NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPETITION APPEAL (AT) NO.31 OF 2022

(Arising out of judgement/order dated 4.4.2022 passed in Suo Moto Case No.1/2020 by the Competition Commission of India, New Delhi)

In the matter of:

M/s Saraswati Sales Corporation,
Through its Director Mr. Naresh Kumar Sharma,
22, Gulmohar Park, Rajendra Nagar,
Bareilly, Uttar Pradesh 243001 Appellant

Vs

Competition Commission of India,
Through its Secretary,
9th floor, Office Block 1,
Kidwai Nagar (East),
New Delhi-110023. Respondent

For Appellant: Mr. Ashutosh Kumar, Mr. Swapnil Dey, Advocates.
For Respondent: Mr. Vaibhav Gaggar, Ms Sharmistha Ghosh, Mr. Prerak, Advocates.
Ms Shama Nargis, Dy Director, CCI.

JUDGEMENT
(14th November, 2022)

Justice Rakesh Kumar, Member (Judicial)

The present Appeal has been preferred under Section 53B of the Competition Act, 2002 (hereinafter referred to as the 'Act') against the order passed under Section 27 of the Act in Suo Moto Case No.1/2020 by the Competition Commission of India (hereinafter referred to as the 'CCI') on 04.04.2022. By the order impugned, the learned CCI after considering every fact, arguments and materials available on record passed the following order:

"132. The Commission notes that cartelisation, including bid rigging, is a pernicious form of anti-competitive conduct under the provisions of

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

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

134. Further, the Commission, in terms of Section 27 (a) of the Act, directs the Opposite Parties and their respective proprietors and directors who have been held liable in terms of the provisions of Section 48 of the Act to cease and desist from indulging in practices which have been found in the present order to be in contravention of the provisions of Section 3(3)(c) and 3(3)(d) read with Section 3(1) of the Act, as detailed in the earlier part of the present order.

135. The Commission, for the reasons recorded below, finds the present case fit for imposition of penalty. Under the provisions contained in Section 27(b) of the Act, the Commission may impose such penalty upon the contravening parties as it may deem fit, which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreement. Further, in cases of cartelisation, the Commission may impose upon each such cartel participant a penalty of up to three times its profit for each year of continuance of the anti-competitive agreement or 10 per cent of its turnover for each year of continuance of such agreement, whichever is higher.

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

137. On the issue of penalty, most of the Opposite Parties in their objections to the Investigation Report and subsequent submissions have averred, referring the decision of the Hon'ble Apex Court in the case of Excel Corp Limited vs. Competition Commission of India and others (2017) 8 SCC 47, that the turnover to be calculated under Section 27 of the Act has to be the relevant turnover, which relates to the product in question, in respect whereof, the provisions of the Act are found to be *contravened. The Opposite Parties have averred that, as that they could not derive any income from the soil testing tenders for never being involved in the business of soil testing, zero penalty would naturally arise out of nil income and nil turnover. Some of the Opposite Parties have prayed for mitigation of penalty on the grounds of being Micro Small and Medium Enterprises (MSME).*

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

> *"115. In relation to the contention that turnover derived from the Impugned Tender alone should be considered, it is noted that a bare perusal of the Excel Crop Care judgement makes it clear that nowhere it held or otherwise declared that relevant turnover should be limited to the turnover earned from the specific customer or tender. Such a plea would frustrate the underlying policy objective of deterring the cartelists besides providing them a fertile ground for regulatory arbitrage. For example, if owing to the understanding between the bidders, if some or few bidders have refrained from participating in the particular tender under investigation, the turnover of the said parties from the said tender*

would obviously be nil, resulting in nil penalty. To allow such parties to walk free without incurring any monetary penalty for their anti-competitive conduct simply because they did not have any turnover from the concerned tender, would not only stultify the Parliamentary intent in providing deterrence through penalties against such behaviour but would also run contrary to the underlying spirit of the judgment of the Hon'ble Supreme Court of India in Excel Crop Care judgment. Taking such a pedantic interpretation would provide a virtual free run to the infringing parties and an effective immunity against any antitrust action for their anti-competitive behaviour. This cannot be the purport or intent either of the Parliament or the Hon'ble Supreme Court of India in laying down the parameters and perimeter for imposition of monetary penalty upon the contravening parties. Therefore, such contentions by the OPs need to be rejected."

