NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Competition Appeal (AT) No. 34 of 2022 &
IA Nos. 2607, 2608 of 2022

IN THE MATTER OF:

Toyfort ...**Appellant**

Versus

Competition Commission of India ...**Respondent**

Present

For Appellant	:	**Mr. S. Chandra, Mr. Sankalp Sharma, Advocates.**
For Respondent	:	**Mr. Vaibhav Gaggar, Mr. Mrityunjay Manchanda, Mr. Prerak Khurana, Ms. Aditi Sinha, Ms. Kokila Kumar, Advocates for R-1/Commission.**

J U D G E M E N T
(2nd July, 2024)

INDEVAR PANDEY, MEMBER (TECHNICAL)

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

Brief facts of the case

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

Cont’d…/

and Tender 2018_AGRUP_212591_1 (Bareilly) dated 18.06.2018 ('Tender No. 2"), invited for the soil sample testing by the Department of Agriculture, Government of Uttar Pradesh.

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

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

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

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

5. It was further alleged that there were numerous red flags in the documents submitted by the aforesaid entities for Tender No. 1 and Tender No. 2, but the tender inviting authorities preferred to ignore these aspects. 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 tender for soil testing for the regions of Bareilly and Moradabad, and Austere Systems was awarded tenders for the regions of Jhansi, Saharanpur and Meerut as a result of such collusive bidding. It was alleged in the complaint that the entities referred above, rigged the tenders of soil testing in the state of Uttar Pradesh by indulging in cover bidding, bid rotation and collusive bidding.

6. The commission considered the complaint and obtained documents like audit report, experience certificates and term deposit receipts submitted by relevant parties. Based on the analysis of records the commission was of the prima facie view that despite being competitors, these entities appear to have manipulated the process of bidding in the soil testing tenders in state of UP by indulging in bid-rigging, in contravention of provisions of Section 3 (1) r/w Section 3 (3) (d) of the Act. Accordingly, the commission passed an order dated 30.01.2020 under Section 26 (1) of the Act directing the Director General (DG) to cause an investigation and submit the investigation report in the matter. The commission also observed that if the DG came across anti-competitive conduct of any other

entity in addition to those mentioned in the information in the information, the DG would be at a liberty to investigate the same. The DG was also directed to investigate the role of the persons/officers who were in charge of and responsible for the conduct of the businesses of the parties at the time the alleged contravention was committed, as well as persons/officers with whose consent or connivance the alleged contravention was committed, in terms of the provisions of section 48 of the Act. The DG, pursuant to the directions of the Commission, investigated the matter, and after seeking due extensions of time, submitted the investigation Report dated 08.04.2021.

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

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

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

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

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

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

(vi) The investigation also found that Austere Systems, Fimo Info Solutions and M/s Toyfort, through cartelisation and collusion, rigged the bids of 2017 for Meerut and Jhansi divisions. Austere Systems and Fimo Info Solutions had prior business relationships and inter se shareholdings in each other. The investigation revealed that these three entities had no prior experience of soil testing before they submitted bids for the Jhansi and Meerut divisions for the year

2017. As per the DG, these entities did not even fulfil the terms and conditions of the said tender.

(vii) Fimo Info Solutions and M/s Toyfort never purchased any soil testing machine or established any soil testing lab or any other infrastructure required for soil testing. The investigation also brought out that the proprietor of M/s Toyfort had submitted bids on behalf of Austere Systems in the Jhansi tender of 2017. The EMD in respect of Austere Systems and M/s Toyfort was submitted by a Director of the rival bidder, Fimo Info Solutions from her husband's bank accounts. However, none of the Directors/Proprietors could submit any explanation for their conduct, which reaffirmed that, through collusion and concerted action, the said entities created a façade of competition and rigged bids in the 2017 Meerut and Jhansi soil testing tenders, with the common objective of ensuring that Austere Systems wins the said tenders.

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

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

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

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

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

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

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

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

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

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

8. The commission considered the investigation report of the DG in its meeting on 08.06.2021 and noted the findings that Yash Solutions, M/s Satish Kumar, M/s Siddhi Vinayak, M/s Saraswati Sales and Austere System along with other entities namely, M/s Delicacy Continental, Fimo Infosolutions, M/s Toyfort and M/s Chaitanya Business Outsourcing indulged in cartelisation and bid rigging in the soil testing tenders floated by Government of U.P.

9. Thereafter, commission decided to add M/s Delicacy Continental, Fimo Info solutions, M/s Toyfort and M/s Chaitanya Business Outsourcing as parties to the proceedings and they were arrayed as Opposite Party (OP) Nos. 6, 7, 8 & 9 respectively. The commission, thereafter forwarded a copy of investigation report to electronic form to all the 9 OPs mentioned above and the persons/ individuals of the opposite parties identified by the DG as being responsible under Section 48 of the Act for filing their respective objections/ suggestions thereto latest by 16.07.2021. The Commission also directed the Opposite Parties to furnish copies of their audited balance

sheets and profit & loss accounts/turnover for the last three financial years, i.e., 2018-19, 2019-20 and 2020-21 latest by 16.07.2021. The persons/individuals named above were also directed to Ille their income details including copies of the income tax returns for the last 3 financial years, i.e., 2018-19, 2019-20 and 2020-21. The Commission further decided to hear the parties on the Investigation Report on 05.08.2021.

