NATIONAL COMPANY LAW APPELLATE TRIBUNAL,

Principal Bench, New Delhi

Competition App. (AT) No. 21 of 2022

IN THE MATTER OF:

Hith Impex Pvt. Ltd. **...Appellant**

Vs.

CCI & Ors. **....Respondents**

Present:

For Appellants	**:**	**Ms. Shagufa Salim, Advocate**
For Respondent	**:**	**Mr. Robin Ratnakar David, Mr. Febin M. Varghese, Advocates for CCI**
		Mr. Davander Prasad, Dy. Director-CCI
		Mr. G.R. Bhatia, Mr. Manav Gupta, Mr. Arjun Nihal Singh, Advocates for R-5.

With

Competition App. (AT) No. 65 of 2022

IN THE MATTER OF:

Manish Jodhavat **...Appellant**

Vs.

CCI & Ors. **....Respondents**

Present:

For Appellants	**:**	**Ms. Shagufa Salim, Advocate**
For Respondent	**:**	**Mr. Robin Ratnakar David, Mr. Febin M. Varghese, Advocates for CCI**
		Mr. Davander Prasad, Dy. Director-CCI
		Mr. G.R. Bhatia, Mr. Manav Gupta, Mr. Arjun Nihal Singh, Advocates for R-5.

O R D E R

Per: Justice Rakesh Kumar Jain (Oral)

23.05.2023: This appeal is directed against the order dated 03.02.2022 passed by the 'Competition Commission of India' (hereinafter referred as to 'The

Commission') in the matter 'Suo Motu Case No. 02 of 2020' in Re: Alleged anti-competitive conduct by various bidders in supply and installation of signages at specified locations of State Bank of India across India.

2. At present two appeals are being disposed of together i.e. Competition Appeal (AT) No. 21 of 2022 titled as Hith Impex Pvt. Ltd. Vs. Competition Commission of India & Ors and Competition Appeal (AT) No. 65 of 2022 titled as Manish Jodhavat Vs. Competition Commission of India & Ors as both the appeals have been filed against the same impugned order, one is filed by the Company and other is filed by the Director of the said Company.

3. In brief, the Commission Suo Motu took up a matter under Section 19(1) of 'the Competition Act, 2002' (hereinafter referred as to 'The Act') in response to a compliant dated 28.06.2018 in regard to bid-rigging and cartelisation in the tender floated by SBI Infra Management Solutions Pvt. Ltd. (SBIIMS) for the supply and installation of new signages/replacement of existing signages for branches/offices/ATMs of SBI located at specified metro centres of various circles of SBI across India (impugned tender).

4. Shorn of unnecessary details, the Suo Motu proceedings were initiated against as many as seven Respondents in which Hith Impex Pvt.Ltd. (Appellant in Competition App.(AT) No. 21 of 2022) was arrayed as Op No.7. The complaint was investigated by the DG and the role of all Ops was discussed separately by the Commission. Since we are concerned with the role of Op No. 7, therefore, the discussion in regard to the role of Op No.7 by the Commission in the impugned order is relevant to refer to in this order and is thus reproduced as under:

"Role of OP-7

77. As already demonstrated above, in his e-mails of 02.06.2018 and 04.06.2018, Mr. Naresh Kumar Dasari of OP-6 had stated that he was basing his pricing logic on 'inputs' from 'MJ'. In his deposition on oath, Mr. Naresh Kumar Dasari has clarified that 'MJ' refers to Mr. Manish Jodhavat of OP-7, which is a flex & vinyl dealer of OP4. The OPs have also stated in their depositions that 'MJ' referred to in Mr. Naresh Kumar Dasari's e-mail is Mr. Manish Jodhavat of OP-7, which company is a flex & vinyl material dealer.

78. OP-7, in its submissions, has, inter alia, asserted that the findings in the Investigation Report are based on hearsay evidence and there is no documentary evidence which shows the involvement of OP-7 in the subject-matter of the investigation. It has also submitted that the e-mail dated 04.06.2018 is not marked to OP-7 or Mr. Manish Jodhavat.