139. The Commission notes that the instant case emanates out of conduct pertaining to public procurement in soil testing tenders and, as such, is a fit case to impose penalties upon the infringing parties. On a holistic appreciation of the facts and circumstances of the case and the mitigating factors put forth by the Opposite Parties, the Commission observes that the findings of the DG clearly indicate the active role played by each of the Opposite Parties in rigging the tenders. The Commission accordingly imposes the penalty upon the Opposite Parties @ 5 percent of the average of their turnover for the three financial years, i.e., 2017-18, 2018-19 and

2019-20. Accordingly, the computation of penalty imposed on each of the Opposite Parties is as follows:

S.No.	Individual	Fy 2017-18	FY 2018-19	FY 2019-20	Total	Average	5% of average turn over of three years
1	**Yash Solutions**	22,51,68,823	**172800135**	**107933393**	**505902351**	**168634117**	**8431706**
2	**Mr Satish Kr Agarwal**	Data not provided	**28862103**	**33515936**	**62378039**	**31189020**	**1559455**
3	**M/s Siddhi Vinayak and Sons**	Data not provided	**32595945**	**17884343**	**50480288**	**25240144**	**1262007**
4	**M/s Saraswati Sales Corp**	14885150	**17116200**	**8017141**	**40018491**	**13339497**	**666975**
5	**Austere Systems Pv Ltd**	48529601	**117043789**	**99960762**	**265534152**	**88511384**	**4425569**
6	**Delicacy Continental Pvt Ltd**	14916478	**78839582**	**94508248**	**197964308**	**65988103**	**3299405**
7	**Fimo Infosolutions Pvt Ltd**	2186517	**0**	**0**	**2186517**	**728839**	**36442**
8	**M/s Toyfort**	27431913	**25595204**	**20621192**	**73648309**	**24549436**	**1227472**
9	**Chaitanya Business Outsourcing Pvt Ltd**	3365279	**15821826**	**41552267**	**60739372**	**20246457**	**1012323**

140. The Commission further deems it appropriate and necessary to impose penalty on the individuals identified above for being liable under Section 48 of the Act at the rate of 5 percent of their average income of the financial years 2017-18, 2018-19 and 2019-20 filed with the Commission. However, since M/s Satish Kumar Agarwal, M/s Siddhi Vinayak, M/s Saraswati Sales and M/s Toyfort, are sole proprietorship concerns, no separate penalty is being imposed on their respective proprietors. Accordingly, the computation of penalty imposed on the aforesaid individuals found liable under Section 48 of the Act are as follows:

S.No.	Individual	Fy 2017-18	FY 2018-19	FY 2019-20	Total	Average Income	5% of average income
1	**Mr Praveen Kumar Agarwal (Managing Director Yash Solutions)**	Data not provided	**32,82,490**	**26,88,128**	**59,70,618**	**29,85,309**	**1,49,265**
2	**Mr Rahul Gajanan Teni, (Director, Austere Systems**	7,25,960	**11,87,296**	**7,69,441**	**26,82,697**	**8,94,232**	**44,712**
3	**Mr Ankur Kumar (Director Delicacy Continental**	3,01,900	**4,89,578**	**3,66,960**	**11,58,438**	**3,86,146**	**19,307**
4	**Mr Jai Kumar Gupta (Director, Fimo Info Solutions**	3,25,034	**4,51,762**	**5,10,000**	**12,86,796**	**4,28,932**	**21,227**
5	**Mr Nitish Kumar Agarwal (Director, Chaitanya Business Outsourcing)**	Data not provided	**19,30,137**	**14,51,503**	**33,81,640**	**16,90,820**	**86,541**

141. The Commission is of the view that ends of justice would be met in this matter by the imposition of the following penalty on the Opposite Parties and their individuals found liable under Section 48 of the Act:

S.No	Name of the Party	Amount of penalty (In rupees)	Amount of penalty(In words)
1	Yash Solutions	84,31,706	Eighty four Lakhs thirty one thousand seven hundred and six only
2	M/s Satish Kumar Agarwal	15,59,451	Fifteen Lakhs fifty nine thousand four hundred and fifty one only
3	M/s Siddhi Vinayak and sons	12,62,007	Twelve lakhs sixty two thousand seven only
4	M/s Saraswati Sales Corporation	6,66,975	Six lakhs sixty six thousand nine hundred seventy five only
5	Austere Systems Pvt LTd	44,25,569	Forty four lakhs twenty five thousand five hundred sixty nine only

