

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Competition App. (AT) No. 44 of 2022 &
I.A. No. 3646, 3647, 3648 of 2022

(Arising out of the Order dated 09.06.2022 read with order dated 22.06.2022 passed by the Competition Commission of India Suo Moto Case No. 06 of 2020)

IN THE MATTER OF:

Keshav Bihani

S-2, Usha Plaza 3rd Floor,
MI Road Jaipur- 302001

...Appellant

Versus

1. Competition Commission of India

9th Floor, Office Block 1 Kidwai Nagar East New
Delhi 110023.

...Respondent No. 1

2. M/s Hari Narayan Bihani

S-2, Usha Plaza 3rd Floor, MI Road Jaipur-
302001

...Respondent No. 2

Present:

For Appellant

Mr. Anup Kumar, Ms. Achint Priya, Ms. Arshi
Hayat & Ms. Neha Jaiswal, Advocates.

For Respondent

Mr. MM Sharma, Ms. Angira Singhvi Hodha &
Ms. Anjali Singhvi, Advocates.

With

Competition App. (AT) No. 45 of 2022 &
I.A. No. 3650, 3651, 3653 of 2022

IN THE MATTER OF:

M/s Hari Narayan Bihani

S-2, Usha Plaza 3rd Floor,

MI Road Jaipur- 302001

...Appellant

Versus

Competition Commission of India

9th Floor, Office Block 1,

Kidwai Nagar East New Delhi 110023.

...Respondent

Present:

For Appellant

Mr. Anup Kumar, Ms. Achint Priya, Ms. Arshi Hayat & Ms. Neha Jaiswal, Advocates.

For Respondent

Mr. MM Sharma, Ms. Angira Singhvi Hodha & Ms. Anjali Singhvi, Advocates.

J U D G E M E N T

(10.04.2026)

NARESH SALECHA, MEMBER (TECHNICAL)

1. There are two appeals containing Competition Appeal No. 44 of 2022 and Competition Appeal No. 45 of 2025 filed by the Appellants i.e. Keshav Bihani (the partner in M/s Hari Narayan Bihani) and M/s Hari Narayan Bihani (the firm in which Keshav Bihani is pending partner of M/s Hari Narayan Bihani) under section 53B of the Competition Act, 2002 ("**Competition Act**") read with 151 of the Civil Procedure Code, 1908 ("**CPC**") against impugned order under Section 27 of the Competition Act dated 09.06.2022 (received on 15.06.2022) (hereinafter referred to as "**Impugned Order 1** ") read with order dated 22.06.2022 (received on 30.06.2022).

Competition Commission of India is the main contesting Respondent (Respondent No.1) in both the appeals herein.

M/s Hari Narayan Bihani is the Respondent No.2 in Competition Appeal No. 44 of 2022 herein.

2. The Appellants submitted that the initiation of proceedings under Section 48 of the Competition Act against the Appellants is inconsistent with the provisions of the Competition Act. The Appellants contended that, Section 48 of the Competition Act cannot be invoked for violations which do not provide for 'imprisonment'. The Appellants stated that it is only in cases where the person committing a contravention is a company and such contravention/breach is 'punishable' with imprisonment that the CCI is required to initiate Section 48 and identify the 'person' who, at the time of contravention, was responsible for the conduct of business of the company. The Appellants argued that the present case did not fall in that category; therefore, the CCI's invocation of Section 48 of the Competition Act against the Appellants was not only premature but also wholly illegal and beyond the provisions of the Competition Act and the intention of the legislature.

3. The Appellants further contended that, the contravention (punishable with 'imprisonment') has to be actually committed, i.e., there has to be an unambiguous and clear finding regarding the commission of contravention, and only after fulfilling the stage of finding a company in contravention is the CCI empowered to initiate proceedings under Section 48 of the Competition Act.

4. The Appellants stated that the CCI has to establish that the person in-charge of the conduct of the business was actually guilty of such contravention after undertaking effective analysis; thereafter, the CCI is obligated to issue a separate show-cause notice to such person and grant an opportunity to defend the charge and establish that the contravention was committed without his knowledge or that he exercised all due diligence. The Appellants argued that Section 48 does not provide for any ‘punishment’ and the imposition of punishment (and not penalty) has to be applied under the relevant section which has been contravened.

5. The Appellants submitted that the other reason why the CCI’s interpretation and application are in derogation of the intention of the legislature and the plain reading of the Competition Act is that any violation of Sections 3 and 4 of the Competition Act is governed by the penalty provision under Section 27 of the Competition Act (which only mentions the word ‘turnover’ and not ‘income’). The Appellants contended that the intention of the legislature is very clear that penalty was to be imposed on the enterprise and the person (representing, inter alia, a partnership firm or proprietorship etc.) for its participation and not on the ‘personal’ income of an individual. The Appellants stated that any breach of Section 27 of the Competition Act is governed by Section 42 of the Competition Act and it is only in that circumstance i.e., upon invocation of Section 42 of the Competition Act that Section 48 of the Competition Act can be invoked and ‘punishment’ as prescribed under Section 42 can be imposed on the director/officer/person-in-charge of the company. The

Appellants reiterated that the legislature has used the word ‘penalty’ under Section 27 and the words ‘proceeded against and punished accordingly’ under Section 48 of the Competition Act. The Appellant argued that, in the present case, for the alleged breach of Section 3(3) read with Section 3(1) of the Competition Act, the CCI has already passed an order under Section 27 and imposed penalty against Respondent No.2 (of which Keshav Bihani is a partner).