10. M/s Toyfort in its submission to the commission has averred that:

> "*the DG failed to appreciate that if neither the prices are getting jointly fixed nor is the output is being jointly controlled, nor the market consciously shared, nor any bid being rigged through the practice, then M/s Toyfort cannot be said to be a member of a cartel hence Section 3(3)(c) and (d) read with section 3(1) of the Act are not attracted in so far as M/s Toyfort is concerned. In the tender for the 2017 Meerut and Jhansi divisions, M/s Toyfort remained unsuccessful in view of tough competition and limited resources in terms of both financial and technical expertise. M/s Toyfort, in its own business wisdom, decided not to further engage/ bid in other tenders which might have been floated by the Department of Agriculture, Government of Uttar Pradesh. Merely because M/s Toyfort participated in two tenders and did not participate in other tenders, it cannot be construed that M/s Toyfort was part of an alleged cartel, if any. It has been submitted that the DG is not able to demonstrate with any cogent evidence, either directly/ indirectly, any coordination between M/s Toyfort and other bidders in any other divisions in U. P. Merely because Austere Systems, M/s Toyfort and Fimo Info Solutions have family relations, that does not ipso facto disqualify them to carry their own respective businesses independently and place bid separately. The finding of investigation that the proprietor of M/s Toyfort has submitted bids on behalf of rival bidder*

Austere Systems for the tender of 2017 in Jhansi and the fact that EMD in respect of Austere Systems and M/s Toyfort in the tender of 2017 for Meerut was submitted by a Director of a rival bidder, Fimo Info Solutions from her husband's account is highly erroneous and misleading. It has been submitted that EMD with respect to M/s Toyfort was prepared by Shikhir Gupta (son of Mr. Jai Kumar Gupta, the brother in law of Mr. Suresh Kumar Gupta, proprietor of M/s Toyfort). Merely because of the fact that the EMD was prepared by a close relative does not mean that there was any coordination or connivance between Toyfort and other competitors. As for M/s Toyfort, Mr. Suresh Kumar Gupta who is the sole proprietor of the concern, has been solely responsible for its day-to-day functioning."

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

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

Issue 2: If the Opposite Parties are found to have contravened the provisions of Sections 3(3)(c) and 3(3)(d) read with Section 3(1) of the Act, then who are the persons in charge thereof and responsible for the conduct of business of the respective enterprises under Section 48 of the Act?"

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

> *"For the sake of brevity, the analysis of the first issue in the present case is being carried out by grouping the Opposite Parties in sets, as under:*
>
> *a) Set 1: Yash Solutions, M/s Saraswati Sales, M/s Satish Kumar, M/s Siddhi Vinayak and Chaitanya Business Outsourcing,*
>
> *b) Set 2: Austere Systems, M/s Toyfort, Fimo Info Solutions and Delicacy Continental, and*
>
> *c) Set 3: Austere Systems and Yash Solutions."*

13. Based on the evidence on record, the DG in his investigation had concluded that the bidders, namely, Austere Systems, M/s Toyfort and M/s Fimo Info Solutions, were related concerns and also had an *inter se* business relationship prior to the issuance of soil testing tenders of 2017.

14. Austere Systems, in its objections to the Investigation Report has, *inter-alia*, stated that the DG erred in observing that Austere Systems has contravened the provisions of Section 3(3)(c) and 3(3)(d) read with Section 3(1) of the Act. It has been stated that neither were the prices were getting jointly fixed nor was the output jointly controlled, nor the market being consciously shared, nor any bid being rigged through the practice, and accordingly provisions of Section 3 of the Act are not attracted. M/s Austere systems in their submissions stated that the DG has only tried to establish the case simply on account of the fact that Austere Systems, M/s Toyfort and Fimo Info Solutions are connected with each other through family relations. It has been submitted that the said three Opposite Parties are acting independently of each other for the last twenty

years, and merely because they are related does not *ipso facto* disqualify them from carrying their businesses independently.

15. M/s Toyfort, in their objections/ suggestions, have made submissions, which are similar to those of Austere Systems as discussed in the paragraph above. It has averred that, in relation to the 2017 soil testing tenders for Meerut and Jhansi divisions, it remained unsuccessful in view of tough competition and limited resources in terms of both financial and technical expertise, and in its own business wisdom, decided to not further engage in other tenders, which might have been floated by different divisions of the Department of Agriculture, Government of Uttar Pradesh. It has also stated, that merely because it participated in two tenders and did not participate in other tenders would in itself not be presumed that it was part of the cartel.

16. The commission noted that as per the statement of Mr. Rahul Teni, Director of Austere Systems, Austere Systems is engaged in software development, onshore development, staffing, augmentation, technology consulting, business consulting, data entry, soil analysis and automation. The shareholding pattern of Austere Systems is as under:

S.No.	Name	% Shareholding
1.	Mr. Rahul Gajanan Teni	40
2.	Mr. Shikhir Gupta	30
3.	Mr. Piyush Gupta	10
4.	Mr. Suresh Kumar Gupta	20
	Total	100

17. Apart from Mr. Rahul Teni, who manages the business as well as the technological aspect of the company, Mr. Piyush Gupta is the other Director who looks after the financial matters of the company. Mr. Piyush Gupta is the son of Mr. Suresh Gupta (sole proprietor of M/s Toyfort) who holds 20 percent shareholding in the company and is also stated to be a strategic investor and had purchased a second-hand soil testing machine in 2017.

18. The commission further noted that Fimo Info Solutions and M/s Toyfort had also bid in the Meerut and Jhansi tenders of 2017. As stated above, Fimo Info Solutions and M/s Toyfort had no experience in soil testing work. However, Fimo Info Solutions and M/s Toyfort could not win any of the aforesaid tenders.

19. The Commission in its finding noted that M/s Toyfort is a proprietorship concern and is engaged in the business of sale of toys, stationery items, etc. Mr. Suresh Kumar Gupta is the proprietor of M/s Toyfort and is stated to be responsible for all the decisions of the said concern. M/s Toyfort had no experience of soil testing work when the bids were submitted in the soil testing tenders issued by the Meerut and Jhansi divisions in 2017.

20. The commission further noted that Mr. Suresh Kumar Gupta, Proprietor of M/s Toyfort in his statement before the DG, admitted that his concern had no experience of soil testing work and did not fulfil the eligibility for said tenders.