6	Delicacy Continental Pvt Ltd	32,99,405	Thirty two lakhs ninety nine thousand four hundred five only
7	Fimo Infosolutions Pvt Ltd	36,442	Thirty six thousand four hundred forty two only
8	M/s Toyfort	12,27,472	Twelve lakh twenty seven thousand four hundred seventy two only
9	Chaitanya Business Outsourcing Pvt Ltd	10,12,323	Ten lakh twelve thousand three hundred twenty three only
10	Mr Praveen Kumar Agarwal (Managing Director, Yash Solutions)	1,49,265	One lakhs forty nine thousand two hundred and sixty five only
11	MR Rahul Gajanan Teni (Director Austere Systems	44,712	Forty four thousand seven hundred twelve only
12	Mr Ankur Kumar (Director, Delicacy Continental)	19,307	Nineteen thousand three hundred and seven only
13	Mr. Jai Kumar Gupta (Director, Fimo Info Solutions	21,447	Twenty one thousand four hundred forty seven only
14.	MR. Nitish Kumar Agarwal (Director Chaitanya Business Outsourcing)	84,541	Eighty four thousand five hundred forty one.

142. The Commission directs the concerned parties to deposit the aforesaid penalty amounts within 60 days of the receipt of this order. It is ordered accordingly.

143. The Secretary is directed to forward copies of this order to all the Opposite Parties and their officials forthwith."

2. The Commission in terms of Section 27(a) of the Act directed the Appellant and others who were held liable in terms of Section 48 of the Act to cease and desist from indulging in practices which were found in the instant case to be in contravention of provisions of Section 3(3) (c) and 3(3)(d) read with Section 3(1) of the Act. In addition the Commission after recording that the appellant was also one of the Members of Cartel and involved in anti competitive conduct under Section 3 of the Act imposed penalty @ 5% of average of turnover for the three financial years imposed penalty on the appellant to the tune of Rs.6,66,975/-.

3. The short fact of the case is that on the basis of a complaint received by the Commission wherein allegation of bid rigging was in the tenders invited by the Department of Agricultural, Govt of UP for soil sample testing in respect of e-tender mainly tender of 2018 i.e. in relation to Moradabad and tender relating to Bareilly. After receipt of the complaint and examining the material available on record as well as the persons against whom in complaint allegations were made regarding bid rigging, the Commission prima facie formed an opinion and thereafter directed the Director General to conduct investigation. The Commission in its forming prima facie opinion noticed that audit reports furnished by M/s Satish Kumar and M/s Siddhi Vinayak indicated the same place of business. Further, the experience certificates furnished by M/s Satish Kumar and M/s Siddhi Vinayak (which were part of the bid documents) were issued by Yash Solutions to them on the same date. The Commission further noted that the term deposit receipts submitted by M/s Satish Kumar and M/s Siddhi Vinayak as EMD for Tender No. 1 and Tender No. 2 bore consecutive serial numbers. Further, the non-judicial

stamp papers used for filing affidavits along with bid documents filed by M/s Satish Kumar and M/s Siddhi Vinayak also bore consecutive serial numbers. The Commission also observed that Yash Solutions, M/s Satish Kumar and M/s Siddhi Vinayak were dealing with a common supplier i.e., Thermo Fisher Scientific Pte. Ltd., under a common account, which indicated a nexus between them. Further, the tax invoices issued by Today Tech Solutions for lab consumables to Yash Solutions, M/s Siddhi Vinayak and M/s Satish Kumar were identical in each and every aspect and appeared to be forged by these entities to obtain technical eligibility for the tenders. The Commission noted that Yash Solutions appeared to have sub-contracted the soil sampling work to M/s Satish Kumar and M/s Siddhi Vinayak and Austere Systems appeared to have sub-contracted the work awarded to it to M/s Saraswati Sales in various regions of Uttar Pradesh. The Commission also noted that M/s Satish Kumar and M/s Siddhi Vinayak indulged in cover bidding in Tender No. 1 and Tender No. 2 to let Yash Solutions which emerged as L1 in both the tenders. Further, it was observed that Yash Solutions emerged as successful bidder in the regions of Bareilly and Moradabad for the years 2017-18 and 2018-19, whereas Austere Systems appeared to have won tenders for the year 2017 for regions of Jhansi and Meerut and for the regions of Saharanpur and Meerut for the year 2018. Based on the above analysis, the Commission was of the prima facie view that, despite being competitors, these entities appeared to have manipulated the process of bidding in the soil testing tenders in the state of Uttar Pradesh by indulging in bid rigging, in contravention of provisions of Section 3(1) read with 3(3)(d) of the Act.

