NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPETITION APPEAL (AT) NO.17/2021

In the matter of:

Together We Fight Society Appellant

Vs

Competition Commission of India & Anr Respondent

For Appellant: Ms Pratiksha Sharma and Mr Ankit Acharya, Advocates.

For Respondent : Mr Nirmalya Shukla, Advocate for Respondent No.5.

Mr Sristuti Vashisht, RA, R1/CCI.

ORDER

06.09.2022: Heard Ms Pratiksha Sharma learned counsel for the Appellant, Mr. Nirmalya Shukla, learned counsel for Respondent No.5 and also representative of Respondent No.1/CCI.

The present appeal has been preferred under Section 53B of the Competition Act, 2002 by the Appellant. The appellant/informant has submitted before the CCI that the Informant is a non-government organization and a not-for-profit organization, established for a charitable purposes that aims to inculcate and encourage men and women, who have the capacity and are willing to devote it, to undertake social work in the service of the needy; to serve humanity, by individual work, as well as by participating in group activities in social service. It has also been claimed that this organization aims to take up Public Interest Litigations (PIL) for important public issues such as fighting corruption, wrongdoings in public life and thereby promoting transparency and integrity in public sphere.

The Appellant under Section 19 of the Competition Act, 2002 filed an information petition before the CCI primarily on the basis of a Report of Comptroller and Auditor General of India (C&AG) dated 04.04.2016. On the basis of the Preliminary Report as well as some statement in the petition filed under Section 19 of the act, it was alleged that the Respondents had formed cartelization/bid rigging and violated the provisions contained in Section 3 and 4 of the Act. Before the CCI on the basis of facts disclosed in the C&AG as well as some of the fact, the appellant/informant sought the following reliefs:-

a) To declare the above practice of the Opposite Parties as anti-competitive in violation of the provisions of Section 3 of the act.
b) To pass a cease and desist order against the Opposite parties, directing them to discontinue their cartel and not to enter such arrangements in future.
c) To impose such penalty on the Opposite Parties under the Act, as this Hon'ble Commission deems fit and proper; and
d) To pass such further order and issue such directions to the Opposite Parties as this Hon'ble Commission may deem fit in the facts and circumstances of the present case.

On receipt of information and examination, the CCI vide its order dated 16.09.2021 after registering the case as Case No.20/2021 has closed the information under Section 26(2) of the Act. The CCI did not find any prima facie case for proceeding with the matter and instead of directing the investigation by the Director General, has closed the proceeding. The said order has been assailed by the Appellant in the present appeal

Ms Pratiksha Sharma, learned counsel for the appellant has primarily argued that the order impugned is liable to be set aside only on the ground that though the Learned CCI has observed that there exists no prima facie case but no detailed reasons has been assigned. Learned Counsel for the Appellant submits that even in the case of closure and passing order under Section 26(2) it is mandatorily required on the part of CCI to assign detail reasons. However, without recording valid reasons and without recording opinion the Learned CCI has closed the petition which is required to be interfered with. Learned counsel for the Appellant has pressed heavy reliance on a judgement of the Hon'ble Supreme Court of India in the case of CCI Vs Steel Authority of India Ltd & Ors MANU/SC/0690/2010. During argument she has taken this Tribunal firstly to para 20 of the judgement and she stated that in para 20 clause (5) the Supreme Court has formulated the issue regarding recording reasons for formation of a prima facie opinion. She further submits that said question has been answered in para 28 of the said judgement. She submits that in view of the law laid down by the Hon'ble Supreme Court it is mandatory on the part of the CCI to record reasons in not finding any prima facie case in its order. Mainly on the aforesaid grounds she submits that it is a fit case that this Hon'ble Tribunal may set aside the impugned order and direct the CCI for further examination of the dispute.

Learned counsel Mr Nirmalya Shukla, for Respondent No.5 submits that in the impugned order there is no error warranting any interference. He submits that in the tender process due procedure was followed and the matter was examined extensively. He submits that in CAG Report which have been relied upon it has been indicated that the rates quoted by all the bidders and reasons explained by them for quoting higher rates were almost similar, indicating some cartelization among the bidders due to said cartelization there was loss to the government exchequer to the tune of Rs.52.95 crores. Learned Counsel for the Respondent No.5 submits that it was not loss but it was extraordinary liability. He further submits by way of referring to 11 of the impugned order wherein the CCI has discussed about the CAG Report and submits that even CAG in its report has not recorded a finding that there was cartelization but it was only a presumption or suggestion which is evident from the word used by CAG and reproduced by the CCI in para 11. According to the learned counsel for Respondent No.5 there is no reason for interference in the impugned order.