6. The Appellants clarified that it is not the CCI’s case that M/s Hari Narayan Bihani has violated Section 27 of the Competition Act, necessitating invocation of Section 42 and therefore consequential invocation of Section 48 of the Competition Act. The Appellants submitted that the CCI’s application of Section 48 is legally and factually flawed and based on incorrect/wrong interpretation of the provisions of the Competition Act and accordingly, the Impugned Orders are void ab initio and bad in law and are liable to be set aside.

7. The Appellants contended that the CCI’s application of ‘penalty on turnover’ as prescribed under Section 27 of the Competition Act to ‘income’ of an individual is bad in law and impermissible. The Appellants stated that Section 27 of the Competition Act does not refer to the word ‘income’ and only provides for imposition of penalty on ‘turnover’.

8. The Appellants argued that it is a well-settled principle of law that while interpreting a provision the courts only interpret the law and cannot legislate; it is only for the legislature to amend or modify the provision. The Appellants submitted that even assuming there is a casus omissus in Section 48 caused by

the failure to mention ‘income’, it is for the Parliament to remedy the lacuna by appropriate amendments and not the CCI. The Appellants pointed out that it is not a disputed position and even the CCI has agreed that Section 27, as it stands today, does not include the word ‘income’ and it is on this basis that the CCI (through the Competition Law Reforms Committee Report) has suggested amendment to Section 27 to include the word ‘income’. The Appellants stated that the proposed Competition Amendment Bill, 2022 is pending before the Parliament. The Appellants contended that in the absence of any such amendment and by invoking Section 48, the CCI has committed ‘illegality’ and caused double-jeopardy to the Appellants. The Appellants submitted that the Impugned Orders are bad in law and liable to be set aside.

9. The Appellants contended that the CCI has failed to appreciate that Section 48 of the Competition Act refers to ‘punishment’ and not ‘penalty’. The Appellant argued that the CCI’s liberty of substituting the words in the Competition Act, thereby causing an interpretation that is not literal, is in derogation of the intention of the legislature and beyond the powers of the CCI. The Appellants submitted that Section 48 of the Competition Act cannot be read with Section 27 of the Competition Act, which provides for penalty and not ‘punishment’. The Appellant stated that Section 48 can only be invoked for any contravention under Sections 42, 43 and 45 of the Competition Act alone.

10. The Appellants submitted that, the initiation of proceedings under Section 48 of the Competition Act against the Appellants is inconsistent with the

provisions of the Competition Act as well as in violation of orders of the Competition Appellate Tribunal (“COMPAT”) (merged into this Appellate Tribunal). The Appellants contended that the CCI is required to first hold M/s Hari Narayan Bihani in violation of the provisions of the Competition Act before proceeding against the Keshav Bihani. The Appellants argued that the CCI’s initiation of proceedings under Section 48 is also inconsistent with the intent of the statute and binding orders of the erstwhile COMPAT, which has unequivocally held in numerous cases that in the absence of a determination by the CCI that the company has committed contravention of any of the provisions of the Act or any rules, regulations etc., proceedings against officers or executives of such a company cannot be initiated. The Appellants stated that Section 48(1) as well as Section 48(2) of the Competition Act uses the term ‘contravention’ and not ‘alleged contravention’, which makes it clear that Section 48 can be invoked only after it is proved that a contravention has been committed by the company. The Appellant relied on the judgment of the COMPAT in Shib Shankar Nag Sarkar and another v. Competition Commission of India and others (Appeal No. 34 of 2014, decided on 10.05.2016), wherein it was observed that the deeming provisions contained in the two sub-sections of Section 48 of the Competition Act can be invoked only after it is found that the company has contravened the provisions of the Competition Act or any rule, regulation, order made or direction issued thereunder.

11. The Appellants contended that the use of the word ‘committed’ necessarily implies that before any person in-charge or director etc. can be proceeded against, there must exist an affirmative finding by the CCI that the company has contravened the provisions. The Appellants argued that, in the present case, without first passing a conclusive order against the company i.e. M/s Hari Narayan Bihani and simultaneously passing an order under Section 48 against Keshav Bihani, the CCI has ignored and disregarded the binding judgment of the COMPAT. The Appellants submitted that this is also against judicial discipline as enshrined under the Constitution of India.

12. The Appellants further stated that the issue of initiation of proceedings under Section 48 of the Competition Act is presently pending before the Hon’ble Supreme Court, and the CCI has given an undertaking in SLP(C) No. 4254/2019 & 4009/2019 that it shall only proceed against the ‘company’ and has consented not to proceed against individuals under Section 48 of the Competition Act.

13. The Appellants submitted that there is no analysis, examination or specific finding against the Appellants establishing that the contravention took place with the consent or connivance or neglect of the Appellants. The Appellants contended that Section 48(2) of the Competition Act requires the CCI to clearly establish that the Appellants have given consent or the contravention happened because of connivance or is attributable to any neglect on the part of the Appellants. The Appellants argued that the CCI has neither examined the such aspects nor brought on record any evidence to establish the same.