4. Accordingly by order dated 30.01.2020 exercising powers under Section 26(1) of the CCI directed Director General to cause an investigation and submit report. The Director General was also in terms of the order granted liberty that if during investigation he comes across anti-competitive conduct of any other entity in addition to those mentioned hereinabove to investigate the same. The Director General was further directed to investigate the role of officers who were incharge and responsible for the conduct of the business of the party at the time the alleged contravention was committed, as well as officers with whose consent or connivance the alleged contravention was committed, in terms of the provisions of Section 48 of the Act. The Director General after conducting investigation submitted a detailed report wherein besides discussing role played by other concluded that the appellant M/s Saraswati Sales Corporation and other indulged in cartelisation and bid rigging in 2017 and 2018 tenders pertaining to soil testing works issued by various divisions of the Department of Agriculture, Govt of UP. The Investigation Report dealt with the role played by others also and it was established that the appellant was also in collusion with one M/s Yash Solutions and used fake documents provided by M/s Yash Solutions to become eligible and submit cover bids to support the bid of Yash Solutions. They were blacklisted by Department of Agriculture, Govt of UP for two years in relation to the lack of authenticity of the documents submitted along with bids for soil testing tenders.

5. In respect of M/s Saraswati Sales/Appellant, investigation revealed that it was a proprietorship concern and was basically engaged in the business of electrical contract work for various agencies and it submitted bids in the soil

testing tenders in the year 2018 for the Bareilly, Moradabad and Aligarh divisions, even though the proprietorship concern neither had prior soil testing experience nor any infrastructure for conducting soil testing. Investigation revealed that M/s Saraswati Sales in collusion with M/s Yash Solutions submitted cover bids using fake documents provided by M/s Yash Solutions. In the case it was noticed that common IP address was used for submission of E-bids in respect of M/s Satish Kumar, M/s Siddhi Vinayak, M/s Saraswati Sales and Yash Solutions in the Moradabad tenders for the year 2018.

6. During investigation it was further established that Yash Solutions was having no prior experience of soil testing even then submitted its bids for various divisions and was awarded tenders in Bareilly and Moradabad divisions in the year 2017 and Moradabad and Aligarh divisions in 2018. The Investigation Report concluded that Yash Solutions in collusion with M/s Satish Kumar, M/s Siddhi Vinayak, M/s Saraswati Sales and Chaitanya Business Outsourcing had rigged the bids in the years 2017 and 2018 issued by various divisions of the Department of Agriculture, Govt of UP. During investigation it was established that the proprietor of M/s Saraswati Sales Corporation i.e. Mr. Naresh Kumar Sharma was also responsible under Section 48 of the Act, besides another proprietor and directors and other proprietorship etc. After receipt of the Investigation Report again proper opportunity was given to the parties including the appellant and finally on 04.04.2022 order was passed against the appellant and others both under Section 27(a) and 27(b) of the Act which has been assailed in the present Appeal.

7. Mr. Ashutosh Kumar, learned counsel for the appellant assailing the impugned order at the very outset has argued that it is not in dispute that the appellant firm tender was not accepted rather tender work was allotted to M/s Yash Solutions. To elaborate his submission, learned counsel for the Appellant has referred to statement made in para 7(ii) at Page of the Memo of Appeal. He further referred para 5 at page 44 of the impugned order which is quoted hereineblow:-

> *"5.It was stated in the complaint that Yash Solutions emerged as the successful bidder for the award of work for Tender No. 1 and Tender No. 2 for the regions Moradabad and Bareilly, respectively, in the year 2018-19. It was also stated in the complaint that in the previous year, i.e., 2017-18, Yash Solutions was awarded tenders for soil testing for the regions of Bareilly and Moradabad, and Austere Systems was awarded tenders for the regions of Jhansi, Saharanpur and Meerut as a result of such collusive bidding."*

8. He submits that in any event it was Yash Solutions who emerged as successful bidder. Learned Counsel for the appellant has further referred to para 10 i.e. the finding of the investigation noticed by the CCI in the impugned order at running page 46.

