

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

TA (AT) Competition No. 37 of 2017
(Old Appeal No.07 of 2017)

IN THE MATTER OF:

**Western Electric & Trading
Company & Anr.**

...Appellants

Versus

Competition Commission of India & Ors.

...Respondents

Present:

For Appellants :-

**Mr. M. M. Sharma, Ms. Deepika Rajpal
and Mr. Anand, Advocates**

For Respondent No. 1 :

**Mr. Pallav Shishodia, Senior Advocate
assisted by Mr. Febin M. Varghese,
Advocate**

TA (AT) Competition No. 38 of 2017
(Old Appeal No.15 of 2017)

IN THE MATTER OF:

R. Kanwar Electricals & Anr.

...Appellants

Versus

Competition Commission of India & Ors.

...Respondents

Present:

For Appellants :-

**Mr. Jafar Alam and Mr. Gautam Chawla,
Advocates**

For Respondent No. 1 :

**Mr. Pallav Shishodia, Senior Advocate
assisted by Mr. Febin M. Varghese,
Advocate**

For Respondent No. 2 :

**Mr. Kamal Nijhawan, Mr. Sumit Gaur and
Mr. Alok Sharma, Advocates**

J U D G M E N T**SUDHANSU JYOTI MUKHOPADHAYA, J.**

In both the appeals as common order dated 18TH January, 2017 passed by the 'Competition Commission of India' (is under challenge, they were heard together and disposed of by this common judgment.

2. These appeals have been preferred by '**Western Electric & Trading Co. & Anr.** in TA (AT) Competition No. 37 of 2017 (Old Appeal No.07 of 2017) and 'R. Kanwar Electricals & Anr.' (Appellants) in TA (AT) Competition No. 38 of 2017 (Old Appeal No.15 of 2017) against the order dated 18th January, 2017 passed by the 'Competition Commission of India' ('**Commission**', for short) in *suo moto* Case No. 03/2014, wherein the Commission observed and passed the following penal order:

"8.13 As the Commission has already held that the impugned acts/ conduct of OP 1, OP 2 and OP 3 are in contravention of the provisions of Section 3(1) read with Section 3(3)(c) and 3(3)(d) of the Act, the liability of the persons in-charge of OP 1, OP 2 and OP 3 flows vicariously from the provisions of Section 48 of the Act. In the present case, while Shri Sandeep Goyal for OP 1 has accepted that he played an active role in the cartelisation; Shri

Ashish Jain for OP 2 and Shri Ramesh Parchani for OP 3 have denied the allegations and have taken bald pleas such as threat from OP 1, absence of knowledge of e-mail, attributing calls to combined procurement of 'die', etc. They have not been able to show or bring on record, either before the DG or the Commission, any evidence to absolve themselves from the liability in terms of the provisions of the Act.

8.14 Resultantly, considering the totality of facts and circumstances of the present case, the Commission decides to impose penalty on Shri Sandeep Goyal for OP 1, Shri Ashish Jain for OP 2 and Shri Ramesh Parchani of OP 3. The penalty on these persons-in-charge imposed in terms of Section 27(b) of the Act calculated at the rate of 10 percent of the average of their income for the last three preceding financial years is as follows:

S. No.	Individuals	Income for 2011-12	Income for 2012-13	Income for 2013-14	Average Income for 3 Years	@ 10 % of average Income
1.	Shri Sandeep Goyal (of OP 1)	4,97,729	4,41,358	4,58,726	4,65,938	46,594
2.	Shri Ashish Jain (of OP 2)	8,50,343	10,20,541	6,74,226	8,48,370	84,837
3.	Shri Ramesh Parchani (of OP 3)	19,70,183	23,68,270	20,79,122	21,39,192	2,13,919

8.15 *Considering that the Commission has decided to grant a 75 percent reduction in penalty to OP 1 under Section 46 of the Act, as recorded hereinabove, the Commission, also decides to allow the same reduction in penalty to Shri Sandeep Goyal for OP 1 under Section 46 of the Act. Thus, the total amount of penalty to be paid by Shri Sandeep Goyal is Rs.11,648/-.*

8.16 *The Commission further directs the parties to deposit the respective penalty amount within 60 days of receipt of this order.*

3. The brief facts of the case are as follows:

4. On 1st April, 2014 Central Bureau of Investigation (CBI) by its letter informed the Commission that CBI during preliminary enquiry of misconduct by a public servant found opposite parties to be involved in cartelisation and bid rigging in respect of tenders floated by Indian Railways and BEML for Brushless DC ("**BLDC**") fans.

5. CBI by its letter dated 1st April, 2014 informed the Commission that during its investigation it came across an email dated 17th March, 2013 from the inbox of Mr. Ramesh Parchani (Partner at '**Western Electric & Trading Co**) along with an attachment which provided details of four upcoming tenders floated by Indian Railways and BEML for procurement of BLDC fans. The attachment to said email mentioned the quantity, unit value and rate to be quoted by the 'Western Electric', 'RK Electricals' and

'Pyramid Electronics' in four tenders floated by Indian Railways and BEML. On verification from the Railways, CBI found that the rates mentioned in the email against the opposite parties were the same as the rates quoted by them in two tenders. The email dated 17th March, 2013 originated from the email id of Mr. Sandeep Goyal (Partner at Pyramid Electronics) who sent the same to Mr. Ashish Jain (Partner at RK Electricals). Mr. Ashish Jain further sent the email to Mr. Gulshan Kapoor (office executive of Mr. Ramesh Parchani), who forwarded the email to Mr. Ramesh Parchani (Partner of Western Electric).

6. The Commission taking cognizance of the letter sent by CBI under Section 19(1) of the Act *suo moto* initiated inquiry into the conduct of the opposite parties. The Commission by its Order dated 23rd June, 2014 took a *prima facie* view that the opposite parties were engaged in collusive bidding in contravention of Section 3(1) and 3(3)(d) of the Act and further directed the Director General (DG) to investigate into the matter under Section 26(1) of the Act.