79. In this regard, it is noted that Mr. Naresh Kumar Dasari of OP-6 has categorially emphasized the role of Mr. Manish Jodhavat of OP-7 in providing inputs for arriving at rigged pricing. Though Mr. Jodhavat is not a recipient of the e-mails dated 02.06.2018 and 04.06.2018, his name appears in both the e-mails. Mr. Dasari has written in his email dated

02.06.2018 that the pricing logic might change based upon inputs from Mr. Manish Jodhavat.

80. The role of Mr. Manish Jodhavat is also gauged from the e-mail dated 04.06.2018, reproduced supra, wherein, based on the inputs (amongst other things) received from Mr. Jodhavat, Mr. Dasari revised the workings and the process sequence. Mr. Dasari, in his deposition, has also stated that OP-4 offered a certain discount on its product, which was communicated by Mr. Manish Jodhavat to Mr. R. G. Venkatesh of OP-1 who, in turn, communicated the same to Mr. Dasari. This indicates the importance of 'inputs' provided by Mr. Manish Jodhavat in deciding the final bid sequences and bid figures. The said inputs also made Mr. Naresh Kumar Dasari re-categorize the circles and decide upon a revised 'cut-off price' for the four categories.

81. Further, as per the deposition of Mr. Naresh Kumar Dasari, as reproduced supra, it was Mr. Manish Jodhavat who called Mr. Dasari and sought help in explaining the reverse auction process to the bidders. Mr. Jodhavat also told Mr. Dasari that Mr. Shamrendra Kumar of OP-4 came up with this idea. Mr. Dasari further stated that Mr. Manish Jodhavat also told him to include a certain quantity of OP-4's material in the working of Excel worksheets.

82. This is corroborated from the submissions of OP-1 wherein it has been submitted that,

"…after SBIIMS held its meeting with pre-qualified bidders on 23.05.2018, to explain to them about the tender process, officials of Avery Dennison i.e. OP-4 approached the Managing Director of OP-5 to enquire if he had understood the process explained by SBIIMS correctly. When he said that he would prefer a better explanation, upon which representative of Hith Impex, which is a distributor of OP-4, called to suggest that he would share with Mr Manish Thakkar a format so that no mistakes were committed.…"

(Emphasis added)

83. Further, when Mr. R. G. Venkatesh of OP-1 was asked during his deposition as to how Mr. Manish Jodhavat was in a position to provide 'inputs' for the bidding despite not participating in the Impugned Tender, his reply was as under:

"Manish Jodhavat was a flex and vinyl supplier. Avery Dennison approached him as he is a distributor, and he approached us to buy the material."

84. When the same question was put to Mr. Manish Thakkar of OP-5 during his deposition, his reply was as under:

"Mr. Manish Jodhavat is one of the owner of Hith Impex, which is a distributor of Avery. I was told by Mr. Shamrendra that Mr. Jodhavat is a distributor and takes part in number of tenders, and he would know about the tender procedures. I got a call from Shamrendra that you would get a call from our distributor Mr. Manish Jodhavat, and try to help you out to understand the procedure. When Mr. Manish Jodhavat called me, he told me that even he did not understand the SBIIMS tender procedure and he would ask Mr. Naresh Kumar Dasari to explain the things." "Mr. Dasari ..has written in this mail dated 2nd June, 2018, in which he has said the illustrator for the pricing format that if Mr. Manish Jodhavat decreased the price of the raw material, then that much discount has to be given in your pricing format."