9. Mr. Ashutosh Kumar, learned counsel for the appellant further submits that the Commission agreeing with the investigation report submitted by the DG has recorded that Austere Systems under an agreement/understanding with rival company i.e. Yash Solutions had geographically allocated the soil testing tenders issued by the Department of Agriculture, Govt of UP in the year 2017 and 2018 by not bidding in each other's allocated regions and by

submitting supporting bids in favour of each other. The Learned counsel tried to persuade that whatever violations were committed were committed by two entities i.e. by Yash Solutions and Austere Systems. However, without any basis the appellant too has been held responsible for violations of the Act. To substantiate his aforesaid submission he heavily relied on contents of the investigation report which is at running page 223 at para 7.34.26 which is reproduced below:

> "*in view of the above it can be concluded that, M/s Yash Solutions and M/s Austere Systems Pvt Ltd through an understanding/arrangement between them, had geographically allocated the soil testing tenders issued by the UP Government in the year 2017 and 2018 and were either not bidding in each other's area/divisions or submitting supporting bids for each other.*"

Taking clue from the aforesaid fact which were noticed in the DG Report as well as considered by the Commission it was argued on behalf of the appellant that there was no reason for holding appellant guilty in the present case and the Commission has committed serious error in passing the impugned order against the appellant.

10. On the point of penalty the learned counsel for the Appellant has referred to running page 303 which is part of written submission submitted by the appellant, M/s Saraswati Sales Corporation, before the CCI. He has referred to para 8 wherein the appellant detailed the steps in determining effective/relevant turnover of the judgement of the Hon'ble Supreme Court in the case of Excel Crop Care Ltd Vs CCI. He submitted that the Learned CCI while considering the turn over has incorrectly taken the "total turnover"

whereas only the “relevant turnover” was to be taken into account and submitted that monetary penalty imposed by the CCI is not in accordance with the law.

11. Mr Vaibhav Gaggar, learned counsel appearing on behalf of the CCI while controverting the submissions of the learned counsel for the Appellant submits that the case of Yash Solutions as well as of Austere Systems may not be looked into in isolation. He submits that learned counsel for the appellant have tried to only substantiate that during investigation as well as in the order of the Commission in bid rigging Yash Solutions and Austere Systems were held responsible whereas on examination of the investigation report as well as impugned order of the Commission in totality there is no dispute that the appellant alongwith others besides Yash Solutions and Austere System were found involved in bid rigging. He further submits that even during oral examination the proprietor of M/s Saraswati Sales Corporation himself has admitted that **he participated in the bid to cover and facilitate success of Yash Solutions.** Learned counsel for CCI Mr. Vaibhav Gaggar has specifically referred to para 57 to 61, 63, 65, 68 to 72 of the impugned order. Since during hearing learned counsel for the CCI has placed aforesaid entire paragraphs of the impugned order, we feel it appropriate to reproduce those paragraphs hereinbelow:-

> *“57. The Commission also notes that Mr. Praveen Kumar Agarwal in his statement before the DG admitted that fake work orders and experience certificates were issued by Yash Solutions to rival bidders M/s Satish Kumar and M/s Siddhi Vinayak in the 2018 soil testing tenders for Aligarh, Bareilly and Moradabad divisions. However, Mr. Praveen Kumar*

Agarwal submitted in his deposition that he did not know why such fake experience certificates and work orders were issued by his company to rival bidders. Mr. Praveen Kumar Agarwal, in his statement, could not come up with any cogent explanation for issuing such fake certificates and work orders. The relevant extracts from the statement of Mr. Praveen Kumar Agarwal recorded before the DG are as under:

"Q. 21. I am showing you the Work Order dated 02.11.2017 & "Experience Certificate" dated 05.12.2017 issued by your company M/s Yash Solutions to M/s Siddhi Vinayak & Sons for analyzing 55,300 soil samples for your company [Exhibit – 4 (6 pages)] which was submitted by the said firm in the tenders of Aligarh, Bareilly and Moradabad in the year 2018.