7. As per the letter dated 1st April, 2014, the CBI, while enquiring into the alleged misconduct, found an e-mail dated 17th March, 2013 in the e-mail inbox of Shri Ramesh Parchani, a partner of OP 3 (hereinafter 'Shri Ramesh Parchani'), along with an attachment providing details of four tenders of Indian Railways and BEML for procurement of BLDC fans. It contained the quantity unit value, rates to be quoted by opposite parties and quantities to be shared amongst them in these four tenders. A copy of the said e-mail along with the attachment was provided to the

Commission. The Information contained in the said attachment is as below:

	Tender	Description	Nos.	Railway	Unit Value	Total Value	R. Kanwar	Crompton (Western Electric)	Pyramid
		O/B				0	0	0	0
27.02.13	301204020T460	BLDC fan	9368	NER	3,481	3,26,10,008	3481	3495	3510
							4215	2810	
							14672415	9781610	0
20.03.13	45131110	BLDC Fan	1217 5	SCR	3,481	4,23,81,175	3495	3520	3481
							2739	1826	4565
							9534459	6356306	1589 0765
25.03.13	4102130113	BLDC Fan	4147	NR	3,481	1,44,35,707	3520	3495	3481
									3110
							0	0	1082 5910
26.03.13	BEML	BLDC Fan	5437	BEML	5,437	2,95,60,969	3495	3481	3520
							1632	2446	
							8873184	13298902	0
		C/F				11,89,87,85 9	3,30,80,0 58	2, 9436818	2,67, 16,6 75

8. It was further stated that CBI had sought information from North Eastern Railway (NER) and Northern Railway (NR) regarding the two tenders mentioned in the said attachments *i.e.*, tender No.

30120402OT460 dated 27.2.2013 and tender No. 4102130113 dated 25.3.2013, in order to verify whether the rates mentioned in the e-mail attachment were the same as quoted by the OPs in the said railway tenders. It was found from the information received that the rates mentioned in the e-mail against each OP were same as the rates quoted by them against the said two tenders.

9. After examining all the material on record, the Commission was of the *prima facie* view that the case involved contravention of provisions of Section 3(1) read with Section 3(3)(d) of the Competition Act, 2002 (hereinafter 'Act'). Therefore, the Commission *vide* its order dated 23.06.2014 directed the Director General (hereinafter the 'DG') to conduct an investigation into the matter under Section 26 (1) of the Act and submit an investigation report. The Commission also noted that apart from the three opposite parties identified by the CBI, the probability of other bidders also indulging in the bid rigging could not be ruled out and required investigation. The DG, accordingly, conducted an investigation and submitted its investigation report dated 27.03.2015 to the Commission.

10. During the investigation, the DG found that the vendors approved by Research Designs and Standards Organisation, Lucknow (RDSO) are divided into two categories namely 'Part I source/supplier' and 'Part II source/supplier'. Part I suppliers are older approved vendors who have earlier supplied as Part II suppliers and whose supplies have received favourable report from the Railways. In the Railways tendering system,

Part I supplier is eligible for 100% of tender quantity if it emerges as L1 and 75% of tendering quantity if a Part II supplier becomes L1. Also, the Part I supplier is eligible to supply at the higher rate quoted by it against the L1 rate of Part II supplier.

11. In the Tenders under investigation the Opposite Parties were Part I suppliers whereas M/s Light Engineering Corporation, Parwanoo; M/s Kapson Industries Ltd., Jalandhar and M/s. General Auto Electric Corporation, Mumbai were part II suppliers. M/s BBC Corporation was an unapproved supplier.

Role of Pyramid Electronics

12. The DG after analysing the email, call data records and statement of Mr. Sandeep Goyal concluded that 'Pyramid Electronics' colluded with 'RK Electricals' and 'Western Electric' to rig the bids.

13. The DG relied on the statements dated 17th February, 2015 and 18th March, 2015 of Mr. Sandeep Goyal wherein he admitted that the email dated 17th March, 2013 was sent by him to Mr. Ashish Jain. Mr. Sandeep Goyal further admitted that he along with RK Electricals and Western Electric formed a cartel in February, 2013 and rigged the bids for Tender No. 30120402OT460 (due date 27th February, 2013) and Tender No. 4102130113 (due date 25th March, 2013). The limited purpose of the cartel was to ensure a market share to each Opposite party and not for earning or sharing profits. The cartel for the Tender dated 27th February, 2013 was arrived over telephone and its rate was mentioned in the mail dated 17th March,

2013 to keep records

14. On perusal of call data records of Mr. Sandeep Goyal and Mr. Ashish Jain (call data record of Mr. Sandeep Goyal), the DG found that Mr. Ashish Jain made/received more than 50 calls to/from Mr. Sandeep Goyal from 25th February, 2013 to 31st March, 2013. Mr. Sandeep Goyal also received several calls from Mr. Ramesh Parchani during this period.

Role of RK Electricals

15. The DG found that the rates quoted by RK Electricals for Tender Nos. 30120420T460 (due dated 27th February, 2013) and Tender No. 4102130113 (due dated 25th March, 2013) were identical to the rates mentioned in the email dated 17th March, 2013.

16. In his statement dated 16th February, 2015, Mr. Ashish Jain admitted that he received the email dated 17th March, 2013 from Sandeep Goyal and forwarded the same to Mr. Gulshan Kapoor.

17. The DG found that Mr. Ashish Jain made/received nearly 26 calls from Mr. Ramesh Parchani between 25th February, 2013 to 31st March, 2013. Mr. Jain also made calls to partners of other firms participating in the Tenders. These calls were more frequent around the date of Tender.

18. The DG found the defence taken by Mr. Ashish Jain that the conversation between Mr. Ashish Jain, Mr. Sandeep Goyal and Mr. Ramesh Parchani during the time of the Tenders was with respect to development of a die (of FRD connector, one of the components of BLDC

fans) as unbelievable as the same was unsubstantiated. There was no written document to show that Rs. 16,000/- was given for development of a die. The DG concluded that Mr. Ashish Jain colluded to rig the bids of Tenders issued by Indian Railways.

Role of Western Electric

19. After analysing the email dated 17th March, 2013 and the rates submitted by Western Electric, the DG in its report observed that the rates quoted by Western Electric for Tender Nos. 30120420T460 (due dated 27th February, 2013) and Tender No. 4102130113 (due dated 25th March, 2013) were identical to the rates mentioned in the email.

20. In his statement dated 18th February, 2015 Mr. Ramesh Parchani admitted that he received the email dated 17.03.2013 from Mr. Gulshan Kapoor. Mr. Gulshan Kapoor in his statement dated 18.02.2015 admitted that on 17th March, 2013 he received an email from Mr. Ashish Jain and he forwarded the same to Mr. Ramesh Parchani.

21. Analysis of call data records of Mr. Ramesh Parchani revealed that he spoke with Mr. Ashish Jain nearly 30 times between 25th February, 2013 to 31st March, 2013.

22. The DG did not accept the defence raised by Western Electric that being the authorised dealer of Crompton Greaves Ltd., the rates were dictated by Crompton Greaves. The DG relied on the statement dated 3rd March, 2015 by Mr. Asif Ali, Manager of Crompton Greaves stating that the rates suggested by Crompton Greaves are not binding on Western Electric. Mr. Ramesh Parchani failed to explain

how Mr. Sandeep Goyal had privy to the rates suggested by Crompton Greaves as the rates were mentioned in the email dated 17th March, 2013.