21. The Commission further noted that Mr. Suresh Kumar Gupta, proprietor of M/s Toyfort, admitted in his statement before the DG that he had submitted bids in the 2017 soil testing tenders for Meerut and Jhansi divisions on the suggestion of his employees. The Commission also noted that Mr. Piyush Gupta, son of Mr. Suresh Kumar Gupta and Director of Austere Systems, had submitted the bids for M/s Toyfort. Mr. Suresh Kumar Gupta, on being questioned by the DG as to why Mr. Piyush Gupta submitted bids for M/s Toyfort when Mr. Suresh Kumar Gupta was the proprietor, he replied "I do not know". Further, Mr. Rahul Teni, on being questioned about the same, had no explanation in this regard. The Commission also took cognizance of the finding of the investigation, that the bid documents of Austere Systems in the soil testing tenders of 2017 for the Jhansi division were signed and submitted by Mr. Suresh Kumar Gupta. In his statement recorded before the DG, Mr. Suresh Kumar Gupta feigned ignorance as to how he submitted the bids of his rival bidder. In his statement, he stated that he had no relationship with Austere Systems. However, he accepted that he and his son, Mr. Piyush Gupta were shareholders in Austere Systems and had a combined shareholding of 30 percent in Austere Systems. Further, on being asked why and how the sole proprietor of M/s Toyfort submitted a bid on behalf of Austere Systems for the said soil testing tender, Mr. Rahul Teni did not have any answer.

22. The investigation also revealed that Austere Systems had formed a consortium with M/s Toyfort in which M/s Toyfort had undertaken printing of soil health cards for Austere Systems in 2018. For the said

purpose, an MOU between them was also entered into. The said MOU mentioned that M/s Toyfort and Austere Systems were sister concerns. Further, Mr. Rahul Teni as well as Mr. Suresh Kumar Gupta could not provide any justification as to why bids were submitted by related/ sister concerns which had no experience of soil testing work and did not even qualify the terms and conditions of the 2017 Meerut and Jhansi tenders.

23. The Commission also noted that Mr. Suresh Kumar Gupta as well as Mr. Jai Kumar Gupta could not submit any explanation regarding the submission of EMD on behalf of their entities from the bank account of Mr. Shikhir Gupta, son of Mr. Jai Kumar Gupta, Director of Fimo Info Solutions. Further, neither persons could justify how Fimo Info Solutions was registered at M/s Toyfort's address.

24. In view of their findings, the Commission took the view that three bidders, namely, Austere Systems, M/s Toyfort and Fimo Info Solutions, which were related concerns through family as well as business relationships, made concerted efforts and rigged the bids in 2017 soil testing tenders for Meerut and Jhansi divisions, with a common objective to ensure that Austere Systems wins those tenders. The Commission agreed with the DG's finding, that the bids submitted by M/s Toyfort and Fimo Info Solutions were not submitted with the intention to compete and win but to create a façade of competition.

Issue 2: If the Opposite Parties are found to have contravened the provisions of Sections 3(3)(c) and 3(3)(d) read with Section 3(1) of the Act, who are the persons in charge thereof and responsible for the

conduct of business of the respective enterprises under Section 48 of the Act?

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

> "(i)
>
> .
>
> .
>
> (vii) Mr. Suresh Kumar Gupta, Proprietor (M/s Toyfort)"

26. The Commission noted that Mr. Suresh Kumar Gupta, Proprietor of M/s Toyfort, manages the entire business affairs of his firm and is responsible for all the decisions. It noted that Mr. Suresh Kumar Gupta had no experience of soil testing work and did not even fulfil the terms and conditions for eligibility in the tenders in question. Further, he could not give an explanation for the submission of bids by his firm in the 2017 soil testing tenders of Meerut and Jhansi divisions. The Commission also notes that Mr. Suresh Kumar Gupta could not submit any explanation as to why EMD in the 2017 soil testing tender of Meerut division in respect for his firm was submitted by Mr. Shikhir Gupta, son of Mr. Jai Kumar Gupta, Director, Fimo Info Solutions, from his own bank account, in the said

tender. The Commission also notes that Mr. Suresh Kumar Gupta submitted false replies and attempted to hide his and his son's shareholding in Austere Systems, which was the beneficiary of both Jhansi and Meerut divisions soil testing tenders of 2017. Further, Mr. Suresh Kumar Gupta admitted to submitting bids of rival bidder Austere Systems in the 2017 soil testing tender of Jhansi division when his own concern was also a bidder in the said tender. All the evidence points to the active role played by Mr. Suresh Kumar Gupta in manipulating the bid process in contravention of the provisions of the Act, and he is thus liable under Section 48 of the Act.

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

tenders, which is in violation of Section 3(1) read with Sections 3(3)(c) and 3(3)(d) of the Act. Therefore, the Commission found the identified individuals of the Opposite Parties liable in terms of the provisions of Section 48(1) and 48(2) of the Act.

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

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

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

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

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

33. On the issue of penalty, most of the Opposite Parties in their objections to the Investigation Report and subsequent submissions have averred, referring the decision of the Hon'ble Apex Court in the case of "***Excel Crop Care Limited vs. Competition Commission of India and***

others" [(2017) 8 SCC 47], that the turnover to be calculated under Section 27 of the Act has to be the relevant turnover, which relates to the product in question, in respect whereof, the provisions of the Act are found to be contravened. The Opposite Parties have averred that, as that they could not derive any income from the soil testing tenders for never being involved in the business of soil testing, zero penalty would naturally arise out of nil income and nil turnover. Some of the Opposite Parties have prayed for mitigation of penalty on the grounds of being Micro Small and Medium Enterprises (MSME).

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

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

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

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

36. The Commission further deemed it appropriate and necessary to impose penalty on the individuals identified above for being liable under Section 48 of the Act at the rate of 5 percent of their average income of the

financial years 2017-18, 2018-19 and 2019-20 filed with the Commission. 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 was imposed on their respective proprietors.