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

Q. 22. I am showing you the Work Order dated 02.11.2017 & "Experience Certificate" dated 05.12.2017 issued by your company M/s Yash Solutions to M/s Satish Kumar Agarwal for analyzing 52,000 soil samples for your company [Exhibit – 5 (6 pages)] which was submitted by the said firm in the tenders of Aligarh, Bareilly and Moradabad in the year 2018.

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

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

A. 23. I do not know.

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

A. 24. No.

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

A. 25. I do not know.

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

A. 26. I do not know.

Q. 27. I am showing you the relevant extracts of the statement dated 12.01.2021 i.e Q. 18, 19 & 22 (Exhibit – 6), submitted by Sh. Satish Kumar Agarwal, Proprietor of M/s Satish Kumar Agarwal.

A. 27. Yes, I have seen.

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

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

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

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

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

Q. 23. I am showing you the Commercial Invoices for purchase of the ICP-OES machine by your firm Satish Kumar Agarwal (Exhibit- 10 and 11). The same were submitted by your firm during the soil testing tenders for Bareilly & Moradabad divisions.

A. 23. I do not remember.

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

A. 24. I do not know.

Q. 25. How is the said Invoice submitted by you in the Bareilly Moradabad tenders are having common Account Number 1532236 and Serial Number IC74DC173313 for Your firm & the Invoice of Siddhi Vinayak & Sons (Exhibit - 13 & 14)?

A. 25. I do not know.

Q. 26. How is the said Invoice submitted by you in the Moradabad tenders is having same Account Number 1532236 and Serial Number IC74DC173313 for Your firm & the Invoice of Saraswati Sales Corporation submitted in the Bareilly & Moradabad tenders (Exhibit-15 &16)?

A. 26. I do not know.

Q. 27. How is the said Invoice submitted by you in the Moradabad tenders are having same Account Number 1532236 and Serial Number IC74DC173313 for Your firm & the Invoice of M/s Yash Solutions Pvt Ltd submitted in the Bareilly & Moradabad tenders (Exhibit-17 & 18)?

A. 27. I do not know.

Q. 30. I am showing the letter received from M/s Thermo Fisher Scientific India Private Limited confirming that no sale of any ICP-OES machine was made to either to M/s Satish Kumar Aggarwal and M/s Siddhi Vinayak & Sons (Exhibit19). Why did you submit fake invoices for said machine in the tenders of soil testing in Moradabad and Bareilly Divisions during 2018?

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

Q. 31. I am showing you the Invoice bearing no. 7000 dated 01.07.2017 raised by M/s Today Tech Scientific Solutions, Ambala Cantt in favour of your Firm M/s Satish Kumar Agarwal for purchase of certain items, which was submitted by your Firm to the Department of Agriculture, Govt. of UP, during the tendering process in the year 2018-19 for Bareilly and Moradabad divisions (Exhibit20,21).

A. 31. Yes, I have seen it.

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

A. 32. I do not know.

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

A. 33. Yes.

Q. 34. How is the invoice submitted by your firm and that of M/s Yash Ornaments (Exhibit- 11) having same time i.e. 02:37PM?

A. 34. I do not know.

Q. 35. How is the invoice submitted by your firm and that submitted by M/s Siddhi Vinayak & Sons in the Bareilly & Moradabad tenders (Exhibit- 22 & 23) having same time i.e.02:37PM?

A. 35. I do not know.

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

A. 36. I do not know.

Q. 37. I am showing you the letter by Dy. Excise & Taxation Commissioner(ST) dated 30.06.2020 (Exhibits- 24) confirming that against the above said invoices raised by M/s Today Tech Scientific Solutions, Ambala Cantt in favour of both your firms namely M/s Satish Kumar Agarwal and M/s Siddhi Vinayak & Sons for purchase of certain items, that no sales were made to both your aforesaid firms.