23. Based on call data records, emails and the statements by parties the DC concluded that 'Pyramid Electronics', 'RK Electricals' and 'Western Electric' colluded with each other to rig the bids pertaining to the four Tenders in contravention of section 3 (3)(d) of the Act.

SUPPLEMENTARY REPORT SUBMITTED BY DG

24. Pursuant to requests by RK Electricals and Western Electric, the Commission by its order dated 14th August, 2015 allowed the Appellants to cross-examine Mr. Sandeep Goyal.

25. The DG also submitted a supplementary report dated 19th October, 2015 with cross examination of Mr. Sandeep Goyal conducted on 9th September, 2015. The DG concluded that there is nothing on record which could refute the facts or evidence gathered during the course of investigation and impeach the credibility of the witness.

26. It is only thereafter the Commission noticed and heard the parties and comparing the rates and other evidence came to the conclusion and passed the order as referred above.

STAND OF THE APPELLANTS – 'Western Electric & Trading Co.'

27. Learned counsel for the Appellants highlighted the following background :

- a) Brushless Direct Current (BLDC) Fans 400 mm – sweep – 110 Volts fixed type conforming to RDSO specifications; designed specifically for Indian Railways by Crompton Greaves / OEM No. 2002. BLDC fans saved energy up to 10 times compared with old conventional fans. Though the demand increased gradually from 2010-11 but the price has remained in the range of Rs.3445 (in 2007) to Rs.3500(in 2013;
- b) Connector- The CG/OEM does not manufacture the Connectors and was supplying BLDC fans to ICF with “Wago” connectors imported from UK and from 2006. When the demand of BLDC fans increased, the specifications for BLDC fans were changed with FRP(Fibre Glass Reinforced Plastic) Connector, which were locally _ produced and were cheaper ; ‘Western Electric & Trading Co.’ (OP 3) was informed that ‘Pyramid Electronics’ and ‘Kanwar Electricals’ (OP -1 & OP-2), were supplying BLDC fans with FRP connectors. OP2 agreed to supply FRP connectors to ‘Western Electric & Trading Co.’ @ Rs. 35/ piece. Evidence of supplies made by ‘Pyramid Electronics’ and ‘Kanwar Electricals’ were also submitted.

28. It was submitted that the Appellants ‘Western Electric &

Trading Co.’ - a reputed dealer/trader only since 1971: Became a dealer of OEM/CG for supply of BLDC fans to Railways in 2006. ‘Pyramid Electronics (OP1- Sandeep Goyal) caught red handed with cash of Rs. 90 Lakhs and arrested on 2nd May 2013 by CBI while investigating Mr. Kul Bhushan, the then Member Electrical, Rly Board in the “Railway Bribery/ Cash for posting scam”, spent 2 months in Tihar Jail, an under trial on bail in criminal case no. 03/2013 before the Special Judge PC Act/ASJ in New Delhi Courts at Patiala House. Pyramid Electronics (OP-1) was delisted as RDSO part supplier in May, 2013 after arrest of SG. ‘Kanwar Electricals’ (OP -2- Ashish Jain), was the supplier of FRP connectors to OP-3 during 20.1.2013. Both ‘Pyramid Electronics’ and ‘Kanwar Electricals’ (OP-1 &OP-2) are RDSO approved Part-1 suppliers of BLDC fans since 2010 along with OEM/CG, RDSO Part 1 supplier since 2005.

29. It was submitted that the following facts was ignored by the Commission :

Unique to WETC/Appellants-(Ignored by CCI)

1. Unlike ‘Pyramid Electronics’ and ‘Kanwar Electricals’ (OP-1 &OP-2), WETC is only an agent and not a manufacture of BLDC fans, not direct competitor to ‘Pyramid Electronics’ and ‘Kanwar Electricals’(OP-1 &OP-2), and the actual competitor is OEM/CG, had no authority to quote rates indecently. (Horizontal agreement not legally possible under section 3(3) of the Act.

2. Unlike 'Pyramid Electronics' and 'Kanwar Electricals' (OP-1 & OP-2), WETC was always instructed the exact rates to be quoted specifically before each tender by CG-OEM and not only for the three tenders in question. Evidence supplied but ignored by CCI (Annexure 8-page 221-222 –page 760-761 Vol.3; Annexure 10- Page 232- Page 771 Vo. 3) & Annexure 11- Page 346-348 Page 881 to 883 Vol.3) of WETC objections dated 21.1.2016 to DG Report dated 21st January,2016).

Learned counsel for the Appellants referred to evidence as relied in the impugned order against the Appellants are :

- i) *E-mail* dated 17.3.2013 with attachment with respect to the 4 tenders;
- ii) Call Detail Records – calls exchanged between 'Western Electric & Trading Co.' and 'Kanwar Electricals' and 'Western Electric & Trading Co.' and 'Pyramid Electronics';
- iii) Confessional Statement dated 18th March, 2015 of Sandeep Goyal to DG (after filing leniency application on 10th March, 2015 as compared with his earlier statement as stated on 17th February, 2015.

With regards to the impugned *e-mail* dated 17th March, 2013, it is submitted that the four tenders in which bid rigging is alleged are :

- (i) Tender No. 30120402 OT 460 dated 27th February, 2013

- by NE Railways;
- (ii) Tender No. 45131110 dated 20th March, 2013 – by SC Railways;
- (iii) Tender No. 4102130113 dated 25th March, 2013 – by Northn Railways; and
- (iv) Tender No. DR01/RM2/1200120506, BEML dated 26th March, 2013 – by BEML.

30. Learned counsel also highlighted the facts about the ‘Western Electric & Trading Company’ with regard to the above tenders, which alleged to have been ignored by the Commission :

1. Tender dated 27th February, 2013 by North Eastern Railway (NER) – WETC did not quote Rs. 3495 as suggested in the impugned *e-mail* but quoted Rs. 3491.98 (Rs. 3325.70 plus 5 % CST), the exact price directed by CG vide letter dated 26th February, 2013.
2. Tender dated 20th March, 2013 by South Central Railway (SCR) – The rate suggested for WETC/CG was Rs. 3520. However, WETC quoted Rs. 3530 (Rs.3361.90 plus 5% CST), the exact price directed by Crompton Greaves vide letter dated 15th March, 2013. Moreover, the rates of neither ‘Pyramid Electronics’ and ‘Kanwar Electricals’ were matching with the impugned *e mail*. Being the lowest (L-1), WETC received the order at the negotiated rate of Rs. 3333.75 all inclusive.
3. Tender No. 4102130113 dated 25th March, 2013 by

Northern Railway (NR) – although the rates as suggested in the attachment are the same, but as far WETC is concerned, the exact price directed by CG vide their letter dated 15th March, 2013 were quoted by it, that is Rs. 3495 (Rs.3328.57 plus 5 percent CST).