Besides hearing the learned counsel for the parties we have minutely examined the material available on record particularly the impugned order. Before proceeding we may reproduce the impugned order which has been assailed as follows:-

Order under Section 26(2) of the Competition Act, 2002

1. *The present Information has been filed by Together We Fight Society (hereinafter, 'Informant') under Section 19(l)(a) of the Competition Act, 2002 (hereinafter, 'Act'), alleging contravention*

of provisions of Section 3(3) of the Act by SR Paryavaran Engineers Pvt. Ltd. (hereinafter, 'Opposite Party/OP-1'), Doshion Veolia Water Solution Pvt. Ltd. (hereinafter, 'Opposite Party/OP-2'), Water Life India Pvt. Ltd. (hereinafter, 'Opposite Party/OP-3'), LVJ Projects Pvt. Ltd. (hereinafter, 'Opposite Party/OP-4'), Hi-Tech Water Solutions Pvt. Ltd. (hereinafter, 'Opposite Party/OP-5') and GA Infra Pvt. Ltd. (hereinafter, 'Opposite Party/OP-6') (collectively referred to as Opposite Parties/OPs).

Facts and allegations as stated in the Information

2. The Informant is a non-governmental organization ('NGO') and a not-for-profit organization, established for a charitable purpose.

3. The OPs execute small, medium and large projects for water and water waste management facilities in the industrial, municipal and infrastructure segments.

4. Relying upon the Comptroller and Auditor General of India (C&AG) Report No. 3, 2016 dated 04.04.2016 ('Report'), the Informant has alleged cartelization/bid rigging by the OPs in certain tenders for the provision, installation and commissioning of Reverse Osmosis (RO) plants in certain districts in the State of Rajasthan.

5. The chronology of events emerging from the Report and relied upon by the Informant is as follows —

16.01.2013 Chief Engineer ('CE'), Rural, Public Health Engineering Department ('PHED') Jaipur invited tender for installation and commissioning of 35 RO plants for three regions — Bharatpur, Jaipur and Jodhpur on rate contract basis (Tender No. 1)

06.03.2013 While the above work was in progress, the Government of Rajasthan decided to install 1000 more RO plants in rural areas (Tender No. 2)

26.04.2013 CE, Rural PHED, Jaipur, invited tenders for installation and commissioning of 1000 more RO plants for five regions namely Jodhpur: 370 (NIT 1,2,3); Bharatpur: 330 (NIT 4 and 5); Ajmer: 140 (NIT 6); Jaipur: 120 (NIT 7); and Udaipur: 40 (NIT 8)

April–May 2013 Tender No. 1 was awarded to OP-2 (15 plants) and OP-3 (20 plants)

24.08.2013–11.09.2013 On receipt of final approval from the Finance Committee (FC), work orders under Tender No. 2 were issued to six successful bidders (6 OPs) :

ACE Jodhpur : OP-2 160 plants

(370 plants) OP-3 80 plants

OP-6 130 plants

ACE Bharatpur : OP-4 150 plants

(330 plants) OP-5 180 plants

ACE Ajmer : OP-1 140 plants

(140 plants)

ACE Jaipur : OP-5 120 plants

(120 plants)

ACE Udaipur : OP-2 40 plants

(40 plants)

6. Based on the Report, the Informant further stated that the contract, with respect to Tender No. 1, involved seven years of operation and maintenance ('O&M') after installation, with a payment schedule of 65% on installation/ commissioning of the plant and the remaining 35% during the O&M period @5% per year. The work under Tender No. 1 was awarded to OP-2 and OP-3 at ₹13.39 lakhs per plant (for Total Dissolved Solid (TDS) upto 5000 ppm) and ₹13.73 lakhs per plant (TDS more than 5000 ppm).