14. The Appellants contended that the CCI's invocation of Section 48 of the Competition Act only in the cases of violation of Section 3(3) read with Section 3(1) of the Competition Act is grossly erroneous, discretionary and arbitrary. The Appellants submitted that, assuming though not admitting, that the invocation is not illegal, the fact that the CCI imposes penalty on Keshav Bihani when found in violation of Section 3(3) and not when found in violation of Section 3(4) or Section 4 or Section 5 or Section 6 of the Competition Act, amounts to interpreting and invoking Section 48 of the Competition Act in a discriminatory and arbitrary manner, rendering the Impugned Orders void and liable to be set aside.

15. The Appellants submitted that the final order under Section 27 as well as Section 48 of the Competition Act was passed in the absence of a judicial member, in direct violation of the judgement of the Hon'ble High Court of Delhi in Mahindra Electric Mobility Ltd. v. Competition Commission of India (2019 SCC Online Del 8032) and the Hon'ble Supreme Court's judgment in State of Gujarat v. Utility Users Welfare Association ((2018) 6 SCC 21). The Appellants contended that the Hon'ble High Court of Delhi held that the CCI shall ensure that at all times, during the final hearing, the judicial member is present and participates in the hearing. The Appellants argued that on this ground alone the Impugned Order 1 dated 09.06.2022 and consequently Impugned Order 2 dated 22.02.2022 are liable to be set aside.

16. The Appellants submitted that there has been denial of a fair hearing and violation of principles of natural justice by not disclosing the complete information emails to the Appellants as part of the DG Report and placing reliance on the said undisclosed evidence while passing the Impugned Order 1 dated 09.06.2022. The Appellants contended that the CCI, being a quasi-judicial authority, is bound to follow principles of natural justice. The Appellants stated that the DG Report supplied on 11.01.2022 had several portions heavily redacted, including contents of emails, names of parties and duration of investigation. The Appellants argued that none of the emails/evidence relied upon in the DG Report or the Impugned Order 1 dated 09.06.2022 were provided to the Appellants. The Appellants pointed out that the CCI repeatedly refers in the Impugned Order 1 to emails/data from names such as “Ms. Shanta Sohoni”, “Rajeev Dudhani”, “Rajesh R” and “Rajesh Nair”, which do not feature anywhere in the DG Report supplied to the Appellants.

17. The Appellants relied on the judgment of the erstwhile COMPAT in BCCI v. CCI (MANU/TA/0011/2015) that if the CCI wants to rely upon any information not forming part of the DG report, it must be disclosed to the person concerned and an effective opportunity to controvert the same must be given. The Appellants submitted that on this ground alone the Impugned Orders are liable to be set aside.

18. The Appellants contended that the CCI has breached Regulation 20(4) of the CCI (General) Regulations, 2009. The Appellants submitted that the DG

Report is required to contain all the evidences, documents, statements and analysis collected during the investigation. The Appellants relied on the Hon'ble Supreme Court's judgment in Competition Commission of India v. Steel Authority of India Ltd. ((2010) 10 SCC 744) that the CCI is expected to write appropriate reasons on every issue while passing an order. The Appellants argued that the DG Report does not include several emails/statements/submissions collected during investigation (especially those heavily relied upon by the CCI) and no order regarding grant of confidentiality was provided.

19. The Appellants submitted that the Impugned Orders are bad in law as they do not take into consideration the Hon'ble Supreme Court's judgment in Excel Crop Care Ltd. v. Competition Commission of India ((2017) 8 SCC 47) for the reasons that penalties have been imposed in derogation of principles of proportionality without taking into consideration the role of the Appellant and by imposing the same penalty percentage on all directors/officers; penalties have been imposed without consideration of mitigating and aggravating factors; penalties have been imposed in an arbitrary and discriminatory manner and the penalty imposed on the Appellant is disproportionate and more than 50% of the relevant turnover of Hari Narayan Bihani.

20. Concluding the arguments, the Appellants requested this Appellate Tribunal to allow both appeals and set aside the Impugned Orders.

21. On the other hand, CCI denied the averments of the Appellants as misleading and baseless.

22. The CCI contended that after a detailed examination of the DG investigation reports, objections filed by the Opposite Parties, and all other material on record, the CCI concluded that the Appellants, along with six other Part 1 RDSO-approved vendors of polyacetal protective tubes for axle box guides to Integral Coach Factory and various zones of Indian Railways, formed a bid-rigging cartel in contravention of Section 3(3)(a), (b), (c) and (d) read with Section 3(1) of the Competition Act, 2002.

23. The CCI submitted that the cartel operated from 10.06.2015 to 29.06.2020. The M/s Hari Narayan Bihani, a partnership firm of two partners (Mr. Keshav Bihani and Mr. Om Narayan Bihani), became a Part 1 vendor on 04.07.2019 and remained involved in the cartel for approximately one year from 26.07.2019 to 29.06.2020.

24. The CCI contended that the cartel was exposed through the leniency application filed by M/s Jai PolyPan (P) Ltd., which disclosed coordination and collusion among all seven Opposite Parties. The CCI submitted that modus operandi included quoting mutually agreed prices and allocating tenders among themselves through a cartel pool. The investigation revealed emails evidencing tender allocation, revision of sharing patterns, induction of new members (including the Appellants), calculation of quoted prices, discussion on rates, complaints of undercutting, and directions to withdraw offers.

25. The CCI submitted that Ms. Shanta Sohoni played a pivotal role by maintaining cartel records, allocating tenders, and serving as the central point for

all communications. She explicitly acknowledged the existence of the agreement/understanding among the Opposite Parties.