4. Tender BEML dated 26th march, 2013 by Bharat Earth Movers Ltd. (BEML) – although WETC could not quote because only the OEM/RDSO approved suppliers eligible. However, WETC were informed the rate to be quoted by the OEM/CG vide their letter dated 16th March, 2013 and again vide their letter dated 26th March, 2013 for arranging supplies. The rate as per the impugned email dated 17th march, 2013 were Rs.3481 but the rate actually quoted by CG was Rs. 3498.6 (Rs. 3412.70 plus 2 percent CST) which again different from the suggested e-mail rate. The rate quoted by ‘Pyramid Electronics’ for 26th March, 2013 was Rs. 3570.75 which was also different from the suggested *e-mail* rate of Rs. 3520.

31. With regard to ‘Call Detail Records’ detailed explanation and the background for the telephonic calls has been given by the Appellants, as under:

Call Detail Records :

Telephone calls exchanged between ‘Ramesh Parchani’ and ‘Ashish Jain’ and ‘Sandeep Goyal’ only 2 calls + 2 SMS mostly with

‘Ashish Jain’. ‘Ramesh Parchani’ never called ‘Sandeep Goyal’ but received a single call on 17th March, 2013 at 6.55 PM which was after sending of the impugned email dated 17th March, 2013 by ‘Sandeep Goyal’ to ‘Ashish Jain’ i.e. at 2.19 PM. ‘Ramesh Parchani’ only returned the call on 23rd March, 2013 for 39 second. Admitted that the call on 23rd March, 2013 may be in connection with procurement of “dye” for FRP connectors.

Background for the telephonic calls between the Opposite Parties

32. In connection with the procurement of the “dye” for locally manufacturing FRP connectors together, admitted directly by AJ12 and indirectly by SG13 in their statements before the DG.

33. In spite of the admission by ‘Ashish Jain’, which corroborated ‘Ramesh Parchani’ statement dated 18th March, 2015 DG/CCI has not even bothered to verify the statements of all the ‘Opposite Parties’, particularly, whether or not WETC was procuring them separately on behalf of the OEM as stated in by RP in his statement dated 18th March, 2015.

34. Commission has completely relied upon the denial of the above in the statement of ‘Sandeep Goyal’ on the ground that “Western Electric & Trading Co., who is not even a manufacturer but only a dealer of Crompton Greaves, would still require a dye for manufacturing a component of that item and wholly ignored the objective justification provided by Western Electric & Trading Co..

35. Whereas DG/Commission ignored 7 calls exchanged between ‘Ashish Jain’ and ‘Mr. Prashant Sehgal of ‘M/s. Kapsons Industries -

OP-5' and 29 calls between 'Ashish Jain' and Maninder Singh – OP-4 and 10 calls between 'Ashish Jain' and Mr. Hetal R. Gandhi – OP-6 though made regarding “supply of spare parts/quotation for spare parts” on the ground that “details of conversation are not known”. The details of conversation i.e. transcript of the audio tapes of telephonic conversation between 'Ashish Jain' and 'Ramesh Parchani' or between 'Ramesh Parchani' and 'Sandeep Goyal'.

36. Confessional statement of 'Sandeep Goyal' dated 18th March, 2015 (Leniency Applicant) has been contradicted.

37. Learned counsel for the Appellants raised legal objections as under :

1. The elements of an agreement under Section 3 of the Competition Act have not been established for WETC. Mere exchange or gathering of information between parties for spare parts (FRP Connector) in an inter-dependent or concentrated market does not constitute a cartel.

2. WETC is being a mere trader/dealer of OEM/CG is not direct competitor of 'Pyramid Electronics' (OP-1) and 'R. Kanwar Electricals' (OP-2), and, therefore cannot be charged under Section 3(3)(d). The real beneficiary of the cartel if presumed to be true was the OEM/CG – why has DG/CCI completely exonerates the OEM/CG?

3. There is no appreciable adverse effect on competition (AAEC) visible on the facts of this case. There has not been any reduction in the number of suppliers of BLDC fans to Railway.

4. Since the prices quoted by OEM/CG/WETC of BLDC fans for Indian Railways has remained in the same range since 2011, the finding of cartelization is against economic theory of cartelization.
5. Instances of violations of principles of natural justice committed during investigation ignored by the Commission.
6. Penalty imposed on the Appellants is grossly excessive and disproportionate and arbitrary. Not based on the relevant turn over principles as decided by 'Hon'ble Supreme Court in ***'Excel Crop care Limited vs. Competition Commission of India and Anr.'*** on 8th May, 2017 in C.A. No. 2480/2014.
38. Other points were also highlighted relating to quoting higher rates for tender dated 20th March, 2013. Additional cost of PCB charger, bid rotation etc. which according to Appellants not proved since 'Pyramid Electronics' (OP-1) and 'Western Electric & Trading Co. (OP-3) got the order in tender dated 27th February, 2013 and 20th March, 2013 respectively. The tender dated 25th March, 2013 was cancelled.

Submissions of Appellants – 'Mr. R. Kanwar Electricals' & Mr. Ashish Jain

39. The facts as noticed above has also been highlighted by the counsel for these Appellants.
40. It was submitted that the DG and the Respondent Commission have failed to note that R. Kanwar Electricals did not derive any benefit

from the alleged cartel, as R. Kanwar Electricals did not receive a purchase order in any of the four tenders. There is therefore no material or ground to suspect their involvement in the alleged cartel.

41. The Commission has failed to appreciate that 'Pyramid Electronics' (Opposite Party No.1) had been delisted from the RDSO owing to their illicit activities. Accordingly, Mr. Sandeep Goyal of (OP-1) suspected Mr. Ashish Jain (OP-2) and 'Ramesh Parchani' (OP-3), who were his competitors, of having given evidence against him during the bribery related investigation conducted by the CBI. As such, it is clear that Mr. Sandeep Goyal was a motivated individual who wanted to take revenge against Opposite Party Nos.2 and 3, and yet the Respondent Commission relied on his alleged "confessional" and contradictory statement(s) without any corroborating evidence.

42. According to the Appellants, there are serious infirmities and contradictions in relation to the evidence for each of the four tenders alleged to have been rigged by the Opposite Parties, as explained below:

- a. In relation to tender dated 27.02.2013,
 - i. The said tender had already been opened before circulation of the alleged distribution list vide e-mail dated 17th March, 2013, and hence the bid prices were known to all bidders.
 - ii. Mr. Sandeep Goyal/Opposite Party No.1 has made contradictory statements in relation to this tender - at one

place he admits that cartel was only in relation to the tenders in March 2013, whereas at another place he states that Opposite Parties cartelized tender dated 27th February, 2013 over telephone.