Submission of Appellant

37. The submission of the appellant is that the Commission by way of the impugned judgment has held the Appellant along with other parties to be guilty of contravening Section 3(1) r/w Sections 3(3)(c) and 3(3)(d) of the Act in consonance with the opposite parties before it in Suo Motu Case No. 01 of 2020.

38. Commission, taking cognizance of a general complaint dated 07.08.2018 alleging bid- rigging in tenders invited by the Department of Agriculture, Government of Uttar Pradesh for soil sample testing had directed the Director General ('DG') to initiate an investigation and submit an investigation report which was submitted to the Commission on 08.04.2021.

39. The DG in its investigation focused on nine tenders as under:

Year- 2017		
1.	Moradabad	Yash Solutions on L-1 Basis
2.	Bareilly	Yash Solutions on L-1 Basis
3.	Jhansi	Austere Systems
4.	Meerut	Austere Systems
Year- 2018		
1.	Moradabad	Yash Solutions
2.	Bareilly	Yash Solutions
3.	Saharanpur	Austere Systems
4.	Meerut	Austere Systems
5.	Aligarh	Yash Solutions

40. The Appellant submits that he had participated in only two tenders, namely Meerut, 2017 and Jhansi 2017, and is not a relevant entity in the remaining 7 tenders. The DG, in the course of its investigation narrowed on and primarily based its findings on the familial relations connecting the parties. The Commission, while adjudicating the same, divided the parties into two sets and the Appellant herein was put in set-2 along with Austere Systems, Fimo Info Solutions and Delicacy Continental and concluded that the parties were related concerned through family and business relationships and that the parties had, through concerted efforts, rigged the bids in 2017 for Meerut and Jhansi Division with a common objective to ensure that Austere Systems won the two tenders.

41. The appellant further submits that the Commission failed to appreciate that the investigation did not conclusively prave or indicate exactly how the Appellants participation contributed to hid rigging and further failed to appreciate that the bids of the Appellant were nothing but commercial misadventure. The appellant further submitted that the investigation conducted by the DG failed to demonstrate how exactly the parties under investigation colluded to ensure bid rigging for the tenders. The DG, throughout its investigations focused on the familial and business links which tie the parties together, however, the DG never showed how the parties colluded with each other to rig the bids. The DG's findings never extended beyond the inter-party links to demonstrate how the participation of the parties led to the bids for the tenders to sway in favour of any one particular bidder. Further, for the Meerut Division there was one more

bidder not related to the entities in Set-2 however, such entity was not investigated by the DG and it's existence does not find mention in the investigation report and the impugned order. This is a classic case of unreasonable classification.

42. The appellant further submitted that the DG failed to show how the Appellant's participation in the Meerut and Jhansi Division bids held in 2017 led to the bid being swayed in favour of Austere Systems. It is further submitted that the two bids did not have a limit on the maximum number of participants who could participate in the bids and the Appellant's bid did not lead to the winner of the bids being declared as L-1. It is further important to note that the Appellant, as has been categorically noted by the DG, was not even qualified to participate in the bid and the entire bidding process by the Appellants was an exercise of commercial misadventure which cannot be construed as bid rigging.

43. That, the Commission did not pass any finding on how Section 19(3) of the act was satisfied to show appreciable adverse effect. The appellant submitted that the Commission, while determining whether an agreement has an appreciable adverse effect on competition under section 3, is required to give due regard to all factors contained in Section 19(3) of the Act, however, in the present case, none of the factors enumerated under Section 19 (3) of the Act are even remotely made out and the same is a major flaw that plagues the impugned judgement.

44. The appellant submitted that the Commission failed to appreciate that the investigation, while noting that the parties were related through

familial and business ties, was unable to demonstrate a breach of Section 3 of the Act. It is an admitted fact that the Appellant and the other parties that find mention in Set-2 in the impugned order are parties that are related by familial and blood ties, however, mere presence of ties, whether they be familial or business, is ground for the Commission to find a plausible basis of concluding, in affirmative, the presence of bid rigging in the tenders. It is further submitted that the Commission's appreciation of the MoU dated 19.02.2018 was flawed, as the same was executed between the Appellant and Austere Systems only after the 2017 bids placed by the Appellant had been finalised and awarded. Furthermore, the MoU does not indicate in any manner whatsoever, any intention on part of the Appellant to be a part of any consortium or act in any manner which could be considered anti-competitive in contravention of the Act. It is highlighted that such MoUs are a common practice across industries with two entities tying up with each other to learn about and enter into new areas of business, as was the case here. Any contrary understanding of the MoU goes directly against the terms of the MoU and is accordingly, flawed.

45. It is submitted that barring the MoU dated 19.02.2018, no document has been adduced by the DG before the Commission that may fall within the scope of an agreement between the parties that would enable bid rigging under Section 3(3) of the Act and an order passed in absence of the same is flawed and illegal and liable to be set aside. Without prejudice to the above it is submitted that the monetary penalty imposed by the Commission is not in accordance with the law. The Hon'ble Supreme Court

in Excel Crop Care Limited v. Competition Commission of India and Another (supra), laid down 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. As per the certificate annexed by the Appellant as Annexure A-11, the average annual turnover from the relevant business stream is Rs. 7,60,784/-, Since a higher sum stands deposited already, the amount paid in excess may kindly be refunded to the Appellant.

Submission of Respondent

46. The counsel for Commission submits that the captioned appeal is part of the batch of appeals ("Appeals") arising out of the Commission order dated 04.04.2022 ("Impugned Order"), wherein it was held that the three bidders, namely, Austere Systems, Toyfort ("Appellant") and Fimo Info Solutions Private Limited ("Fimo"), which were related concerns through family as well as business relationships, made concerted efforts and rigged the bids in 2017 soil testing tenders for Meerut and Jhansi divisions, with a common objective to ensure that Austere Systems wins those tenders. The Commission further held that the bids submitted by the Appellant and Fimo were not submitted with the intention to compete and win, but to create a façade of competition.