(Emphasis added)

85. Though OP-7 has averred that it was not concerned with the bidding process of supply and installation of signages at specified locations of SBI as alleged, and it never participated in the bidding process, it is noted from the documents submitted by SBIIMS that OP-7 submitted its application in response to the EOI published by SBIIMS in February 2018 as well as the EOI published by SBI in December 2017, seeking pre-qualification as a signage solution provider for installation *of signages at branches/ATMs/offices of SBI. The same has not been disputed by OP-7 before the Commission.*

86. When Mr. Manish Jodhavat was asked why OP-7 submitted technical bid in SBIIMS' EOI of February 2018, he replied as under:

"We took a chance that we could have succeeded if SBIIMS had taken our total work orders together, though we did not fulfil the individual work criteria. We fill lot of tenders and take our chance. Sometimes we get selected and sometimes not."

Mr. Manish Jodhavat, in his deposition, also stated that:

"We have worked with Avery Dennison as a distributor since 2016 and we also convert some project. For last one year, we are doing only conversion now, because distribution margin, stocking, bad debts have forced us to move to conversion part."

87. Based on the above, it is noted that OP-7 works not only as a distributor of OP-4 but also as a converter, placing it horizontally with the other OPs in the matter. Further, OP-7 not only operated as a supplier of material in the Impugned Tender, but also tried to directly participate as one of the bidders in the Impugned Tender.

88. OP-7 in its written submissions also stated that "…..Opposite Party No. 7 was following the instructions given *by the Opposite Party No. 4 Avery Dennison and acted in any manner beyond the same in the entire tender". Thus, OP-7 admitted that he was acting as per the instructions of OP-4. This corroborates the submission of other OPs (viz. Mr. Naresh Kumar Dasari of OP-6 and Mr. Manish Thakkar of OP-5, as reproduced supra) that Mr. Manish Jodhavat of OP-7 was instrumental in involving Mr. Dasari in writing the e-mails which led to manipulation of the bidding process.*

89. Thus, it is noted that Mr. Manish Jodhavat, and consequently, OP-7, was instrumental in providing costing details of flex & vinyl and LED modules to Mr. Naresh Kumar Dasari of OP-6 to enable him to work out the bid prices for each of the OPs in the ereverse auction conducted by SBIIMS on 04.06.2018 and 05.06.2018. Further, as per the details available on record, it is noted that OP-7 also supplied flex and vinyl to two OPs in relation to the execution of the Impugned Tender.

90. In view of the foregoing, the Commission is of the view that the assertions made by OP-7 noted supra are liable to be rejected and it was very much a part of the overall arrangement between the OPs to geographically allocate the market and rig the bids in the Impugned Tender. This conduct falls squarely within the ambit of Section 3(1) read with Section 3(3) of the Act.

91. Hence, the Commission also finds OP-7 guilty of contravention of the provisions of Section 3(3)(c) read with Section 3(3)(d) read with Section 3(1) of the Act along with OP-1 to OP-6.

92. In relation to OP-4, the DG has noted that though OP-4 had given project specific authorisation letters (PSALs) to its converters to participate in the SBIIMS signage tender of March-2018, it itself participated in the tender offering complete signage solution to SBIIMS, i.e., as a converter, which was not its core business activity. The DG has also noted that OP-4 had already decided to sub-contract the work awarded under the Impugned Tender to its converters and its sole intention of participation was to get firsthand information regarding the said tender and bidding by the converters. Based on the same as well as evidence as discussed above, it appears that OP-4 played a crucial role in the organizing and facilitating collusion between the OPs."

5. It is pertinent to mention here that similar to the present Appellant, Op No.6 (Macromedia Digital Imaging Pvt. Ltd.) filed Competition Appeal (AT) No. 26 of 2022 titled as Macromedia Digital Imaging Pvt. Ltd. Vs. Competition Commission of India and its Director – Mr. Naresh Kumar Dasari had also filed Competition Appeal (AT) No. 24 of 2022 titled as Mr. Naresh Kumar Dasari Vs. CCI against the same impugned order. Both the aforesaid appeals have been

dismissed by this Tribunal vide its order dated 27.07.2022 which has been produced before us during the course of hearing.

