

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Competition Appeal (AT) No. 09 of 2019

[Arising out of Order dated 9th November, 2018 passed by the Competition Commission of India in Case No. 41 of 2018]

IN THE MATTER OF:

Reprographic India, New Delhi

604, Siddartha Building,

96, Nehru Place, New Delhi – 110019

Through Shri A. K. Ganjoo, Authorized Signatory

...Appellants

Vs

1. Competition Commission of India,

9th Floor, Office Block, Tower-1,

Kidwai Nagar (East), Opp. Ring Road,

New Delhi – 110023.

Through its Secretary.

2. Hitachi Systems Micro Clinic Pvt. Ltd.,

E-44/2, Okhla Industrial Area,

Phase-II, New Delhi – 110 020.

3. IL&FS Technologies Limited.

3rd Floor, Ambience Corporate Tower,

Ambience Mall, Gurgaon,

Haryana – 122 002.

4. Bharat Heavy Electricals Limited,

BHEL House,

Siri Fort, New Delhi – 110 049.

....Respondents

Present:

**For Appellant: Mr. Deepak Khanna, Appellant in person.
 Mr. Setu Sharma, Advocate.**

For Respondents:

J U D G M E N T

BANSI LAL BHAT, J.

The Appellant is aggrieved of order dated 9th November, 2018 passed by the Competition Commission of India (hereinafter referred to as 'CCI') under Section 26(2) of the Competition Act, 2002 in Case No. 41 of 2018 whereby and whereunder CCI closed the information filed by the Appellant alleging that during the entire bidding process Respondents acted in collusion and thereby rigged the process causing huge loss to public exchequer. CCI observed that a prima facie case under the Competition Act, 2002 was not made out against the Respondents as the case of Appellant Informant lacked reasonable allegations based on any concrete evidence.

2. The issue arising for determination is whether the CCI erred in undertaking an exercise itself to determine whether or not the allegation of inter-alia collusive bid rigging leveled against Respondent No. 2 & 3 has been established without ordering an investigation in terms of Section 26 (1) of the Competition Act, 2002.

3. Before referring to the allegations leveled in the information lodged by the Appellant with CCI, it would be appropriate to notice the relevant

provisions of the Competition Act, 2002. Relevant portion of Section 3 reads as under:-

“3. (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

- (c) *shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;*
- (d) *directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition: Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.*

Explanation - For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding."

4. On a plain reading of the aforesaid provision it is abundantly clear that Section 3 (1) prohibits agreements, inter-alia in respect of supply of goods between enterprises and persons and their associations which causes or is likely to cause an appreciable adverse effect on competition within India. It lays down that such agreements shall be void. Such agreements between enterprises, persons or their associations including cartels engaged in identical or similar trade of goods or provisions of services which determine purchase or sale price, limit or control, production, supply, markets, shares the market or source of production, etc. by allocating geographical areas of markets or type of goods or services or number of customers in market in any conceivable manner or directly or indirectly results in bid rigging or collusive bidding is presumed to have an appreciable adverse effect on competition. Joint venture agreements designed to increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provisions of services have been kept out of purview of Sub-section (3) which means that the presumption relating to such agreement shall not be available qua joint venture agreements. The explanation appended to Sub-section (3) provides that an agreement between such enterprises or persons engaged in identical or similar production or trading of goods or provisions of services shall fall within the definition of 'bid rigging', if it has the effect of eliminating or reducing competition or bids or adversely affecting or manipulating the process for bidding. A bare look at the provision engrafted in Section 3 brings it to fore

that anti-competitive agreements in respect of certain activities involving production, supply, distribution, etc. which adversely affects competition, at a given time or where there is likelihood of its affecting competition in future are presumed to have an appreciable adverse effect on competition if such agreements or decisions taken in pursuance thereof determine prices, control or limit production, supply, markets or results in sharing market or source of production, etc. or entails bid rigging or collusive bidding. This includes cartels but excludes joint venture agreements. Therefore, it would be imperative for an Informant to demonstrate that there was an agreement between enterprises or persons or their associations engaged in identical or similar business which inter-alia resulted in bid rigging or collusive bidding, directly or indirectly. Agreement postulates meeting of minds. The Informant shall have to lay evidence, direct or circumstantial, before the CCI that an agreement was entered into between such enterprises, persons or their associations engaged in identical or similar trade in respect of the prohibited activity which resulted in bid rigging or collusive bidding. It is only then that such agreement can be presumed to have an appreciable adverse effect on competition.