- iii. It is an admitted position that the tender dated 27th February, 2013 was cancelled and no purchase orders were issued.
- b. In relation to tender dated 20th March, 2013,
- i. None of the bids match the prices in the e-mail dated 17th March, 2013. RKE's actual price bid of Rs. 3757 was 7.5% higher than the price bid stated in the e-mail dated 17th March, 2013 (of Rs. 3495) and hence it is evident that RKE did not follow the e-mail dated 17th March, 2013.
 - ii. As per the e-mail, 'Pyramid Electronics' (O.P -1) ought to have won the tender. However, as per the actual tender, 'Western Electric & Trading Co. (OP- 3) won the tender.
 - iii. Mr. Sandeep Goyal's statement that each of the Opposite Parties changed their price bids for this tender on the date of the tender itself (i.e. 20th March, 2013) is completely contrary to the documents on record, namely (a) the call detail records in the DG Report, and (b) data regarding the tender submission time. No explanation was

given by Mr. Sandeep Goyal in relation to this inconsistency at the cross-examination.

- iv. Mr. Sandeep Goyal contended that 'Western Electric & Trading Co.' (Opposite Party No.3) wanted to be L-1 in this tender for which purpose Mr. Ashish Jain called Mr. Sandeep Goyal 6 times on 20th March, 2013. This is completely contrary to the record as 'Western Electric & Trading Co. (Opposite Party No.3) had already submitted its bid at 17:22 hours on 19th March, 2013.
- v. Mr. Ashish Jain made 6 calls to Mr. Sandeep Goyal after 'Pyramid Electronics' (Opposite Party No.1) had already placed its bid (at 6:39am), 5 of which were after Opposite Party No.2 had also placed its bid (at 08:47am). There was no reason whatsoever for either of them to be talking to one another about the tender after they had placed their price bids. Clearly their conversations were not about the tender.
- c. In relation to tender dated 25th March, 2013,
 - i. R. Kanwar Electricals' price bid was identical to the price stated in the e-mail dated 17th March, 2013 merely as a coincidence, given that it always bid in the same price range (Rs. 3450 - Rs. 3750) and had submitted the price bid as per its own calculation.

- ii. Without prejudice, this tender was ultimately cancelled by the tendering authority (due to technical reasons, to the best of Appellant's knowledge), and resultantly there was no appreciable adverse effect on competition ("AAEC") caused by the alleged conduct of the Opposite Parties.

- d. In relation to tender dated 26.03.2013,
 - i. R. Kanwar Electricals did not submit a price bid in this tender owing to independent business considerations, as explained to the DG.

 - ii. Assuming without conceding that R. Kanwar Electricals' was part of the cartel, it is inexplicable as to why R. Kanwar Electricals' having fixed the prices for the upcoming tenders does not even offer a price bid in one tender.

43. It was contended that there are serious infirmities in the evidence in relation to each tender and the Respondent Commission has simply assumed that quotation of identical prices for one tender dated 25th March, 2013 tantamount to violation of Competition Act. While doing so, the Respondent Commission has failed to consider that *(i)* the said tender dated 25th March, 2013 was ultimately cancelled by the tendering authority and resultantly there was AAEC caused by the alleged conduct of the Opposite Parties, and *(ii)* no purchase orders were issued to Appellants in any of the four tenders. This

demonstrates that there was no AAEC caused by the conduct of the Opposite Parties, and contrary to its own precedent in the Sugar Mills case (Suo moto Case No. 1 of 2010), both the DG and the Commission failed to carry out an examination of whether the conduct of the parties caused any impact on competition in terms of the factors under section 19(3) of the Competition Act.

Submissions with regard to e-mail dated 17th March, 2013

44. According to the learned counsel for the Appellants only of the four tenders specified in the e-mail dated 17th March, 2013, (i) the first tender (dated 27th February, 2013) had already been opened and hence the bid prices were known to all bidders, (ii) R. Kanwar Electricals' price bid did not match in the second tender (dated 20th March, 2013), (iii) the third tender (dated 25th March, 2013) was cancelled by the tendering authority (owing to technical reasons, to the best of Appellants knowledge), and (iv) R. Kanwar Electricals' did not submit a price bid in the fourth tender (dated 26th March, 2013) owing to independent business considerations. It is therefore evident that R. Kanwar Electricals did not follow the prices stipulated in the e-mail dated 17.03.2013.

45. It is also pointed out that Mr. Sandeep Goyal who made the distribution chart in e-mail dated 17th March, 2013, intended to ensure that his firm, 'Pyramid Electronics' (Opposite Party No.1) is the L-1 in two of the upcoming three tenders (and L-2 in the third

tender) to ensure maximum gain to 'Pyramid Electronics' (Opposite Party No.1). Further, Mr. Sandeep Goyal threatened and directed Mr. Ashish Jain to forward the e-mail to 'Western Electric & Trading Co.' (Opposite Party No.3)

Submissions regarding call detail records

46. It is further contended that the Commission has relied on the fact that 'Pyramid Electronics' (OP-1) and 'R. Kanwar Electricals (OP-2) spoke 50 times and 'Pyramid Electronics' and 'Western Electric & Trading Co. (OP-3) spoke 30 times between 25th February, 2013 and 31st March, 2013 (*para 6.16 of impugned order*). However, the Commission failed to consider that all the bidders spoke to each other throughout the period between 25th February, 2013 and 31st March, 2013. The frequency of the calls does not show any particular pattern.

47. Further case of the Appellants is that during the same period, 'Pyramid Electronics' (OP-1) also spoke 29 times with Opposite Party No. 4, and 'R. Kanwar Electricals (OP-2) also spoke several times with Opposite Party No. 5 and Opposite Party No. 6, none of whom are found guilty of cartelization. All the people who bid for railway contracts know one another and talk to one another on spare parts, bid technical specifications and such like as was stated by all the Opposite Parties to the DG. The nature of discussions in the calls between Mr. Sandeep Goyal and Mr. Ashish Jam, as admitted by Mr.

Sandeep Goyal were limited to technical issues and exchange of *ROSO drawings*.

48. It is an admitted position amongst the Opposite Parties that they exchanged calls to discuss *the procurement of a die* (@ Q17 -18 of Mr. Sandeep Goyal's statement dated at internal page 170 of DG Report r/w Q4 of Mr. Ramesh Parchani's statement dated 24.03.2015 at internal page 200 of DG Report r/w Q3 of Mr. Ashish Jam's statement dated 17.03.2015 at internal page '183 of DG Report).