47. The cause of action arose from a general complaint dated 07.08.2018 received by the Commission alleging bid- rigging in the tenders invited by the Department of Agriculture, Government of Uttar Pradesh ("Department of Agriculture") for soil sample testing.

48. The DG vide the Investigation Report dated 09.04.2021 ("DG Report") concluded that the Appellant contravened Sections 3(1) read with 3(3)(d) of the Competition Act, 2002 ("Act"), inter alia

a. No experience in soil testing
b. Common Shareholding between the Appellant and Austere Systems
c. Earnest Money Deposit of the Appellant was submitted by the Director of Fimo
d. Same registered address for Fimo (a rival bidder) and the Appellant

49. The counsel submitted that the Appellant is a proprietorship concern engaged in the business of sale of toys, stationery items etc. Mr. Suresh Kumar Gupta is the proprietor of the Appellant, and the Appellant has no experience of soil testing work, when the bids were submitted for Meerut and Jhansi divisions in the year 2017. Mr. Suresh Kumar Gupta also admitted before the DG that the Appellant has no experience of soil testing and did not fulfil the eligibility for the said tenders.

50. It was further submitted that Austere Systems had formed a consortium with the Appellant in which the Appellant had undertaken printing of soil health cards for Austere Systems in 2018. To this effect, a Memorandum of Understanding dated 19.02.2016 was also signed between them. Even the directors could not provide any explanation or justification as to why the sister concerns, with no soil testing work and without meeting the eligibility criteria stated in the tender documents, had submitted their bids.

51. The counsel highlighted the common shareholding between the Appellant and Austere System:

a) Mr. Suresh Kumar Gupta had admitted that the Appellant had submitted the bid on the suggestion of his employees. Mr. Piyush Gupta, son of Mr. Suresh Kumar Gupta and Director of Austere Systems, had submitted bids for the Appellant. Further, the bid documents for Austere Systems in the soil testing for Jhansi division in the year 2017 were signed and submitted by Mr. Suresh Kumar Gupta. Upon being questioned, his answer was that he does not remember why.

b) While he stated that he did not have any relationship with Austere Systems, Mr. Suresh Kumar Gupta accepted that he and his son, Mr. Piyush Gupta were shareholders of Austere Systems with a combined shareholding of 30%. Moreover, Mr. Suresh Kumar Gupta could not explain how the bids for the Appellant were submitted by his son, Mr. Piyush Gupta, when he is the proprietor.

52. The conduct of the appellant is also seen by the act of Earnest Money Deposit of the Appellant being submitted by the Director of Fimo Although Mr. Suresh Kumar Gupta is the proprietor of the Appellant, as per the reply given by ICICI Bank, the Demand Draft for the Appellant was made by Mr. Shikhir Gupta, from his own account.

53. Fimo Info Solutions (a rival bidder) has the same registered address as the Appellant, which could not be justified/explained by their directors.

54. Even though, the Appellant is a sister concern of Austere Systems i.e, the winning entity, Mr. Suresh Kumar Gupta was unable to explain as to why the Appellant and Austere Systems submitted separate bids in the 2017 tenders, when both were related concerns.

55. The counsel submitted that the Appellant had placed reliance on the decision of the Hon'ble Supreme Court in Excel Crop Care Limited (supra) and submitted that since it derived no income from the tenders in question, therefore zero penalty would arise, to which, the Commission had rightly noted that there is no merit in this submission and no narrow interpretation of the relevant turnover can be taken, as contended by the Appellants. In support, the Commission had placed reliance on its decision dated 03.02.2020 in Suo Moto Case No. 2 of 2020". Further, Commission considered both aggravating and mitigating factors while imposing the penalty at 5% on the Appellants, as the penalty permissible under section 27(b) is a maximum of 10% of the turnover and further, for violations under section 3 of the Act, <u>a penalty of up to three times of its profits for each year of the continuance of such agreement or ten percent whichever is higher.</u>

56. The counsel further submitted that in cases of cartelisation, if the relevant turnover is to be considered qua the unlawful monies generated from act of cartelisation, which in the present case would be zero, then the entire purpose of the Act would be defeated.

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

Analysis of evidence and findings:

58. We have considered the evidence on record and heard the counsels in detail. There are two key players in the above matter and their statement before the DG gives a fairly clear idea about relationship between the appellant and Austere Systems. These are Mr. Suresh Kumar Gupta, Proprietor of M/s Toyfort and Shri Rahul Teni Director of Austere Systems. We examine the relevant portion of their statement before the DG.

59. Extracts from the statement of Mr. Suresh Kumar Gupta, Proprietor of M/s Toyfort, recorded on 02.02.2021.

> *Q.3 What is your role and responsibilities in your firm M's TOY FORT?*
>
> *A.3 I manage the entire affairs of the company and I am responsible for all the decisions with regards to the affairs of the Firm.*
>
> *Q.6. Has your Firm ever bid in any tenders for Soil Testing floated by Govt. of UP? If yes, please provide details.*

A.6. Yes, my company had bid in soil testing tenders floated by Government of U.P.

Q.7. Please explain your understanding of Government's Soil testing Program?

A.7. I have no understanding of Government's soil testing program

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

A. 8. I have no understanding of soil testing work.

Q.9. Did you or your firm Toyfort had any experience in soil testing work when bids were submitted in the soil testing tenders issued by Meerut & Jhansi divisions of the Agriculture department, Uttar Pradesh Government in the year 2017?