6. Counsel for Appellant has vehemently argued that the Appellant (Company) was not involved in the bidding though it had given the technical bid but was not part of the final bid. It is also submitted that the Appellant was the supplier of 'Vinyl' and 'Flex' to OP No.4 and not beyond that, therefore, he could not have been considered to be part of Cartel for the purpose of returning a finding against him and ultimately imposing the penalty, in the case of the Company (Op No.7) to the tune of Rs. 5,94,619/- and in the case of the Director i.e. Manish Jodhavat to the tune of Rs.12,923/-.

7. Counsel for Appellant has also pointed out that in this appeal prayer has been made for quashing and setting aside the impugned order 03.02.2022 because at that time all the appeals were pending and the order dated 27.07.2022 has been passed by this Tribunal subsequently dismissing the Competition Appeals No. 24 & 26 of 2022. Therefore, she has prayed that her case may be restricted to relief to be granted to OP No.7 and to the Director. Be that as it may, Counsel for Appellant has then argued that there is no direct evidence against the Appellant of participation in the transactions in order to assign the role of a bidder. It is further submitted that the email dated 02.06.2018 and email dated 04.06.2018 has only reference to Manish Jodhavat who has been addressed as 'MJ' but that would not be suffice in holding them liable as a part of the Cartel. At this stage, it is appropriate to refer to the Email dated 02.06.2018 and 04.06.2018 which read as under:

From: **Naresh Kumar Dasari** naresh@mmdi.in
Subject: BBI - Way Forward
Date: 2 June 2018 at 7:40 PM
To: Venkatesh R G rgv@ddspl.in, Arjun arjun@agdpl.com, opalvinyl@gmail.com, Arbind Singh arbind.singh@ap.averydennison.com, amreesh.manish@gmail.com

Dear Friends,

Greetings.

I have attached an Excel Sheet and please have a look at it.

This Excel Sheet contains Several Worksheets.

The first work sheet is "Nut Shell" which is what we have broadly agreed before the bidding started on the previous occasion. I have made no changes in that.

Auction sequence wise I have listed the Circles where in the "Auction Sequence" has been illustrated.

As you all know the opening bid is 8750.

I have categorized the circles in to 3 types.

Type 1 : Bangalore, Chennai, Hyderabad, Mumbai, Delhi
Type 2 : Patna, Bhopal, Lucknow
Type 3: Jaipur, Chandigarh and Kolkata

The cut-off price / per Sq. Mtr. is :

Rs.7950 (Rs.738.85 per Sq.Ft.) for Type 1
Rs.8050 (Rs.748.15 per Sq.Ft.) for Type 2
Rs.8150 (Rs.757.45 per Sq.Ft.) for Type 3

Logic for it is : @ Type 1, bidders have their own manufacturing bases
: @ Type 2, bidders need to transport signages which involves additional costs
: @ Type 3, geographically difficult territories ie., @ Jaipur, branch density is low, @ Chandigarh, involves Kashmir and @ Kolkata involves North East

I have deliberately not mentioned OPAL in Jaipur & Patna circles – with a logic – that they don't have local alignments & difficult region to work for a Chennai based vendor.

For any further clarifications, please reach out to me @ anytime.

I am traveling to Europe on Monday morning and hence won't be able to co-ordinate on the D-day.. RGV will take the lead so that there is no confusion while the actual process is going on.

The pricing logic might change based upon further inputs from MJ (he is currently not reachable I believe).. We shall incorporate them in the same excel sheet as and when such inputs are given / we all agree on those inputs.

I wish you all the very best and let's make this a success.

Regards,

Naresh Kumar D

Bbi_Bid_4June1
8.xlsx

From: **Naresh Kumar Dasari** naresh@mmdi.in
Subject: Re: BBI - Way Forward
Date: 4 June 2018 at 4:20 AM
To: Venkatesh R G rgv@ddspl.in, Arjun arjun@agdpl.com, opalvinyl@gmail.com, Arbind Singh arbind.singh@ap.averydennison.com, amreesh.manish@gmail.com, Ritanshu Mohan ritanshu@agdpl.com

Dear Friends,

Greetings.