49. In relation to tender dated 26th March, 2013, although the Opposite Parties allegedly cartelized for this tender, only one call was made between them after 23rd March, 2013. The call was made by 'R. Kanwar Electricals (OP-2) on 'Pyramid Electronics' (OP-1), and 'R. Kanwar Electricals (OP-2) did not even participate in the tender dated 26th March, 2013 so there was no reason for 'R. Kanwar Electricals (OP-2)' to speak with 'Pyramid Electronics' (OP-1).

50. As such, it is submitted that the frequency of telephone calls does not imply cartelization. Also, it is submitted that the call detail records only show the factum of the calls exchanged and do not and cannot provide the nature or content of the conversation amongst the Opposite Parties.

Submissions regarding "confessional" statement

51. The Commission has relied upon the confessional statement of Mr. Sandeep Goyal which decoy to Appellants is vague and

inherently contradictory to the documents placed on record. The Commission has failed to appreciate that Mr. Sandeep Goyal was a motivated individual who was desperate for leniency as his firm had been de-listed by the RDSO in effect shutting down his business. Notably, Mr. Sandeep Goyal did not confess or complain of a cartel until after the CBI investigation began, although he was purportedly cartelizing under pressure from the other Opposite Parties.

52. The Respondent Commission relied on Mr. Sandeep Goyal's statement that there was a meeting of the Opposite Parties in February 2013 (*Q5 of DG Report*) where the bid rotation arrangement was arrived at and it was agreed that Mr. Sandeep Goyal would prepare and circulate the distribution chart keeping rates of tender dated 27.02.2013 as *reference distribution (Qs 22 and 24)*.

53. However, Mr. Sandeep Goyal is totally vague about the specifics of the date, time and place of the meeting. Mr. Sandeep Goyal is based out of Panchkula and would have had to travel specifically for this meeting. It is therefore most strange that he did not remember or have any other material particulars about this meeting, nor has he produced any other proof of the meeting in the form of hotel or travel receipts despite being asked about it (*Q54 nw Q62*).

54. It was submitted that the month of February has 28 days, the tender dated 27.02.2013 was opened on 27.02.2013 itself, and Mr.

Sandeep Goyal claims that they met in February i.e. therefore they could have only met on 28.02.2013 but in statement dated 18.03.2013 Shri Sandeep Goyal stated that he does not remember the exact date of the meeting (*Q5 and 16, internal page 169-170 of DG Report*). This is because there was no such meeting, as has been denied by the Appellants as well as Opposite Party No.3.

55. In relation to tender dated 20.03.2013, in his first statement dated 17.02.2015 Mr. Sandeep Goyal stated that Mr. Ashish Jain called him on 20.03.2013 from 7am till 12:30pm but he did not receive his call (*Q13 at internal page 165 of DG Report*), in his next statement on 18.03.2015 he stated that the bid for tender dated 20.03.2013 was changed by the Opposite Parties on the insistence of Mr. Ashish Jain on the date of the tender itself for which Mr. Ashish Jain called him 6 times (*Q10 of DG Report*).

56. Considering the contradiction about the change/revision of bids for tender dated 20.03.2013 and receipt of phone calls on 20.03.2013, which was also contrary to the documents on record w.r.t. call detail records in the DG Report and data regarding the tender submission time as Opposite Party No.3 had already submitted their bid on 19.03.2013, an explanation was sought Mr. Shri Sandeep Goyal at the cross-examination. Mr. Sandeep Goyal replied that he does not remember the time of the bid submission, the same is a matter of record, and he does not remember whether there were any revisions

to the bid submission (Q 10-13), all of which are completely contrary to the earlier statements. Such swinging stance of the Shri Sandeep Goyal from his earlier statements, which is also inconsistent with the documents on record, makes it amply clear his statement is unreliable and motivated.

Submissions on penalty

57. Based on the above submissions, it was submitted that the Impugned Order including the penalty imposed on the Appellants deserves to be set aside.

58. The Hon'ble Supreme Court of India in *Excel Crop Care Limited v. CCI & Anr*, (2017) 8 SCC 47 held that the penalty imposed must be based on the doctrine of proportionality, and the penalty should not be so disproportionate so as to lead to shocking results. In the present case, the following grounds shown to suggest between the conduct of the Appellants and the quantum of penalty imposed,

- a. 'R. Kanwar Electricals' (OP-2)'is a small family firm comprising Appellants No.2 and his mother.
- b. It is in fact registered as a small scale industrial firm (S.S.I) with the Government of India's National Small Industries Corporation Limited.
- c. Another ground is that its net profit for the entire year of 2012-13 was Rs. 17.31 lakhs. The penalty amount of Rs.

20.01 lakhs will grievously affect the day-to-day working of RKE.

- d. The Commission also found that the alleged cartel existed for 3 tenders over a span of one month (February - March 2013).
- e. 'R. Kanwar Electricals (OP-2)' got no purchase orders on any of the tenders that allegedly formed part of the bid rigging.
- f. 'R. Kanwar Electricals (OP-2)' has never been accused of any anti-competitive acts except the present case, which has been previously considered as a mitigation factor by the erstwhile Competition Appellate Tribunal.

However, in absence of such facts brought before Commission, facts beyond record cannot be taken to allege that the penal order is disproportionate.

ANALYSIS OF FACTS & FINDING:

59. There are primarily three types of evidence in the present case

i.e. (a) e-mail, (b) call data records and (c) statement of OPs.

60. The *e-mail* dated 17th March, 2013 was initiated by Shri Sandeep Goyal to Mr. Ashish Jain with the following comments :

*“Dear Ashish,
I have made the distribution for your reference. Please see and then we can discuss.*

Thanking you,

With warmest regards”

Thereafter, Shri Ashish Jain forwarded the e-mail to Shri Gulshan Kapoor, an office executive of OP 3 with the following remarks:

“Sir, please put the said mail with attachment on the table of Sir Ji”

61. On receipt of this e-mail, Mr. Gulshan Kapoor forwarded the e-mail to Mr. Ramesh Parchani on the same day. It is from the inbox of Shri Parchani that the CBI retrieved this e-mail.

62. Opposite party No. 1 accepted that the *e-mail* was sent in pursuance of the agreement between the Opposite parties. However, opposite party No. 2 (R. Kanwar Electricals) and Opposite Party No. 3 (Western Electric & Trading Co.) denied any such agreement.

63. Mr. Ashish Jain, Opposite Party No. 2 (R. Kanwar Electricals) contended that though he forwarded the *e-mail* but he has done so because Shri Sandeep Goyal had threatened him with dire consequences. In the case of OP 3 (Western Electric & Trading Co.) both Shri Gulshan Kapoor as well as Shri Ramesh Parchani denied knowledge of the contents of the e-mail. Shri Gulshan Kapoor even went to the extent of stating as to how Shri Ashish Jain got hold of their *e-mail* and thereby accepted that it was his *e-mail*.