26. The CCI contended that the definitions of “agreement” under Section 2(b) and “cartel” under Section 2(c) of the Act stipulate that even a tacit understanding or an attempt to reduce competition is sufficient to establish cartelisation. Mere receipt of incriminating emails suggesting bid prices and specific percentage allocations, without any protest over a prolonged period, constitutes a legally sufficient “agreement” to indulge in bid rigging.

27. The CCI submitted that in oligopolistic markets where cartels operate in secrecy, proof often relies on circumstantial evidence evaluated on the standard of preponderance of probability, coupled with the concept of “conscious parallelism plus”. The CCI highlighted that in the present cases, direct evidence in the form of detailed emails, coupled with admissions by parties, conclusively proves an explicit agreement. The conduct of the Appellants does not reflect independent unilateral action or mere mutual accommodation but amounts to a clear case of cartelisation established ipso facto by the plethora of emails exchanged.

28. The CCI contended that the ratio in *M/s Rajasthan Cylinder and Ors. v. Competition Commission of India* (supra) is inapplicable. In that case, there was no direct evidence such as email communications; the CCI relied solely on circumstantial evidence and limited “plus factors”. Market conditions involved a monopsony buyer (IOCL) that unilaterally determined prices and even negotiated

with L-1 bidders, which negated the need for a cartel. In contrast, the present case features overwhelming direct evidence of emails shared by the leniency applicant, multiple tenders floated by different railway zones, and only seven RDSO Part 1 vendors. The CCI pleaded that the defence of the Appellants based on similar market conditions of oligopsony is unsustainable. The requirement to examine the buyer does not arise given the direct evidence available.

29. The CCI submitted that the emails relied upon are duly accompanied by certificates under Section 65B of the Indian Evidence Act, 1872, as recorded in Paragraphs 23 and 24 of the Impugned Order. The Appellant's contention that the emails lack proper certification is factually incorrect and liable to be rejected.

30. The CCI contended that the penalty imposed on Mr. Keshav Bihani (active partner of the M/s Hari Narayan Bihani) vide Impugned Order dated 22.06.2022 under Section 48 of the Act (pre-2023 amendment) is legally valid. It was imposed at the same rate of 5% of the average of the last three years' annual income as was applied to the firm under Section 27 of the Competition Act. The CCI elaborated that the word "punished accordingly" in Section 48(1) (pre-amendment) means the penalty on the individual must be in the same proportion as that on the enterprise and since individuals like Keshav Bihani have "income" and not "turnover", the CCI correctly applied the percentage to the average annual income of the last three financial years. The CCI stated that the penalties on the M/s Hari Narayan Bihani and the Keshav Bihani are separate and cannot be clubbed. The CCI stated that the reliance by the Appellants on *Excel Crop Care*

Limited v. Competition Commission of India is misplaced, as that judgment dealt with relevant turnover for enterprises under Section 27 of the Competition Act and did not address or restrict the imposition of penalty on individuals like Keshav Bihani under Section 48 of the Competition Act.

31. The CCI submitted that substantial direct and circumstantial evidence implicates the Appellants, including the un rebutted confession in the leniency application of Jai Polypan Private Ltd., admitting the cartel involving the Appellants and contemporaneous incriminating emails. The CCI stated that the Appellants did not seek cross-examination of Jai Polypan Private Ltd. under Regulation 41(5) of the Competition Commission of India (General) Regulations, 2009, amounting to tacit admission by omission.

32. The CCI contended that ten emails were exchanged with the Appellants on 25.07.2019, 20.09.2019, 07.10.2019, 11.11.2019, 12.11.2019, 15.11.2019, 03.02.2020, 10.02.2020, 08.06.2020, and 29.06.2020 and undisputedly. In eight of these incriminating emails, the Appellants were specifically marked with allocated shares ranging from 16.67% to 14.30%. The CCI emphasized that these emails demonstrate sustained communication on tender allocation, revision of shares, price determination, undercutting complaints, and directions to withdraw bids among all Opposite Parties. The CCI stated that the Appellants never protested or dissociated, despite receiving these emails containing highly confidential information while submitting bids.

33. The CCI submitted that the Appellant's emphasis on two allegedly exculpatory emails dated 10.02.2020 and 08.06.2020 (where Jai Polypan Private Ltd. protested non-cooperation) is misplaced as these emails actually reflect disputes over share allocation (reduction from 16.67% to 14.30%) and indirectly admit prior cooperation with the cartel. The Appellant's failure to deny receipt of the emails, coupled with non-application for cross-examination of Ms. Shanta Sohoni (the central communicator), further establishes tacit acquiescence.

34. The CCI contended that mere receipt of cartel-related emails without protest or dissociation over an extended period amounts to participation through tacit acquiescence and a "meeting of minds". The CCI submitted that this principle finds support in the decision of this Appellate Tribunal in *Sundram Brake Linings Ltd. & Ors. v. Chief Materials Manager, South Eastern Railways & CCI* (Competition Appeal (AT) No. 19/2020, decided on 02.04.2024), which has attained finality.

