession. Moreover, in the present case at the time of admission itself it was admitted by the appellants that the appeal may be heard on the point of penalty only. So far as point which has been raised from the appellant side regarding calculation of turnover in view of Excel Crop Care Ltd judgement (supra) on going through the impugned order it is evident that CCI has also examined and considered the

Excel Crop Care judgement which has been discussed in para 94, 95, 96 of the impugned order which are quoted hereinbelow:

*“94. As regards the penalty to be imposed under Section 27 of the Act, the Commission finds that OP-1, OP-2, OP-4, OP-5, OP-6 and OP-7 entered into an arrangement to rig the bids pertaining to Tender nos. 34, 35, 44, 62 and 63 of 2014 floated by PMC for ‘Design, Supply, Installation, Commissioning, Operation and Maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant(s)’, as brought out hereinabove, and are, hence, responsible for infringement of the provisions of Section 3(3)(d) read with Section 3(1) of the Act and are liable for penalty. However, the Commission notes that in the instant case some OPs, namely, OP-5 and OP-6 have contended that they are not engaged in any manufacture, trade or service pertaining to solid waste management, which were subject matter of the said tenders. Therefore, keeping in view the decision of Hon’ble Supreme Court in Excel Crop Care (supra) where “turnover” appearing in Section 27 of the Act has been interpreted to mean “relevant turnover”, no penalty should be imposed on them as they do not have any “relevant turnover” or “relevant profit”.*

*95. In this regard, the Commission observes that facts before the Hon’ble Supreme Court in that case were altogether different from the facts of this case. The Hon’ble Supreme Court invoked the principle of ‘proportionality’ and doctrine of ‘purposive interpretation’ in Excel Corp Care case to interpret the term ‘turnover’ in Section 27 of the Act as ‘relevant turnover’ to ensure that infringer does not suffer punishment which may be disproportionate to the seriousness of the infringement. This cannot be interpreted to mean that the infringer should not be punished at all. In fact, Hon’ble Supreme Court has stated that the perpetrators of anti-competitive practices need to be indicted and suitably punished and the aim of penal provision is to ensure that it acts as deterrent for others. The relevant portion of the judgement of Hon’ble Supreme Court is reproduced below:*

*“74) ...(vi).... No doubt the objective contained in the Act, viz., to discourage and stop anti-*

*competitive practices has to be achieved and those who are perpetrators of such practices need to be indicted and suitably punished. It is for this reason that the Act contains penal provisions for penalising such offenders. At the same time, the penalty cannot be disproportionate and it should not lead to shocking results...*

*The doctrine of proportionality is aimed at bringing out 'proportional result or proportionality stricto sensu'. It is a result oriented test as it examines the result of the law. In fact the proportionality achieves balancing between two competing interests: harm caused to the society by the infringer which gives justification for penalising the infringer on the one hand and the right of the infringer in not suffering the punishment which may be disproportionate to the seriousness of the Act.*

*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....."*

*96. In view of the foregoing, Commission is of the view that in the peculiar facts of this case where OPs have admittedly submitted cover bids but are not engaged in the solid waste management i.e. the activity relating to which bid-rigging has taken place, interpretation of 'turnover' in Excel Crop Care case would not be applicable. This is because imposition of penalty on the basis of relevant turnover in this case would imply that no penalty would be leviable on several Ops who have indulged in bid rigging in contravention of the provisions of the Act. This would result in an anomalous situations and would render the objective of the Act infructuous. Evidently, this cannot be and was not the purpose or intent of the judgement of the Hon'ble Supreme Court."*

24. Besides this in view of the peculiar facts and circumstances of the present case which we have noticed hereinabove we are of

opinion that the appellants may not get any benefit on the basis of Excel Crop Care Case. The Hon'ble Supreme Court in Excel Crop Care case in para 74 which has been quoted hereinabove has clarified the issue.

25. Now coming to the discretionary jurisdiction of the CCI in considering the turnover on the higher level i.e. 10% which is maximum percentage prescribed under Section 27(b) of the Act is concerned we are of the opinion that though CCI is empowered to take turnover upto 10% but while taking up such percentage i.e. maximum as prescribed in the Act it was required for the CCI to elaborately assign reason for coming to the conclusion for maximum penalty. It may not be held that CCI in no case can impose higher penalty upto 10% but in such situation it would be required for the CCI to afford full opportunity to the concerned party to address the CCI as to why such higher penalty may not be imposed. On going through the impugned order we find no indication as to whether the appellants were asked to explain regarding exemplary penalty i.e. maximum 10% or detailed reasons has been assigned for the same. It is true that in respect of imposing penalty discretion has been given to the CCI, but at the same time it is settled that discretion may not be exercised

indiscreet manner. We are of the opinion that though discretionary jurisdiction may not be interfered with but in view of facts and circumstances particularly the fact that discretion by the CCI in the present case has not been exercised in a reasonable manner it would be a fit case for remanding back the matter to CCI to examine the issue to afford opportunity to the appellants to address on the point as to whether instead of exemplary penalty i.e. upper limit of 10%, the appellants are entitled to get the said percentage reduced or not. Without interfering with the merit of the case the appeals are remitted back to the CCI to reconsider the penalty in view of observations given hereinabove and pass appropriate order in accordance with law after giving full opportunity to the appellants on the point of penalty.