As you all know, we have been talking to MJ for further inputs.

Based on MJ's inputs & our own assessment of the situation, I have attached revised workings and process sequence.

I have categorized the circles in to 4 types now (instead of earlier 3)

Type 1 : Bangalore, Chennai, Mumbai, Delhi
Type 2: Hyderabad, Lucknow, Bhopal
Type 3 : Patna, Jaipur
Type 4: Chandigarh, Kolkata

The cut-off price / per Sq. Mtr. is :
Rs.7850 (Rs.729.55 per Sq.Ft.) for Type 1
Rs.7950 (Rs.738.85 per Sq.Ft.) for Type 2
Rs.8050 (Rs.748.15 per Sq.Ft.) for Type 3
Rs.8150 (Rs.757.45 per Sq.Ft.) for Type 4

Logic for it is : @ Type 1, bidders have their own manufacturing bases
: @ Type 2 & 3, bidders need to transport signages which involves additional costs
: @ Type 4, geographically difficult territories ie., @ Chandigarh, involves Kashmir and @ Kolkata involves North East

I have deliberately not mentioned OPAL in Chandigarh, Jaipur, Patna circles – with a logic – that they don't have local alignments & difficult region to work for a Chennai based vendor.
Similarly, I have taken out Amresh Neon from Kolkata circle

I would like to clarify that : MJ wanted us to quote less than what I have mentioned in this Revised Sheet. I deliberately haven't done that because there might be a table top negotiations post auction and at that point of time, whether we like it or not – we need to come down on our prices a bit. If we quote as per MJ during the auction - then we will end up going down than the cut-off price, which will result in lower margins on the project (which is not advisable).

I wish you all the very best and let's make this a success.

Regards,

Naresh Kumar D

8. On the other hand, Counsel for Respondent has argued that there is a detailed discussion of the role of Op No.7 which has been noticed by the Commission from paragraphs No.77 to 92 of the impugned order in which at various places the role played by Mr. Manish Jodhavat as the Director of the Company is specifically mentioned. He has then referred to the conclusion drawn in para 93 of the impugned order to contend that in such type of cases, the Commission has to decide on the basis of the attending circumstances as no direct evidence is found. The conclusion drawn in Para 93 is also reproduced as under:

> *"Conclusion*
>
> *93. The definition of an 'agreement' as given in Section 2(b) of the Act, requires, inter alia, any arrangement or understanding or action in concert, whether or not formal or in writing or intended to be enforceable by legal proceedings. The definition, being inclusive and not exhaustive, is a wide one. Such understanding may be tacit, and the definition under Section 2(b) of the Act covers even those situations*

> *where the parties act on the basis of a nod or a wink. There is rarely direct evidence of action in concert, and in such situations, the Commission has to determine whether those involved in such dealings had some form of understanding and were acting in co-operation with each other. In light of the definition of the term 'agreement', the Commission has to assess the evidence on the basis of preponderance of probabilities."*

9. We have heard counsel for the parties and after perusal of record, are of the considered opinion that there is no force in the argument of counsel for the Appellant insofar as she has submitted that two emails dated 02.06.2018 and 04.06.2018 cannot be relied upon against the company as well as the Director because the said emails are coming from the other party and neither the company nor the Director has copied the email or part of the email. This argument cannot be accepted because at that time, there was not a whisper that ultimately this matter is going to be taken in its Suo Motu jurisdiction by the Commission for the purpose of finding out as to whether there has been a cartel of the bidders which is contrary to the provisions of the Act and, therefore, the role ascribed to Manish Jodhavat has been thoroughly discussed in Para 77 to 92 of the impugned order with which we are totally satisfied that the company as well as Manish Jodhavat was somehow or the other were involved and, therefore, the conclusion drawn by the Commission cannot be faulted.

10. Thus in view of the facts and circumstances of the present case, we do not find any merit in the present appeal and the same is hereby dismissed, though without any order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

Raushan/Ravi