35. The CCI submitted that the plea regarding absence of judicial members in the Commission does not render the proceedings or the Impugned Order a nullity. The Hon'ble Delhi High Court in *Cadd Systems and Services Private Limited v. Competition Commission of India (W.P.(C) 6661/2019*, held that while appointment of a judicial member is necessary, no direction restrained the CCI's functioning in its absence. The CCI stated that the Section 15 of the Competition Act provides that no act or proceeding of the CCI shall be invalid merely by reason of any vacancy or defect in its constitution. The CCI submitted that the

SLP filed by the CCI against the related judgment in *Mahindra & Mahindra Ltd.& vs Competition Commission of India W.P.(C) 6661/2019* is pending before the Hon'ble Supreme Court of India.

36. The CCI contended that the Appellant's grievance of denial of cross-examination is misconceived as no applications seeking cross-examination, were ever filed before the CCI under Section 36(1) and 36(2) of the Competition Act, and the CCI is guided by principles of natural justice but is not bound by the Code of Civil Procedure. The CCI stated that the Regulation 41(5) of the CCI (General) Regulations, 2009 uses the word "may", making cross-examination discretionary and not mandatory.

37. Concluding the arguments, the CCI requested this Appellate Tribunal to dismiss both the Appeal.

Findings

38. We note that the Appellants are engaged in the manufacture and supply of protective tubes. We also note that M/s Hari Narayan Bihani is a partnership firm and was approved as a Part II supplier of protective tubes to the Indian Railways on 26.07.2017 and upgraded as Part I supplier on 04.07.2019. We take note that the Impugned Orders mention findings of Evidence of common IP addresses from which bids were quoted and common directorship/partnership between various Opposite Parties including the Appellants were found. Further, exchange of

several email communication between the representatives of the Opposite Parties were found, wherein discussion on prices to be quoted in the tenders was made, tender quantity allocation took place, the Opposite Parties were seen distributing tenders amongst themselves wherein the Ops mutually agreed to a given rate, and non-allottees were instructed to quote 8-10% higher prices, the Opposite Parties can be seen asking other Opposite Parties to withdraw their offers from tenders, and the Opposite Parties were seen manipulating the bidding process by forming a pool/cartel of vendors, even for developmental vendors who were entering the market and were in the initial phases of manufacturing. From Impugned Order, we find that few representatives of certain Opposite Parties also admitted to the above arrangement. It is further seen that the DG observed a modus operandi which was being followed by the Opposite Parties and concluded that the Appellants indulged in contravention of the provisions of Section 3(3)(a), 3(3)(b), 3(3)(c), and 3(3)(d) read with Section 3(1) of the Act. In terms of Section 48 of the Competition Act, the DG identified certain individuals of the Opposite Parties who had played an active role in contravention of the provisions of the Competition Act by the respective Opposite Parties and/or who were in-charge of and responsible for the conduct of the business of the respective Opposite Parties during the period of contravention, and accordingly, fixed liability.

39. We observe that the issue involves allegations of cartelisation relating to the product ‘polyacetal protective tube’ for axle box guide in Integral Coach Factory (ICF). It has been brought out that the Indian Railways, in order to ensure

reliability, availability, and safe working of Railway assets, follows the practice of maintaining lists of approved vendors for certain specific items which included polyacetal protective tube. Research Designs and Standards Organisation (RDSO), the nodal agency of the Indian Railways for vendor approval, maintains two lists - of Part I and Part II vendors. RDSO-approved vendors included in Part I are eligible for regular supply to the Indian Railways for getting an order for full quantity of tenders floated by the Indian Railways, whereas approved and included in Part II are eligible for developmental order and getting an order for part quantity (up to 25% only). The RDSO-approved vendors/suppliers of polyacetal protective tubes included the name of M/s Hari Narayan Bihani which was approved as Part II source on 26.07.2017 and as Part I approval on 04.07.2019.

40. We also take into account that the CCI, after examining various emails exchanged between Opposite Parties including M/s Hari Narayan Bihani found that there were communications between the Opposite Parties w.r.t. the tenders issued by the various zonal railways and ICF for the procurement of polyacetal protective tubes, establishing the modus operandi of the collusion/coordination in the form of cartel pool amongst the Opposite Parties, which includes the allocation/allotment of tenders amongst the Opposite Parties, revision of sharing pattern, induction of new members to the pool, calculation methods to arrive at the price to be quoted, discussion on rates to be quoted, complaints regarding undercutting, and communication amongst Opposite Parties to withdraw offers.

It is the case of the CCI that such arrangement between the Opposite Parties led to manipulation of Indian Railways bidding process for the procurement of polyacetal protective tubes.

41. As per the Impugned Orders, the modus operandi of the cartel arrangement emanating from the e-mail communications between the parties seems to be that Ms. Shanta Sohoni, an employee of Polyset Plastics Private Ltd. (Opposite Party 1). (as well as on behalf of M/s Anju Techno Industries (Opposite Party-2) and M/s Power Mould (Opposite Party-3)), used to make allocation of tenders among the Opposite Parties. Usually, an e-mail was circulated from Ms. Shanta Sohoni of Polyset Plastics Private Ltd. (and also on behalf of M/s Anju Techno Industries and M/s Power Mould Opposite Party 2) to the other Opposite Parties, including M/s Hari Narayan Bihani allocating forthcoming tenders in total for the period ahead, revising the previously allocated quantity on the basis of excess/shortage value, and also informing and discussing the prices to be quoted. It has been brought out by evidence in the DG's report that Ms. Shanta Sohoni kept a record of all the forthcoming tenders of Indian Railways updated online on the Indian Railways E-Procurement System (IREPS) and allocated tenders on the basis of allotment value (a decided percentage (%) distribution of tenders) to each member, which was maintained similar to an account statement. It was also brought out in DG's report that, allocation tables were also maintained which also mentioned earlier shortage/excess value and allocated value with net excess. Tenders were allocated in compliance with the allocation done and allotment