A.9. No, my firm Toyfort had no experience of soil testing work when bids were submitted in the soil testing tenders issued by Meerut & Jhansi divisions of the Agriculture department, Uttar Pradesh Government in the year 2017

Q.10. I am showing you the GST registration of your firm Toyfort (Exhibit 1), as per which your firm is engaged in the business of Toys, stationery items, articles & equipment for general exercise etc., however no mention has been made regarding soil testing work. Why?

A 10. As my firm did not have any soil testing work experience hence, no mention has been made regarding the said work.

Q. 11. As per condition no 16 of the terms and conditions for the Meerut tender issued in 2017 (Exhibit 2) the Bidder should have experience of 12 parameters soil testing This experience should be from Government/ Semi Government or standard Agencies. Further, the company/firm's Proprietor/Director should also have experience of soil testing work of 15 years, for which experience certificate is to be enclosed with bid. As your firm Toyfort was a Proprietorship concern, did you and your firm fulfil the aforesaid condition before submission of bids in the aforesaid tender?

A. 11. No. my firm M/s Toyfort did not have any experience of soil testing work and hence, as per the terms and conditions of the Meerut soil testing tender issued in 2017 and my firm did not fulfil the aforesaid conditions.

Q. 12. As per condition no 18 for the Meerut Division tender (Exhibit - 2) and condition 14 of the Jhansi Division tender (Exhibit -3) of the terms and conditions for soil testing tenders of 2017, it was required that the bidder should have experience of working on high tech equipment ICP (Indictivity Cupeled Plasma Spectrometer). Did your firm had any experience of soil testing on ICP machine/ high tech soil testing machine?

A. 12. No, my firm had no experience of working on high tech equipment ICP (Inductivity Cupeled Plasma Spectrometer) and hence, as per the terms and conditions of the Meerut and Jhansi soil testing tender issued in 2017 my firm did not fulfil the aforesaid conditions.

Q 13. As Toyfort was a Proprietorship concern, did you or your firm had any experience of working on ICP machine/ high tech soil testing machine?

A. 13. No, neither my firm nor me had any experience of working on high tech equipment ICP (Inductivity Cupeled Plasma Spectrometer)

Q. 14. Why your firm M/s Toyfort submitted bids for the soil testing tenders of Jhansi & Meerut division in 2017, whether you not your feed the required conditions as mentioned above?

A.14. I do not know. One of my employee informed me that soil testing tenders of Government of Uttar Pradesh have been published and he suggested me to submit bid of my firm M/s Toyfort.

Q.15. I am showing you a copy of the comparative statement of bids submitted by Toyfort & other bidders in the Jhansi & Meerut (Exhibit-4 & 5) and also the technical bid of Meerut for soil testing tenders of 2017 (Exhibit-6).

A. 15 Yes, I have seen

Q 16 Did you or your firm had any relationship with any other firm which had submitted bids in the aforesaid tenders?

A. 16. No, I do not know any of two other firms M/s RK Enterprises. Meerut and M/s Austere Systems Pvt. Ltd. Pune.

Q 17. As your firm had no experience in soil testing work, how did you decide the financial bids for the aforesaid tenders?

A. 17. I do not know.

Q. 18. Your firm Toyfort had submitted bids in the Jhansi & Meerut soil testing tenders of 2017 (Exhibit-7 & 8) wherein the bid documents of your firm have been submitted by Sh. Piyush Gupta.

A. 18. Yes, Seen

Q.19 Who is Piyush Gupta?

A. 19 Sh. Piyush Gupta is my son

Q. 20. How did Sh Piyush Gupta submit bids of your company in the soil testing tenders when you were the Proprietor.

A. 20. 1 do not know

Q. 21. I am showing you the bid submitted by Austere Systems Pvt Ltd in the Jhansi tenders of 2017 and the minutes of the tender committee dated 31.08.2017 (Exhibit-9 & 10), wherein the bid documents of the said firm have been signed & submitted by you and M/s Austere was represented in the tender committee meeting by you. Why did you submit bid of your rival firm in the Soil testing tender of the Government of Uttar Pradesh?

A. 21. Yes, I had submitted the aforesaid bids but I do not remember why I signed the said bids.

Q 22. What was your & your firm's relationship with Austere System Private Limited, when bids were submitted in the aforesaid tenders issued in 2017?

A. 22 No relationship.

Q. 23. What was Piyush Gupta's relationship with Austere System Private Limited, when bids were submitted in the aforesaid tenders issued in 2017?

A. 23. I do not know

Q.24. I am showing you list of shareholders as on 31.03.2018 in Austere System Private Limited, wherein your's and your son Piyush's shareholding in the firm is 30% and the remaining shareholding is with Rahul Teni and Shikhir Gupta. Who is Shikhir Gupta and Rahul Teni?

A. 24 Yes, I have seen it. I am one of the shareholders and Director of M/s Austere Systems Pvt. Ltd. However, I do not know who is Mr. Shikhir Gupta or Mr. Rahul Teni I had only signed the documents as shown in the Exhibit.

"Q.25 I am showing you a copy of the Demand Draft Nos 505279 (Exhibit -12) issued by ICICI Bank Gurgaon Suncity Branch Gurgaon, to M/s Toyfort, which was submitted in the soil testing tenders of 2017 in Meerut Division.

A. 25. Yes, seen.

Q 26 As per reply of ICICI Bank (Exhibit 13) the Demand Draft in respect of M/s Toyfort was made by Sh Shikhir Gupta, from his own account. Why was a Demand Draft for submission in a Government soil testing tender by Toyfort was got prepared by Shikhir Gupta who is associated with another firm M/s FIMO Infosolutions which was also your rival bidder in the Jhansi & Meerut tender, from his own bank account, although you were the sole Proprietor of M/s Toyfort?

A. 26. I do not know

Q. 27 I am showing you a copy of the registration of FIMO Info solutions Pvt Ltd with the Ministry of Corporate Affairs (Exhibit-14). As per the said data the Registered address of the said firm is the same as of your firm M/s Toyfort. Please explain how common address for both the firms?