64. Shri Ramesh Parchani submitted that he first come to know of the *e-mail* dated 17th March, 2013 when the CBI found it in his inbox but such stand cannot be accepted.

65. It is interesting to note that when Shri Gulshan Kapoor, who claims that he did not know Shri Ashish Jain, received an e-mail from Shri Ashish Jain with instructions to put it on table of “Sir Ji”, he did not ignore the e-mail and rather immediately forwarded the same to his superior, Shri Ramesh Parchani. It is inconceivable that any prudent person would forward an e-mail from an unknown source with unknown contents without opening or reading the same, unless he knew the sender and/ or the contents of the e-mail. Further, the call data records of Shri Ashish Jain show that there were nine calls made between Shri Ashish Jain and Shri Gulshan Kapoor from 27.02.2013 to 31.03.2013 with three calls being exchanged on the date of the e-mail itself *i.e.*, 17.03.2013. Thus, considering the above conduct of Shri Gulshan Kapoor, his statement that he did not know Shri Ashish Jain is without credence.

66. The evidence as adduced from the call data records forwarding the *e-mail* an incidental event and this has rightly be held by the Commission. Opposite Party No. 2 ‘R. Kanwar Electricals’ and Opposite Party No. 3 (Western Electric & Trading Co.) tried to project that it was an incidental but the conduct makes it clear that there was an understanding/arrangement arrived at amongst the Opposite parties to rig the tenders floated by the Indian Railways and BEML.

67. Shri Asif Ali, Marketing Manager of CGL were recorded. In his statement, recorded by the DG on 18th February, 2015 stated as :

*“Generally, the notified tenders of railways
are communicated to us by M/s Western Electric &*

Trading Company and then we issue authorization letter for specific tender before the opening of tender. Thereafter, we issue a separate letter wherein the suggested rates are mentioned (based on certain factors including tender trends, tender quantity etc.) to be quoted by M/s Western Electric & Trading Company in the railway tenders. The rates mentioned in the said letters are just an advice and are competitive price. We mention one figure as a rate for quoting in the tenders. After issuance of authorization letter, Crompton Greaves Ltd. hand over the products i.e., BLDC fans to M/s Western Electric & Trading Company and charge the total price for the supply... M/s Western Electric & Trading Company issues us periodic order for bulk quantity on fix price independently of railways orders. Crompton Greaves invoices to Western Electric & Trading Company upon supply of BLDC fans and receives payment from the later independent of railway payment to Western Electric & Trading Company....Thereafter, M/s Western Electric & Trading Company bid in the railway tenders and after getting orders from railways, supply the same to the railways and charge the price from the railways. Railways have to pay to

M/s Western Electric & Trading Company and M/s Western Electric & Trading Company has to pay to us. We do not claim any money from railway directly regarding supply of BLDC fans as billing is raised by M/s Western Electric & Trading Company ...”

68. The statement of Asif Ali shows the clear relationship between OP-3 (*Western Electric & Trading Company*) and OP-2 (‘R. Kanwar Electricals) Ashish Jain was not one of principal-agent as claimed by OP-3 (*Western Electric & Trading Company*.) Shri Parchani has also contended that he had quoted the same rates as given to him by CGL. To support his contention he supplied a letter dated 18.02.2013, wherein the rates were advised by CGL for the four tenders that are subject matter of this case. He also provided another letter dated 15.03.2013 of CGL wherein rates for tender dated 20.03.2013 were revised by CGL. However, when the DG examined the rates suggested by CGL, it was found that the rates proposed in the e-mail dated 17.03.2013 and the rates advised by CGL in letter dated 18.02.2013 (final price after adding 5% CST) were same. This raises the issue how Shri Sandeep Goyal of OP 1 became privy to the rates suggested by CGL to OP 3.

69. The Commission has noticed the sequence of events which conclusively shows that the rates were shared by Shri Ramesh Parchani with Shri Ashish Jain and Shri Sandeep Goyal, directly or indirectly, through *e-mail* or telephone. Thereafter, the Opposite Parties bid for tender dated 27th February, 2013 as per mutually agreement rates and then met at New Delhi to make their arrangement.

70. For proper understanding, it is relevant to quote some of the evidence, given by the Ashish Jain and others.

71. Mr. Ashish Jain (R. Kanwar Electricals) during his deposition, at Question No. 16 makes the following statement :

“Question No. 16 :Have you received any mail on 17.03.2013 on your mail ID *rdso.fans@gmail.com* from Sandeep Goyal from his mail ID *goyal.pk1@gmail.com*? If yes, please provide the details.

Answer: Yes, I have received a mail from Sandeep Goyal from his mail ID *goyal.pk1@gmail.com* on 17.03.2013 with an attachment relating to details of upcoming three tenders and one tender which was already passed on 27.02.2013. After receiving the mail, I have not called Mr. Sandeep Goyal. In fact, he has called me on same day i.e. 17.03.2013 and threatened me that I will have to forward it to Western Electric and Trading Company and if I will not forward it then he will get me black listed from RDSO because of his strong links. Also, he has threatened that ‘main tumhare pankhen railways me fail karwa dunga, mere ML (member electrical), Mr. Kulbhushan se personal relation hain, RDSO mein bhi mere ache relation hain, wahan se main tumhe black list kara dunga.’”

Question No. 21 : When Mr. Sandeep Goyal of Pyramid has threatened you on 17.03.2013 telephonically then why you have not called the police?

Answer: I have not called the police because I was afraid that Sandeep Goyal will shut down my business by using his contacts in RDSO and Railway Board mainly Member Electrical.

Question No. 22: The rates decided by you i.e. R. Kanwar Electricals and Pyramid Electronics & Western Electric and Trading Company and rates quoted in the tenders are same (after showing the mail and tender documents). Considering the same please specify that why the said conduct of R. Kanwar Electricals and Pyramid Electronics & Western Electric and Trading Company should not be term to be cartelization and rigged the bid?

Answer” Tender No. 301204020T460 due date 27.2.2013 was already open and rates were known to all. In second tender i.e. Tender No. 45131110 due date 20.3.2013, I have not quoted the rates as given by Sandeep Goyal and I have quoted as per my own calculations. As far as third tender is concerned i.e. Tender No. 4102130113 due date 25.03.2013, I want to say that it was the same rate as given by Sandeep Goyal in the mail dated 17.03.2013 but the same was only due to

co-incident. And as far as fourth tender i.e. BEML is concerned I have not participated in the bid.

Ramesh Parchani (Western Electric and Trading Company) in his statement made the following statement :

Question Nos. 6: Do you have any agreement with Crompton Greaves Ltd. regarding the supply/price to be quoted in tenders?