share. It has been submitted by the CCI that there were also instances where tenders were allocated to more than one supplier as agreed between alleged operators and in such cases, members mutually agreed to a price before filing the bids. Ms. Shanta Sohoni communicated the basic price, which the designated vendor should quote in the allocated tender. Thereafter, the vendors communicated the price based on their respective additional taxes and arrived at a mutually agreed price over e-mails for submitting the bids. Ms. Shanta Sohoni also used to advise the members of the alleged cartel via e-mails that non-allottee vendors should quote prices that are 8-10% higher than the basic prices agreed by members. It is pleaded case of the CCI that in course of time, various players/vendors kept adding to the pool and the share of each member was adjusted accordingly in order to accommodate new players.

42. We note that the CCI found that M/s Hari Narayan Bihani was found to have received several e-mail communications from competitors from July 2019 to June 2020. In the e-mail dated 25.07.2019 sent by Ms. Shanta Sohoni of Polyset Plastics Private Ltd. to competitors, it is clearly stated that M/s Hari Narayan Bihani has got approval (as Part I vendor), and it can be seen that 16.67% share was allocated to it. This share continues in an e-mail dated 20.09.2019. Prior to this, whenever a tender was allotted by the Indian Railways to M/s Hari Narayan Bihani, Ms. Shanta Sohoni used to make a remark in her allocation tables regarding the same. However, from July 2019 onwards, a specific share and specific tenders were allocated to M/s Hari Narayan Bihani in the allocation

tables of Ms. Shanta Sohoni, which were also sent to M/s Hari Narayan Bihani. Thereafter, again, in the e-mail dated 07.10.2019, the share of M/s Hari Narayan Bihani remains the same and was revised to 14.30% in the e-mail dated 11.11.2019. It has been brought out that the email dated 15.11.2019 was also sent to M/s Hari Narayan Bihani for meeting. In the e-mail dated 03.02.2020 also, the share of M/s Hari Narayan Bihani remained the same i.e. at 14.30% which continued to remain the same in the e-mail dated 16.03.2020. The CCI held that in view of such clear evidences of communication between the Opposite Parties relating to tender allocation and prices which compromised independent bidding, and the CCI stated that it is inconsequential as to whether any other party(ies) were examined by the DG or not. Mere receipt of such e-mails by M/s Hari Narayan Bihani compromised the independence of the Opposite Parties while giving quotations to the Railways.

On the other hand, it is the case of the Appellant that the information contained or the share allocated in the said e-mails were never implemented by the Appellants. However, it is also an undisputed fact that M/s Hari Narayan Bihani never replied to such e-mails or sent any such emails to any of its competitors. Thus, it may be implied and observed that M/s Hari Narayan Bihani was a part of the cartel arrangement post July 2019, when it became a Part I vendor as a percentage share and multiple tenders were allocated to M/s Hari Narayan Bihani, and by even receiving such emails from its competitors, M/s Hari Narayan Bihani

was privy to the information contained in these e-mails, which also at times related to prices to be quoted by the vendors in the tenders floated.

43. We put a pointed query to the Appellants regarding receipt of emails by the Appellants which was not denied by the Appellants. This prima facie establish that the Appellants was in full knowledge about cartel especially share allocation to Hari Narayan Bihani and never objected to any such communications. The arguments of the Appellants that it never acted on email is not convincing as very rarely cartel is established in direct admissions by the Opposite Parties.

44. We also find the active participation of the Opposite Parties in discussing the bids and controlling the supply and allocation of market for polyacetal protective tubes in various Railway tenders, establishes manipulation of the bidding process and also note that the period of involvement of M/s Hari Narayan Bihani was from July 2019 to June 2020.

45. It is the case of the Appellant that the alleged cartel conduct of the Opposite Parties did not lead to any Appreciable Adverse Effect on Competition (AAEC) in the market as there were no entry barriers for new entrants, nor were competitors driven out of the market, nor prices increased for the Indian Railways. We observe that in this regard, the CCI held that provisions of Section 3(1) of the Competition Act not only proscribe the agreements which cause an AAEC in the market, but also forbid agreements which are likely to cause an AAEC in the market. The CCI also held that, once an agreement of the types specified under Section 3(3) of the Competition Act is established (including

cartel), the same is presumed to have an AAEC within India. Thus, it may be presumed that the impugned conduct of the Opposite Parties including the Appellants has caused AAEC. We tend to agree with the CCI on view of provisions of the Act on this issue and do not agree with the arguments of the Appellants

46. The Appellants empathetically relied on the judgment of the Hon'ble Supreme Court of India in the case of *M/s Rajasthan Cylinder and ors. v. Competition Commission of India (supra)*. The ratio decidendi of the Supreme Court Judgment in *M/s Rajasthan Cylinder and ors.* is not attracted in this case, since there was no direct evidence like email communication between the parties in the *Rajasthan Cylinder case (supra)* and the entire case of the CCI was based on circumstantial evidence and few other factors, like, existence of an active trade association, meeting of some of the members of the trade association 2 days before the date of submission of bids in Mumbai and filing of bid documents of some of the bidders in Mumbai by “common agents”.