A. 27. I do not know

Q. 28. I am showing you the copy of an MoU (Exhibit-15) between M/s Toy Fort & M/s Austere System Private Limited dated 19.02.2018 for sharing of soil testing work. It is mentioned therein that Toy Fort & Austere System Private Limited are sister concerns and share common director Sh. Suresh Kumar Gupta.

A. 28. Yes, seen

Q. 29. If both M/s Toy Fort and M/s Austere System Pvt. Ltd. were sister concerns, having common directors, why your firm submitted a separate bid in the soil testing tenders of Jhansi & Meerut divisions in 2017?

A. 29. I do not know."

60. The relevant extracts from the statement of Mr. Rahul Gajanan Teni, Director of M/s Austere System Pvt. Ltd, Pune, recorded on 19.02.2021 are as follows:

"Q.1. What is your role and responsibilities in your firm M/s Austere System Pvt. Ltd?

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

Q.2. Details of the business your company M/s Austere System Pvt Ltd. is engaged in?

A.2. Software Development, Onshore development, Staffing Augmentation. technology consulting, business consulting, data entry, soil analysis and automation. My company M/s Austere is not engaged in any other business other than the above mentioned business.

Q.3 Has your company M/s Austere Systems Pvt Ltd, submitted bids in the tenders for Soil Testing floated by Govt. of UP? If yes, please provide details?

A.3. Yes, our company M/s Austere bid for Meerut and Jhansi Divisions in 2017 and in Meerut, Saharanpur and Bareilly Divisions in year 2018 tender Shri Suresh Gupta was strategic investor in our company. In mid of 2017 my company had purchased a second *hand soil testing machine from Mumbai based vendor in which Shri Suresh Gupta had invested majority of the capital.*

Q.6. Did you or your firm have any relation with any other firm or their Directors/Proprietors which had submitted bids in the 2017 & 2018 soil testing tenders of UP Government?

A.6. I was aware about M/s Fimo Info and M/s Toyfort. I had some prior business relation related to data entry work with Fimo while Toyfort was a strategic investor in our company.

Q.10. Did you or your company had any experience in soil testing work when you had bid in the soil testing tenders of UP Government during 2017? If Yes give details.

A.10. No, my company was not having any soil testing work experience at the time of submitting bids for the above tenders.

Q.11. The terms & Conditions of the soil testing landers issued by Meerut Division in the year 2017, Clause No 18 prescribed that the Bidder should have experience of soil testing of 12 parameters (Exhibit-3). Did your company had any experience of soil testing?

A.11. No, my company did not have any soil testing experience

Q12. The terms & Conditions of the soil testing tenders issued by Meerut (Clause 18) & Jhansi (Clause 14), Divisions in the year 2017 prescribed that the Bidder should have experience of working on high tech equipment namely ICP (Indictivity Cupeled Plasma Spectrometer) (Exhibit-3). Did your company had any such experience when bids were submitted in the soil testing tenders?

A. 12. No, my company did not have any soil testing experience

Q. 13. Where was the soil testing lab of your firm and what machines were available for soil testing, when bids were submitted in the soil testing tenders of Meerut division in the year 2017?

A 13. Before bidding in the Meerut and Jhansi tenders in 2017, my company was had a ICP Machine which was lying idle.

Q. 14. As per details of soil testing experience submitted by your firm in the Soil testing tenders of UP Government (Exhibit 4), it only *had data entry experience and did not had any soil testing experience, before contract for soil testing was awarded by the Meerut and Jhansi Divisions in the year 2017. How did your company qualify and receive contract for soil testing from UP Govt. in 2017 tenders, when your company neither had any Lab nor the relevant experience of the soil testing work as required by the aforesaid conditions?*

A. 14. Because, there were very few players in the soil testing business. We thought that we can apply in these tenders. As to how my company qualified only Government authorities can explain the same.

Q15. I am showing you the GST Registration receipt (Exhibit 5) generated from Maharashtra which was submitted in the Meerut tenders. As per details of GST registration of your company (Exhibit-6). the Principal place of business of your company is mentioned as the office of the Assistant Director (Soil Testing/Culture), Regional Soil testing laboratory, Meerut. How and why did you register your company at the address of the Regional Soil Testing Lab Meerut to the GST Department?

A 15 There was no permission from any authority to use the address of the Assistant Director (Soil testing) for using their address in the GST registration. However, I do not remember whether the soil testing authorities has given me any No objection certificate (NOC) for using their address in the GST registration.

Q. 16. As per reply of ICICI Bank (Exhibit-7), the Demand Draft Bearing No. 505282 in respect of your company M/s Austere Systems, which was submitted in the Meerut tenders of 2017 (Exhibit 8), was made by Ms Esha Gupta, a Director, M/s FIMO INFO Solutions Pvt. Ltd, from her own account. How and why did the Director of another Firm got prepared a Demand Draft for your company from her own account despite the fact that both were rival bidders in the said tenders?

A. 16. I do not know. I knew Mrs. Esha Gupta who is wife of Shri Shikhir Gupta a Director in my company and she is my Professional *friend and also a Director of M/s Fimo Info. I have no information how the demand draft submitted by my firm was got prepared by Mrs. Esha Gupta from her own bank account and I do not have any justification for the same*

Q. 25 I am showing you the schedule forming part of the balance sheet of M/s Toyfort (Exhibit 14). There is a transaction mentioned as "Advanced Paid to Suppliers" between your company and M/s Toyfort, which shows both the firms were well known to each other and had business relationship.

A. 25 As explained earlier my company formed a consortium M/s Toyfort in which Toyfort has to do printing of soil health cards for my company and the above said payment was made for the card printing work. Further, my company prepared domain name and website hosting for M/s Toyfort for which our company received a payment of Rs. 3500 from M/s Toyfort.