7. Tender No. 2 was issued on similar terms and conditions as Tender No. 1. However, the rates received by CE were high, and after considering the approved base rates for similar work and adding the impact of appreciation in US Dollars for imported parts, payment terms (65/ 35%), additional scope of IEC, logistic costs etc., the same was submitted to the Standing Negotiation Committee ('SNC') for consideration/ negotiation.

8. The SNC observed in July 2013 that the lowest quoted rates under all five regions were much higher. It was further observed that work orders for similar works were awarded in respect of Tender No. 1, and these firms had also quoted very high rates in Tender No. 2. The representatives of these contractors *clarified that Tender No. 1 was a small pilot work and first of its kind in the State of Rajasthan (based on the Punjab model). It was stated that, at the time of quoting for Tender No. 1, they could not make any realistic assessments of prevailing terms and conditions and thus, quoted a lower price for entry into the State. However, while undertaking the actual work on the project, the situation in the State was found to be quite different than in Punjab in terms of distances, scattered population, availability of skilled labour, means of transport, logistics and lesser public interest, and it was stated that the rates quoted by them earlier should not be construed as the basis for the quotes made by them in Tender No. 2.*

9. During negotiation of Tender No. 2, all the bidders initially expressed their inability to reduce rates, as they claimed that about 80% of the parts for the RO plant were imported, and the increase in prices was caused due to the devaluation of the rupee. They further stated that the terrain was difficult and technically skilled labour was not available locally, and that payment conditions provided for 65% payment on installation and the remaining @5% in seven years of the O&M period. However, they finally agreed to slightly reduce their rates/prices.

10. The SNC compared the rates with the justified rates proposed by CE (Rural) and found them to be a little higher than the justified rates, and recommended them to the FC of

Rajasthan Water Supply & Sewerage Management Board ('RWSSMB') for approval. After receiving the approval from the FC, work orders were issued to the OPs with respect to Tender No. 2.

11. C&AG in its Report drew a comparison between approved rates in April 2013 of Tender No. 1 and approved rates in August 2013 of Tender No. 2, wherein it was observed that the rates approved for each RO plant in Tender No. 2 were higher by ₹5.14 lakh to ₹5.87 lakh compared to the rates approved in Tender No. 1, and therefore, the action of the Department was not justified. It was also noticed that 'the rates quoted by all the bidders and reasons explained by them for quoting higher rates were almost similar, indicating some cartelization among the bidders.' Further, the C&AG also noted that most of the parts used in RO plants were manufactured in India, and the RO plants were manufactured by the contractor himself or by a consortium of service providers. The rates of RO plants were 38%–43% higher while the rupee had devalued by only 11% during January 2013 to July 2013, resulting in a loss to the government exchequer to the tune of Rs. 52.95 crores.

12. Based on the above facts, the Informant has alleged collusion amongst the OPs in directly or indirectly determining the bid price in respect of Tender No. 2 for the installation of 1000 RO plants in five regions under the provisions of Section

3(3)(d) of the Act and, inter alia, sought the imposition of a penalty on the OPs.

13. The Commission considered the present Information in its ordinary meeting held on 17.08.2021 and decided to pass an appropriate order in due course.

14. The Commission perused the information and documents forming part of the record. At the outset, the Commission noted that the information filed pertains to alleged cartel in Tender No. 2. Based on the facts and circumstances of the matter and the material available on record, the Commission observes that the allegations raised by the Informant against the OPs in the instant matter do not prima facie disclose the existence of any concerted action on the part of the OPs in submitting the bids in Tender No. 2.

15. Accordingly, the Commission is of the opinion that there exists no prima facie case, and the Information filed is directed to be closed forthwith against the OPs under Section 26(2) of the Act.

16. The Secretary is directed to communicate to the Informant accordingly."

On examination of the impugned order it is evident from para 11 that the CCI has noted that in the CAG Report there was observation that the rates quoted by the bidders and reasons explained by them for quoting higher rates were almost similar, **indicating some cartelization among the bidders**.

However, in para 14 of the impugned order, of course, learned CCI has not dealt with the said report in detail but it has been recorded that the circumstances does not show prima facie existence of any concerted action on the part of the Ops in submitting the bids in Tender No.2. Of course, no detailed reasons has been given by the Learned CCI but order indicates that there was no concerted action on the part of the Ops. Besides this the CCI in its order has discussed each and every point as to how tenders were floated and rates were quoted by the participants. It is true that in para 14 detailed reasons has not been assigned but at the same time we are of the opinion that if reasons and facts discussed in the impugned order is examined on totality, not in isolation, there is no point to consider that no detailed reason has been assigned in para 14 of the impugned order.