47. We have noted that the rival contentions of the Appellants and the CCI on the implication of ratio of Rajasthan Cylinder (supra). The ratio of the decision given by the Hon'ble Supreme Court of India in the matter of *Rajasthan Cylinders and Containers Ltd. v. Union of India and Others, 2018 (I 3) SCALE 493*, elucidated by the CCI before us is that the presumption of AAEC in a case involving contravention of the provisions of Section 3(3) of the Competition Act, rebutted by the parties by placing evidence to the contrary on record; however, it

is noted that it is upon the contravening parties to rebut the presumption of AAEC by showing positive effects emanating from the cartel activity such as accrual of benefits to the consumers (in the instant case, the Indian Railways), improvement in production or distribution of goods or provision of services or promotion of technical, scientific, and economic development by means of production or distribution of goods or provision of services. We find this quite logical in given context of the present case. In this regard, the relevant part of the Hon'ble Supreme Court decision in Rajasthan Cylinders (supra) reads as under:

"We may also state at this stage that Section 19 (3) of the Act mentions the factors which are to be examined by the CCI while determining whether an agreement has an appreciable adverse effect on competition under Section 3. However, this inquiry would be needed in those cases which are not covered by clauses (q) to (d) of sub-Section (3) of Section 3. Reason is simple. As already pointed out above, the agreements of nature mentioned in sub-Section (3) are presumed to have an appreciable effect and, therefore, no further exercise is needed by the CCI once a finding is arrived at that a particular agreement fell in any of the aforesaid four categories. We may hasten to add, however, that agreements mentioned in Section 3 (3) raise a presumption that such agreements shall have an appreciable adverse effect on competition. It follows, as a fortiori, that the presumption is rebuttable as these agreements are not treated as conclusive proof of the fact that it would result in appreciable adverse effect on competition. What follows is that once the CCI finds that case is covered by one or more of the clauses mentioned in sub-section (3) of Section 3, it need not undertake any further enquiry and burden would shift upon such enterprises or persons etc. to rebut the said presumption by leading adequate evidence. In case such an evidence is led, which dispels the presumption, then the CCI shall take into

*consideration the factors mentioned in Section 19 of the Act and to see as to whether all or any of these factors are established. **If the evidence collected by the CCI leads to one or more or all factors mentioned in Section 19 (3), it would again be treated as an agreement which may cause or is likely to cause an appreciable adverse effect** of competition, thereby compelling the CCI to take further remedial action in this behalf as provided under the Act. That, according to us, is the broad scheme when Sections 3 and 19 are to be read in conjunction."*

(Emphasis supplied)

48. We find above ratio self explanatory. The ratio clearly mentions “enterprise or person”. This negates the pleading of the Appellant that Keshav Bihani could not have been proceeded against in the manner as done in the Impugned Order. This judgement also take care of yet another set of arguments of the Appellants that there was no AAEC to Indian Railways. The judgement clearly stipulate “as an agreement which may cause or is likely to cause an appreciable adverse effect...”. This negate the argument of the Appellant that there was no AAEC.

49. It is noted that here was an understanding amongst the Opposite Parties w.r.t. the determination and revision of prices for tenders being floated by the Indian Railways for procurement of polyacetal protective tubes from at least November 2015 to June 2020 which is in contravention of the provisions of Section 3(3)(a) of the Competition Act. At this stage, we reproduce the relevant portion of the Impugned Order concerning the Appellants which reads as under:

(10) **Mr. Keshav Bihani, Partner of M/s Hari Narayan Bihani**

61. Mr. Keshav Bihani is the Partner of OP-7. As such, he was in-charge of and responsible for the conduct of business of OP-7, which responsibility has not been denied by Mr. Bihani in his suggestions/objections to the DG Report. Further, the DG has noted that e-mails, as detailed above, sent to OP-7, were to the e-mail ID of Mr. Keshav Bihani. The DG has also noted that Mr. Bihani decided the final price to be quoted by OP-7 in the protective tube tenders.
62. Hence, in view of the above, the Commission finds Mr. Keshav Bihani liable in terms of Sections 48(1) and 48(2) of the Act, for the cartel conduct of OP-7.
63. It has been argued on behalf of OP-7 that no finding against Mr. Bihani can be given in terms of Section 48 of the Act before a finding of contravention against the firm OP-7 has been given. In this regard, it is noted that, in the paras above, OP-7 has already been found guilty of contravention of the provisions of the Act. Hence, only after determination of guilt of the firm OP-7 has the Commission proceeded to analyse the liability of Mr. Keshav Bihani in terms of the provisions of Section 48 of the Act.

Conclusion:

64. Hence, the Commission holds OP-1 to OP-7 guilty of contravention of the provisions of Sections 3(3)(a), 3(3)(b), 3(3)(c), and 3(3)(d) read with 3(1) of the Act.
65. As far as individuals' liability is concerned, the Commission holds the following individuals of the OPs liable under Section 48 of the Act for anti-competitive conduct of their respective companies:

.....

- (x) Mr. Keshav Bihani, Partner of M/s Hari Narayan Bihani.

Penalty and lesser penalty:

66. Once contravention of the provisions of the Act has been established, the Commission now proceeds to determine the penalty, if any, to be imposed upon the contravening parties under the provisions of Section 27(b) of the Act.
67. Under Section 27(b) of the Act, where, after inquiry, the Commission finds that any agreement referred to in Section 3 or action of an enterprise in a dominant position is in contravention of Section 3 or Section 4 of the Act, as the case may be, it may impose upon each such person or enterprise which is party to such agreements or abuse such penalty as it may deem fit, which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years.