A. 37. Yes, I have seen it.

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

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

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

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

59. Further, the Commission also notes that M/s Saraswati Sales, which had no experience, infrastructure such as soil testing machine and manpower for conducting soil testing work, had participated in the soil *testing tenders of 2018 for Bareilly, Moradabad and Aligarh divisions and had also submitted fake invoices for the purchase of ICP-OES soil testing machine in the soil testing tenders of 2018 for which the Commission has already recorded its view in the preceding paragraphs. The Commission also heeds the fact that Mr. Naresh Kumar Sharma of M/s Saraswati Sales, in his statement before the DG, admitted that the said invoices were arranged by Mr. Praveen Kumar Agarwal of Yash Solutions, and that Mr. Praveen Kumar Agarwal in his statement agreed with the aforesaid statement of Mr. Naresh Kumar Sharma. The relevant extracts from the statements of Mr. Naresh Kumar Sharma and Mr. Praveen Kumar Agarwal are as under: Extract from the statement of Mr. Naresh Sharma of M/s Saraswati Sales:*

"Q. 10. How did you procure Invoices for purchasing of ICP-OPs machine which is used for soil testing as shown in (Exhibits – 5 & 6 above)? A. 10. The said invoices were arranged by Sh. Praveen Agarwal and I have no knowledge from where the said invoices were arranged." Extract from the statement of Mr. Praveen Kumar Agarwal of Yash Solutions

"Q. 35. I am also showing you the relevant extracts of the statement dated 29.12.2021 i.e Question no. 10, of Sh Naresh Kumar Sharma., Sole Proprietor of M/s Saraswati Sales Corporation Bareilly (Exhibit - 14). Please submit your comments.

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

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

A. 36. No comments."

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

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

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

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

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

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

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

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

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

65. The Commission also notes that Mr. Satish Kumar Agarwal, in his statement, had admitted that he had submitted fake documents and bids separately for both his Suo Motu Case No. 01 of 2020 Page 38 concerns, M/s Satish Kumar and M/s Siddhi Vinayak, in the 2017 soil testing tenders for Moradabad and 2018 soil testing tenders for Aligarh, Moradabad and Bareilly divisions, just to show that there was enough competition and to avoid cancellation of tenders due to lack of participation. The Commission further notes that the name of Yash Solutions appeared in the affidavits submitted by M/s Satish Kumar and M/s Siddhi Vinayak. Further, the phone number of the authorised signatory of Yash Solutions, i.e., Mr. Rachit Agarwal, appeared in the character certificate issued to Ms. Sangeeta Agarwal of M/s Siddhi Vinayak. The Commission also notes that Mr. Satish Kumar Agarwal persistently submitted evasive replies "I do not know" or "I do not remember" and submitted no explanation for the alleged linkages. It is also noted that Mr. Satish Kumar Agarwal initially denied knowing Mr. Praveen Kumar Agarwal of Yash Solutions; however, when confronted with the CDR of his mobile number, he admitted having regular interactions with Mr. Praveen Kumar Agarwal. He also admitted to be in regular communication with Mr. Nitish Agarwal, CEO of Yash Solutions, as well as Mr. Rachit Agarwal, General Manager of Yash Solutions. Mr. Satish Kumar Agarwal admitted that he used to take Mr. Rachit

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

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

"Q. 37.I am showing you authorization letter (Exhibit- 11 & 12) issued in respect of Shri Vivek Saxena to represent & sign on behalf of the firm Saraswati Sales Corporation for various Tenders. The said documents have been submitted in soil testing tenders in Bareilly and Moradabad

division in 2018. I am showing you copies of Pan and Aadhaar cards (Exhibit- 13 & 14) of Shri Vivek Saxena which were submitted in these tenders.

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

Q. 1. This is in continuation of your statement recorded on oath on 05.12.2020 copy shown to you as (Exhibit- 1). As you had denied in your earlier statement dated 05.12.2020 that you had not submitted any bids in the soil testing tenders issued by Bareilly & Moradabad divisions of the Deputy Director Soil testing, Uttar Pradesh Government in 2018, I would request you to confirm the same.

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

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

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

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

72. The Commission observes that the evidence on record coupled with the statements of the individuals of the above-mentioned Opposite Parties point to their complicity in manipulating the tenders issued by the Department of Agriculture, Government of Uttar Pradesh. Further, even acts of forgery were resorted to in such processes, which speaks about the conduct of such Opposite Parties. Further, Yash Solutions, M/s Satish Kumar and M/s Siddhi Vinayak were blacklisted by the procurer. The Commission does not find any merit in the submissions made by the said Opposite Parties in their objections/ written submissions as well as the arguments advanced during the oral hearing and in subsequent submissions. The Commission thus concludes that Yash Solutions, M/s Satish Kumar, M/s Siddhi Vinayak, M/s Saraswati Sales and Chaitanya Business Outsourcing have contravened the provisions of Section 3 (3)(d) read with Section 3(1) of the Act. Set 2: Austere Systems, M/s Toyfort, Fimo Info Solutions and Delicacy Continental.