5. Adverting to the facts of the case in hand, be it seen that the Appellant alleged bid rigging/ collusive bidding by 'Hitachi Systems Micro Clinic Pvt. Ltd.' (Respondent No.2) and 'IL&FS Technologies Ltd.' (Respondent No.3) in the tender floated by 'Bharat Heavy Electricals Ltd.' (BHEL) for procurement of PCs and Peripherals. The Appellant claimed to be an ancillary to BHEL,

Haridwar Unit, manufacturing folding and finishing systems and also engaged in distribution of IT Products and provision of services. It claimed to have supplied IT Products to BHEL either directly or through System Integrators (SIs) of Original Equipment Manufacturers (OEMs). Respondents 2 and 3 are said to be in business of providing IT Solutions to different businesses. Both Respondent Nos. 2 & 3 are stated to be HP Partners and SIs. According to Informant, BHEL started the process of floating a composite tender from year 2006 for requirements of IT Product of all BHEL Units across India, ultimately culminating into a Corporate Rate Contract. The computer related equipment was to be procured on Hire and Purchase Basis. The Appellant alleged that in terms of tender notice dated 1st April, 2017, BHEL invited tenders for supply, installation and maintenance of PCs and other computer peripherals on more than 20 locations for a period of five years on lease basis on Corporate Rate Contract. Total items were grouped into two categories. Group-A comprising of 24 items pertained to PCs and Peripherals while Group-B comprising of 47 items related to Enterprise Equipment. L-1 was to be determined in each group respectively based on the total value of items in that group while the bidder had the liberty to bid for one or both categories. The Appellant restricted his allegations only in respect of Group-A items. Only OEMs and SIs were eligible to bid. All items in the each group were required to be of the same OEM. According to the Appellant bids were submitted by R-2 and R-3 only. Rate Contract LOI for IT equipment of

contract value of about Rs.110 Crores + Taxes was awarded to Respondent No. 2 by BHEL on 23rd December, 2017. The total value of Rate Contract comprised of the elements of outright purchase price, maintenance cost and interest component. The Appellant alleged that in the entire bidding process Respondents 2 and 3 acted in collusion and thereby rigged the process resulting in huge loss to the State Exchequer.

6. The CCI after hearing the Appellant – Informant and the officials of BHEL found that the tender floated by BHEL was an open tender and there was no embargo on any SI or OEM to participate. It noted that various SIs, OEMs and other representatives from the industry had participated in the pre-bid discussions. However, in respect of Group-A Items only Respondents 2 and 3 submitted the bids as its requirement comprised of providing maintenance and other services for five year lease period. The CCI also noted that four bids were submitted for Group-B Items, which did not contain maintenance provision. In Commission's view stringent operative requirements could be a factor in restricting bids in respect of Group-A Items. The Commission was of the view that low participation in bidding process of Group-A Items in the given circumstances would not necessarily be indicative of any concerted action. The Commission dismissed the allegation of supportive bid on the Part of Respondent No. 3 in favour of Respondent No. 2 on the ground of both being connected to HP and having business links as there was no evidence to suggest that these Respondents were engaged in bid rotation. It also did not attach any significance to the