Answer: We do not have any agreement with Crompton Greaves Ltd. regarding dealership/supply/price to be quoted in writing from inception but we are exclusive agent of Crompton Greaves Ltd. for BLDC fans in India since inception till date.

Question No. 7: Did you decide bidding rates independently or after consultation with some other bidder?

Answer: I never consult any other person or firm or other bidders for quoting my rates in railway tenders for BLDC fans but Crompton Greaves Ltd. direct us what price we should be quoted in tenders. Here by I am submitting letters dated 18.02.2013 and 15.03.2013 (Annexure I) of Crompton Greaves Ltd. wherein they have directed us to quote the rates in railway tenders. I will also submit some more letters of Crompton Greaves Ltd. wherein they have directed us to quote the rates in railway tenders latest by 23.02.2015. We

are advised by the OEM the indicative prices much before the date of opening of the tenders however price to be quoted is communicated to us one or two day earlier before submission of the quotation.

72. Mr. Gulshan Kapoor (office Executive, Western Electrical & Trading Company) in his deposition stated that :

Question No. 6 : Did you decide bidding rates independently or after concern with some other bidder?

Answer: Yes, we decide bidding rates as per the price list given by CGL and we never consult any other person and firm for quoting our rates in railways tenders for BLDC fans.

Question No. 7: What price you have quoted in Tender No. 30120402OT460 due date 27.02.2013, Tender No. 45131110 due date 20.03.2013, Tender No. 4102130113 due date 25.03.2013 and Tender No. DR01/RM2/1200120506 due date 26.03.2013?

Answer:

Sl. No.	Tender No. with due date	Price in Rs.
1.	30120402OT460 (27.02.2013)	3491.98
2.	45131110 (20.03.2013)	3530/-
3.	4102130113 (25.03.2013)	3495/-
4.	DR01/RM2/1200120506 (26.03.2013) BEML	3481 (Quoted by CGL)

Question No. 8 : Are you were L-1 in any of these tenders? If yes, in

which tender?

Answer: Yes, we were L-1 in tender No. 4513110 due date 20.3.2013. And in BEML tender due dated 26.03.2013 purchase order have been received by us.

Question No. 9 : Can you please explain what are the reasons for quoting different prices for different tenders with in a span of one month?

Answer: We have quoted the price given by the Crompton Greaves Ltd. therefore I do not know what was the reasons for quoting different prices for different tenders.

xxx

xxx

xxx

Question No.13 : Have you received any mail on 17.03.2013 on your mail ID kapoor.gulshanwestern@rediffmail.com from Ashish Jain from his mail ID rke26@rediffmail.com ? If yes, please provide the details.

Answer: Yes, I have received a mail from mail ID rke26@rediffmail.com but I have not opened its attachment and forward the same to mail IDs rameshparchani@yahoo.com; Wetco3@gmail.com and westernelectric@airtelmail.in. I came to know about the attachment to this email only when CBI approached Ramesh Parchani during June, 2013.

73. The arrangement proposed in the *e-mail* was implemented by the parties, it is evident if compared with the rates actually quoted by the opposite parties in the four tenders as :

Tender No. and Due Date	30120402OT460, (27.02.2013) (1)	45131110, (20.03.2013) (2)	4102130113, (25.03.2013) (3)	DR01/RM2/1200120506, (26.03.2013) (4)
Procurer	N.E Railway	S.C Railway	North Railway	BEML
OP 1 (Rate in e-mail)	3510	3481	3481	3520
OP 1(Rate quoted)	3510	3610.80	3480.75	3570.75
OP 2 (Rate in e-mail)	3481	3495	3520	3495
OP 2(Rate quoted)	3481.07	3757	3520	No bid
OP 3 (Rate in e-mail)	3495	3520	3495	3481
OP 3 (Rate quoted)	3491.98	3530	3495	3498.36 (Quoted by Crompton Greaves Ltd.)
L1 based on rates in e-mail	OP 2	OP 1	OP 1	OP 3
L1 based on rates quoted	OP 2	OP 3	OP 1	Crompton Greaves

From the above table, it is evident that:

- a. as per arrangement, the rates agreed to be quoted by OPs were Rs.3481 (by L1), Rs.3495 (by L2) and Rs.3520/3510 (by L3);
- b. the arrangement was followed for tender dated 27th February, 2013. OP 2 quoted the same rate as was mentioned in e-mail attachment *i.e.*, Rs.3481 and was L1. OP 3 and OP 1 had also quoted identical/similar rates as in e-mail attachment and were L-2 and L-3, respectively;
- c. the arrangement was not followed for tender dated 20.03.2013. The rates quoted in this tender were different from what was mentioned in the e-mail. Interestingly, all the three OPs, did not

- quote rates lower or equivalent to the previous L-1 *i.e.*, Rs. 3481; rather all quoted a higher rate. OP 3 was L-1 in this tender.
- d. after deviating in tender dated 20.03.2013, the arrangement was again followed by OP 1, OP 2 and OP 3 in tender dated 25.03.2013, where OP 1 quoted Rs. 3480.75 and was L1, OP 3 and OP 2 quoted identical rates as in e-mail and were L 2 and L 3, respectively.
- e. the arrangement was not effectuated in tender dated 26.03.2013, as instead of OP 3, CGL quoted directly in this tender. Further, OP 2 did not submit bid and the rates quoted by OP 1 did not match with the rates in the e-mail.

74. There are other evidence on record which we have not discussed but detailed by the Commission. Some of important evidence suggests that OP-1 (Pyramid Electronics), OP-2 (R. Kanwar Electricals) and OP-3 (Western Electric & Trading Co.) not only rig the tender dated 25th March, 2013 but also the tender dated 27th February, 2013.

75. In fact, the Opposite Party No. 1 had admitted to entering into the arrangement with OP-2 (R. Kanwar Electricals) and OP-3 (Western Electric & Trading Co.) to rig the four tenders for BLDC Fans and quoted rates in three out of four tenders in collusion with OP-2 (R. Kanwar Electricals) and OP-3 (Western Electric & Trading Co.) though latter have denied that it was part of the cartel.

76. In view of the evidence on record and discussion as made and the Commission having dealt with the matter in detail based on the evidence, no case is made out to interfere with the findings of the

Commission.

77. The grounds that 'R. Kanwar Electricals' is a small family firm or is a small scale industries and on net profit for the entire year is less is not a ground to interfere with the penalty as imposed by the Commission on the Appellants. It deserves to be rejected.

Both the appeal are accordingly dismissed. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice A.I.S. Cheema]
Member (Judicial)

[Balvinder Singh]
Member (Technical)

New Delhi

17th February, 2020

/ns/