So far as the Hon'ble Supreme Court Judgement SAIL (Supra) is concerned on which heavy reliance has been placed by the learned counsel for the appellant, before the Hon'ble Supreme Court the main question was as to whether an appeal can be filed by the informant against an order passed under Section 26(1) of the Act and can CCI proceed with the enquiry/direct investigation without recording detail reasons that prima facie case exists. In that context the Hon'ble Supreme Court in para 20 has formulated certain issues. Para 20 of the Judgement of the Hon'ble Supreme Court is reproduced below:

> *"20.In order to examine the merit or otherwise of the contentions raised by the respective parties, it will be appropriate for us to formulate the following points for determination:--*

1) Whether the directions passed by the Commission in exercise of its powers under Section 26(1) of the Act forming a prima facie opinion would be appealable in terms of Section 53A(1) of the Act?

2) What is the ambit and scope of power vested with the Commission under Section 26(1) of the Act and whether the parties, including the informant or the affected party, are entitled to notice or hearing, as a matter of right, at the preliminary stage of formulating an opinion as to the existence of the prima facie case?

3) Whether the Commission would be a necessary, or at least a proper, party in the proceedings before the Tribunal in an appeal preferred by any party?

4) At what stage and in what manner the Commission can exercise powers vested in it under Section 33 of the Act to pass temporary restraint orders?

5) Whether it is obligatory for the Commission to record reasons for formation of a prima facie opinion in terms of Section 26(1) of the Act?

6) What directions, if any, need to be issued by the Court to ensure proper compliance in regard to procedural requirements while keeping in mind the scheme of the Act and the legislative intent? Also to ensure that the procedural intricacies do not hamper in achieving the object of the Act, i.e., free market and competition."

In para 20 Clause (5) the question was as to whether it is obligatory for the CCI to record reasons for formulation of prima facie opinion in terms of Section 26(1) of the Act. Section 26(1) of the Act prescribes for proceeding further on recording a prima facie case for directing investigation by Director General. Moreover, since heavy reliance has been placed on para 28 of the Judgement in the SAIL case (Supra) it is apt to reproduce the same:-

"28.As already noticed, in exercise of its powers, the Commission is expected to form its opinion as to the existence of a prima facie case for contravention of certain provisions of the Act and then pass a direction to the Director General to cause an investigation into the matter. These proceedings are initiated by the intimation or reference received by the Commission in any of the manners specified under Section 19 of the Act. At the very threshold, the Commission is to exercise its powers in passing the direction for investigation; or where it finds that there exists no prima facie case justifying passing of such a direction to the Director General, it can close the matter and/or pass such orders as it may deem fit and proper. In other words, the order passed by the Commission

under Section 26(2) is a final order as it puts an end to the proceedings initiated upon receiving the information in one of the specified modes. This order has been specifically made appealable under Section 53A of the Act. In contradistinction, the direction under Section 26(1) after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter. Issuance of such a direction, at the face of it, is an administrative direction to one of its own wings departmentally and is without entering upon any adjudicatory process. It does not effectively determine any right or obligation of the parties to the lis. Closure of the case causes determination of rights and affects a party, i.e. the informant; resultantly, the said party has a right to appeal against such closure of case under Section 26(2) of the Act. On the other hand, mere direction for investigation to one of the wings of the Commission is akin to a departmental proceeding which does not entail civil consequences for any person, particularly, in light of the strict confidentiality that is expected to be maintained by the Commission in terms of Section 57 of the Act and Regulation 35 of the Regulations"

On perusal of the aforesaid observations of the Hon'ble Supreme Court there can not be any dispute that the said issue and observation was in relation to an order passed under Section 26(1) of the Act. Accordingly we are of the opinion that the appellant may not get any favour in view of distinct issue in the SAIL Case (Supra).

On going through the impugned order we are of the opinion that Learned CCI has discussed sufficient reasons and considered the same for closing the Information Petition. We do not fine any apparent error in the impugned order warranting interference.

The Appeal stands dismissed.

(Justice Rakesh Kumar)
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member (Technical)

Bm/gc