Q 26.1 am showing you the bid submitted by your company M/s Austere Systems Pvt Ltd in the Jhansi tenders of 2017 and the minutes of the tender committee dated 31.08.2017 (Exhibit-15 & 16), wherein the bid documents of your company have been signed & submitted by Sh. Suresh Kumar Gupta, sole proprietor of M/s Toyfort, a rival bidder in the said tender Sh Gupta also represented company M/s Austere Systems Pvt Ltd in the tender committee meeting. Why and how did the Sole Proprietor of a separate entity submitted bid of your company in the said Soil testing tender?

A 26. I do not know, how it had happened

Q. 27. I am showing you the bid submitted by M/s Toyfort in the Jhansi tenders of 2017 (Exhibit 17), wherein the bid documents M/s Toyfort have been signed & submitted by Sh. Piyush Gupta. Sh Piyush Gupta also represented Toyfort in the tender committee meeting.

A. 27. Sh. Piyush Gupta who is son of Sh. Suresh Kumar Gupta. Sh. Suresh Kumar Gupta was also shareholder and director in our company with a 10% holding Sh. Piyush Gupta is currently a director in Mis. Austere Systems

Q. 30. What is the justification for submission of bid documents and EMD by competitors on behalf of rival bidders as well as the competitors/bidders being related concerns shows?

A. 30. I have no justification.

Q. 31. Why bids from all three related /sister concerns having no experience of soil testing work as mentioned in the terms of conditions, wherein bid & EMD were submitted for each other?

A. 31.1 have no justification

61. We have seen from the aforesaid statement of Sh. Suresh Kumar Gupta on oath and Sh. Rahul Teni that Sh. Gupta gave false statement on oath and accepted to facts only confronted with documents. The statement of Sh. Rahul Teni fills the gaps perfectly in regarding the relationship between M/s Toyfort, M/s Fimo Info Solutions Pvt. Ltd. and M/s Austere System Pvt. Ltd. The following emerges from the statement of Sh. Gupta and Sh. Teni and the documents on record:

(i) M/s Toyfort had no experience in soil testing and dealt in sale of Toys. The firm was not eligible to bid for soil testing tenders and still it participated in the tender.

(ii) The bids submitted by M/s Toyfort in the aforesaid tenders were not submitted with intention to compete, but only to create a façade of competition, so that tender could fructify and not fail due to no. of bidders falling below threshold.

(iii) There is clear cut business and family relationship between M/s Toyfort, M/s Fimo Info Solutions Pvt. Ltd., and M/s Austere System Pvt. Ltd., which was the beneficiary of both Meerut and Jhansi tenders. This comes out very clearly from the fact that EMD for 2017 tenders of Meerut division for M/s Toyfort was submitted by Sh. Shikhir Gupta a director of M/s Fimo Info Solutions Pvt. Ltd. who was a rival bidder. Sh. Suresh Kumar Gupta also signed and submitted bids for rival firm M/s Austere System Pvt. Ltd. in the Jhansi tenders, although his firm M/s Toyfort was also participating in the same tender. The relationship also comes out clearly from the fact that M/s Fimo Info Solutions Pvt. Ltd. was registered at the address of Sh. Suresh Kumar Gupta, proprietor of M/s Toyfort. Sh. Suresh Kumar Gupta's son was a direction in M/s Austere System Pvt. Ltd. and father and son together held 30% of shares of M/s Austere System Pvt. Ltd.

62. Based on the above and evidence on record, we are of the view that M/s Toyfort along with other bidders namely M/s Austere System Pvt. Ltd. and M/s Fimo Info Solutions Pvt. Ltd., colluded to rig bids in the 2017 soil testing tenders of Meerut and Jhansi Divisions.

63. It has also been established beyond doubt that the submission of bids by M/s Toyfort in the 2017 soil testing tenders of Meerut and Jhansi divisions were the cover bids in support of M/s Austere System Pvt. Ltd., so that the tender is not cancelled due to lack of participation. Had they not participated these bids would have been cancelled due to insufficient participation in tenders, as there were only 3 bids for Jhansi and 4 bids for Meerut.

64. Accordingly, based on the material on record and our findings as above, we are of the considered opinion that:

> *"Commission has correctly and legally held the appellant responsible for violation of Section 3(3)(c) and 3(3)(d) read 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."*

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

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

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

3.2. There were only four manufacturers of APT, namely, M/s Excel Crop Care Ltd.. M/s UPL, M/s Sandhya Organics Chemicals (P) Ltd. (which are the three appellants herein) and Agrosynth Chemicals Ltd.

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

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

68. It can be seen that the aforesaid companies were in the same business since 2002, and their balance sheets had segment wise reporting, which made it possible to segregate the turnover from the APT business for each year of operation. In such cases, the ratio laid down by Hon'ble SC regarding imposition of penalty on the basis of relevant turnover is a very logical and correct way of calculating the penalty, as it brings in the doctrine of proportionality to the penalty for the offences under the Act.

69. In the present case, the appellant was acting as a member of the cartel and was providing cover bid for the successful bidder Austere Systems. In view of peculiar facts and circumstances of the present case, where almost all bidders for soil testing are first time bidders and relevant turnover of firms from the aforesaid business is NIL, the concept of relevant turnover in such cases would not be correct, as it would lead to NIL penalty and allow the parties involved to go scot-free. Hence, we agree with the Commission's approach of taking the total turnover for computation and imposition of penalty. At the same time considering the fact that the Appellant was in a supporting role in this cartel, by providing the cover bids, we are of the view that the penalty in such cases should be less than for those in the main role.

70. Based on the above discussion, we hold

(i) The order of the 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 are upheld.

(ii) The penalty under Section 27 (b) is reduced to 3% of average annual turnover for last 3 years, instead of 5% as imposed by the commission.

71. The pending IAs if any, are accordingly disposed of.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indevar Pandey]
Member (Technical)

sa