26. Since Competition Appeal (AT) No.68/2018 which arises out of the proceeding initiated in Case No.50/2015 and only year of tender was different other reasons are the same as such the said appeal is also required to be remitted back on the same terms as indicated above.

27. Before parting with this order we are of the opinion that if some fact disclosing commission of conspiracy and by the act of such conspiracy state exchequer is suffered and such fact is

brought to the notice of this Tribunal, this Tribunal may not shut its eyes. We are conscious of the fact that in an appeal filed under the Competition Act we may not travel beyond the impugned order and we may discharge our function in terms of the provisions contained in the NCLAT Rules, but after noticing a fact disclosing something which may on enquiry establishes commission of cognisable offence, instead of shutting eyes it is required to direct for conducting enquiry. In the present case it has been noticed that in the information petition which was filed by the informant it is evident that the informant had alleged that conspiracy and collusion by Accused No.1 and 2 alongwith technically ineligible company (nevertheless qualified) on the one hand and personnel of PMC Accused No.3 on the other hand as a result and by giving effect to this fraud Accused No.2 became L1 in 5 tenders in 2014 bagging contracts for worth of Rs.14,82,94,580/- while the internal estimate was Rs.11.45 crores i.e. 30% lower. Even during investigation DG had examined the role of PMC in its report. The relevant portion at running page 437 para 8.27 is reproduced hereinbelow:-

**8.27 Involvement of officials of Pune Municipal Corporation (OP 3)**

*“8.27 As discussed earlier, no evidence of collusion of OP-3 was furnished by the Informant. Further, the investigation perused the documents submitted by third parties, the statements on oath of key persons in the bidding entities and the statement of Shri Bipin Vijay Salunke and no direct evidence of involvement of officials of OP-3 was noted. Certain issues of systemic failures have also been pointed out earlier in the report. Taking appropriate measures regarding these issues could have prohibited such cartel activity.*

*The call details records of Shri Sanjay Atmaram Gawade (Assistant Municipal Commission), Shri Ravindra Krishnanath Mulay (Branch Engineer) and Shri Suresh Jagtap (Jointer Municipal Commissioner) were examined and it was noted that there were a number of calls which have been exchanged on mobile No. 7720999222 and 7720999333 registered in the name of M/s Ecoman Enviro Solutions Pvt Ltd (OP2) and are being used by Shri Parimal Salunke (770999222) and Shri Bipin Vijay Salunke (7720999333).*

*However, Shri Sanjay Atmaram Gawade (Assistant Municipal Commissioner) and Shri Ravindra Krishnanath Mulay (Branch Engineer) in their statement on oath have stated that these calls were for the purpose of compliance to be given in court/NGT/questions related to Assembly of Maharashtra and/or implementation of work/work-orders/operations of the machinery*

*and other work-related talks for previous tenders, respectively. Also Shri Suresh Jagtap (Joint Municipal Commissioner) in his statement on affidavit has stated that the calls were made/received to/from Shri Parimal Salunke and Shri Bipin Vijay Salunke in relation to work order issued in tender No.21 and 28 of 2013. He further stated that this communication was in connection with supervision and feedback of work from time to time. As such, it cannot be conclusively stated that the communication between them, was for the purpose of cartel or bid-rigging. The Pune Municipal Corporation (OP\_3) needs to examine the veracity of the statements of their officials and whether they had a locus standi as stated by them to engage in telephonic conversation with the main persons engaged in cartel.”*

28. Such facts are obviously sufficient to draw an inference that something has gone wrong which need enquiry. Accordingly we are of the opinion that while remitting back the aforesaid appeals to CCI to reconsider the penalty a direction can be issued to the Director General of Police Maharashtra/Director General, Anti-Corruption, Maharashtra to conduct an enquiry in respect of role played by the Pune Municipal Corporation in relation to Tender No.34, 35, 44, 62 and 63 of 2014. It goes without saying that if during enquiry any cognisable offence comes to fore in that event

it would be necessary to register FIR for its statutory investigation to its logical end.

29. Let a copy of this order be sent to Director General of Police, Maharashtra/Director General, Anti Corruption, Maharashtra.

**(Justice Rakesh Kumar)**  
**Member (Judicial)**

**(Dr. Ashok Kumar Mishra)**  
**Member (Technical)**

**bm**