12. On the basis of the aforesaid fact which has been reproduced hereinabove it was argued by the learned counsel for the CCI that it was a specific case of involvement of the appellant and it was established that he was Member of the cartel involved in violation of the provisions of the Act and as such Learned CCI has committed no error in passing the impugned order against the appellant besides other entity. On the point of penalty Mr. Gaggar has placed Section 27(b) of the Act which is reproduced hereinbelow:-

"(b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profits for each year of the continuance of such agreement, whichever is higher"

13. Mr Gaggar, learned counsel for the CCI further submits that statutory provision, i.e. sub-section (b) of Section 27 in clear term speaks that penalty may be imposed which shall not be more than 10% of the average of the turnover for the last three preceding years. According to the learned counsel for the CCI in terms of the provisions of the Act, the CCI has leniently and rightly instead of imposing upper limit of 10% has preferred to consider 5% of average income of the financial year 2017-18, 2018-19 and 2019-20. According to him neither there is any error in recording finding of involvement of appellant nor there is any defect in the impugned order so far as imposition of penalty is concerned.

14. After conclusion of the reply made by learned counsel for the CCI, learned counsel for the Appellant in rejoinder has taken this Tribunal to running page 164 of the brief particularly para 7.21.8 and running page 166 para 7.21.11 of the Investigation report i.e. questions put to proprietor of the Saraswati Sales Corporation i.e. Mr. Naresh Kumar Sharma during cross examination by the DG i.e. Question No.8 which is as follows:-

“8. Who else was associated with you/ your firm for Soil testing work?

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

And Question No.2 at Page 166 para 7.21.11 is quoted below:

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

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

15. By way of referring to aforesaid fact it was reiterated that all the misdeeds were committed by Mr. Praveen Agarwal of Yash Solutions and the appellant was not at all involved.

16. Besides hearing Learned counsel for the parties we have minutely examined materials available on record and after going through the same we are of the considered opinion that the Commission has correctly and legally held the appellant responsible for violation of Section 3(3)(c) and 3(3)(d) reading with Section 3(1) of the Act and there is no error in respect of order passed under Section 27(a) whereby the appellant was directed to cease and desist from such act from indulging in the practices which were found in contravention of the provisions contained in Section 3(3)(c) and 3(3)(d) read with Section 3(1) of the Act. So far as imposition of penalty is concerned it is evident that appellant was a proprietor firm. Of course imposition of penalty was entirely within the discretion of the CCI and in respect of exercising discretion same may not be interfered with. However, it is also settled that discretion is to be exercised not indiscreet manner. Moreover, Hon'ble Supreme Court in ***Excel Crop Care Ltd Vs CCI & Another*** particularly in para 95 and 96 has given some guidelines in respect of turnover as well as relevant turn over. Para 95 and 96 of the judgement of the Hon'ble Supreme Court reported in (2017) 8 Supreme Court Cases 47 in Excel Crop Care Ltd Vs CCI & Another is reproduced bellow:-

> *"95.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.

96.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."

17. However, in peculiar facts and circumstances of the present case particularly the fact that the appellant was found by the Commission that he being a Member of the Cartel the appellant was providing cover for the success of the bidder, Yash Solutions, it would be difficult to consider penalty on the basis of relevant turn over and as such total turn over which has been considered by the Commission may not termed as erroneous. However, considering the fact that the appellant was a proprietorship firm the Commission may consider to reduce the percentage of average income of the appellant.

18. Accordingly while approving the order of Commission in respect of holding the appellant guilty under Section 3(3)(c) and 3(3)(d) read with Section

3(1) and order passed under Section 27(a) regarding cease and desist order we feel it appropriate to remit back the matter to Commission to reconsider imposition of penalty which has been imposed under Section 27(b) of the Act. We expect that the CCI may take lenient view in respect of imposition of penalty on the appellant.

19. With the above observations and directions the appeal is disposed off.

(Justice Rakesh Kumar)
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member (Technical)

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