factum of some officials of one Respondent earlier working with another Respondent holding that in IT Industry this was a routine affair and meeting of minds for purposes of bid rigging/ collusive bidding could not be inferred from such proximity. The Commission was of the view that the Respondent 2 and 3 were two different entities operating independently. No fault could be found with the bidder's choice of quoting products of one or the other manufacturer. The Commission agreed with the submission of BHEL that at the time of preparation of tender proper analysis of the market was undertaken to devise an estimate which was kept confidential. Respondent No. 2 was declared L-1 for Group-A Items based on composite value quoted therein which conformed to the terms and conditions of tender. It was during negotiations that Respondent No. 2 reduced its price to Rs.110 Crores which was within the budget estimate of BHEL. The Commission was of the view that due to various factors piece meal comparison of the tendered 24 items of Group-A for their price reasonability with respect to outright price, GEM Price, etc. viz-a-viz lease price was not appropriate. The Commission concluded that the Appellant Informant had failed to provide or suggest any evidence to show that there was any meeting of minds between Respondents 2 and 3 at the time of submission of bids. Thus, it was of the view that no prima facie case was made out against the Respondents justifying ordering of an investigation by DG.

7. Heard the Appellant in person and considered his submissions.

8. CCI is empowered to inquire into any alleged contravention of provisions contained in Section 3(1) or Section 4(1) of the Competition Act, 2002 on its own motion or on receipt of an information from any person, consumers or their associations or trade associations or upon a reference made to it by the Central Government, State Government or Statutory Authority. Section 26 of the Act provides that upon receipt of a reference or upon its own knowledge or upon information received from any person, the Commission, if of opinion that there exists a prima facie case, shall direct the Director General (DG) to cause an investigation to be made into the matter. On a bare reading of this provision, it is abundantly clear that causing of investigation to be conducted by Director General is entirely dependent on existence of a prima facie case warranting such investigation. Unless the Commission is satisfied that a prima facie case exists, the Informant (where information has been received from any person) has no vested right to seek investigation into alleged contravention of provisions Section 3(1) or Section 4(1) of the Act. The Informant has to demonstrate that there is substance in the allegations leveled in the information and he will fairly succeed in establishing that the Respondents are engaged in anti-competitive agreements. Raising of competition concerns on the strength of bald allegations without any shred of evidence would not absolve the Informant of his obligation to make out a prima facie case warranting causing of investigation by DG. It is indisputable that direct evidence would seldom be available in cases of bid rigging or collusive bidding. However,

inference of complicity in anti-competitive activities would be available only on the basis of proved facts. Merely because the bidders while exercising their choice of quoting products, opt for a particular manufacturer, which may be attributable to a variety of factors, would not necessarily justify meeting of minds. This observation equally applies in the facts and circumstances of instant case where Respondent No. 2 emerged as L-1 in the bidding process while he was found to have quoted quite a few products of HP for Group-A Items. The successful bidder had not only the choice to quote product of a particular OEM but also was required to attend to the service and maintenance besides providing spare parts etc. during the entire lease period. The choice for a particular product may have emanated out of this consideration as well. The Respondent No. 2 was entitled to exercise his choice of quoting products of a particular manufacturer so long he did not come in conflict with the terms and conditions of the tender. There may have been business linkages inter-se Respondents 2 and 3 but in absence of any material to suggest that these Respondents were engaged in the practice of bid rotation, no adverse inference suggestive of collusive bidding could be drawn against them.

9. On a careful consideration of the matter, we are of the considered opinion that the Appellant – Informant who was neither an OEM nor an SI and was not in the fray for bidding qua the tender in question raised competition concerns on the basis of wild allegations without any substance. The circumstances projected by him, in absence of any

incriminating evidence, would not justify drawing inference of complicity of Respondents 2 and 3 in bid rigging/ collusive bidding. The Appellant-Informant has miserably failed to make out a prima facie case warranting causing of an investigation by DG. The impugned order passed by the Commission is based on application of mind and does not suffer from any legal infirmity.

10. The appeal lacks merit and the same deserves to be dismissed. We accordingly dismiss the appeal. There shall be no order as to costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

26th February, 2019

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