.....

70. Hence, taking into consideration the revenues earned by the OPs from the sale of protective tubes in the market, the Commission, in terms of the aforesaid provision, decides to compute a separate penalty to be imposed upon the OPs in the present matter. Considering the nature of the cartel arrangement, the mitigating factors submitted by the OPs, and the fact that some of the OPs are MSMEs, the Commission decides to impose upon the OPs penalty @5% of the average of their turnover generated from the sale of protective tubes for the last three preceding financial years.

.....

M/s Hari Narayan Bihani (OP-7) (In ₹)

FINANCIAL YEAR	RELEVANT TURNOVER
2017-18	Not filed
2018-19	Not filed
2019-20	2,30,01,080
Total	2,30,01,080
Average	2,30,01,080
Penalty	11,50,054

74. Upon the remaining individuals found liable in terms of Section 48 of the Act i.e. individuals of OP- 5 and OP-7, the Commission decides to impose penalty @5% of the average of their incomes, for the last three preceding financial years, which is calculated as under:

Mr. Keshav Bihani of OP-7 (In ₹)

FINANCIAL YEAR	INCOME
2017-18	1,60,04,421
2018-19	1,62,76,749
2019-20	1,63,72,630
Total	4,86,53,800
Average	1,62,17,933
Penalty	8,10,897

.....

76. In view of the above, the Commission passes the following:

ORDER

7.	M/s Hari Narayan Bihani	11,50,054	Rupees Eleven Lacs Fifty Thousand and Fifty Four Only
9.	Mr. Keshav Bihani, Partner of M/s Hari Narayan Bihani	8,10,897	Rupees Eight Lacs Ten Thousand Eight Hundred and Ninety Seven Only

50. We take note that the CCI vide its order dated 09.06.2022, in *Suo Motu* Case No. 06 of 2020("Impugned Order 17) after examination of the DG investigation report(s) objections filed by the Opposite Parties and other material available on record arrived at a finding that the appellants along with 6 other Part 1 RDSO approved vendors /suppliers of 'polyacetal protective tube' for axle box guide to the various zones and ICF of the Indian Railways, were guilty of forming

a bid rigging cartel, by contravening the provision of Section 3(3)(a), (b), (c), (d) read with Section 3(1) of the Competition Act.

51. We also note from the Impugned Order that the cartel was found pursuant to the leniency application filed by M/s Jai PolyPan (P) Ltd. (OP-4) disclosing that there existed coordination and collusion among all the OPs from 10.06.2015 to 29.06.2020 (“Period of the Cartel”) in the tenders issued by the Indian Railways for procurement of polyacetal protective tube’ through the modus operandi of, inter alia, quoting mutually agreed prices and allocating tenders amongst themselves. The CCI noted that since M/s Hari Narayan Bihani, [a Partnership Firm of two partners (Mr. Keshav Bihani and Mr. Om Narayan Bihani)] became a Part 1 vendor on 04.07.2019, its involvement in the cartel was for a period of one-year w.e.f. 26.7.2019 to 29.06.2020.

52. We recall that during pleadings the CCI drew attention of this Appellate Tribunal to the definition of “agreement” and that of the term “cartel” under Section 2(b) and Section 2 (c) of the Competition Act to emphasize that any action taken with even “tacit” understanding between parties under which even an “attempt” is made to reduce competition between them is sufficient to hold all parties guilty of cartel formation. The receipt of the emails by the parties suggesting bid prices to be quoted and giving specific percentage of distribution of the order for each party, was not disputed or denied despite our pointed queries to the Appellants, on more than once, prima-facie holds sufficient evidence that

an “agreement” (even tactical or even simple understanding) amongst the parties, including the Appellants, to indulge in bid rigging cartel.

53. It is widely accepted fact that since cartels are formed in cloak and dagger manner and direct evidence of any such understanding are very difficult to be established. The proof of cartels depends largely upon circumstantial evidence. We have already noted that direct evidence of communication between the parties in the form of emails, which described their understanding in sufficient details, coupled with the admission of the parties, indicating that the conduct of the Appellants, as part of cartels, due to implicit agreement reached between the parties as seen from e-mails exchanged between them.

54. We agree with the arguments of the CCI that the defense of merely relying upon only somewhat similar “market conditions” of oligopsony (not monopsony, since each Zonal Railway had its own benchmark of last purchase rates is not sustainable in the light direct evidence of communication between the parties shared by the leniency applicant (Opposite Party 4 i.e. Jai Polypan Private Limited) in this case and the defense of not examination of the buyer,(like IOCL in the Rajasthan Cylinder case) is also not available since unlike over 80 parties in the Rajasthan Cylinder Case (supra) submitting bids in response to a single tender floated by IOCL, there were multiple tenders floated by different railway zones in this case and the number RDSO Part 1 vendors , the Opposite Parties, was also only seven. In the present case, given the existence of evidence in the form of e-mails demonstrating coordination among cartel participants, the

requirement of examining the procurer, as sought to be implied by the Appellants, do not seem to be convincing.

55. It is significant to note that e-mails relied upon by the CCI are accompanied by certificates under Section 65B of the Indian Evidence Act as recorded in Paragraphs 23 and 24 of Impugned Order-1, the requisite certificate under Section 65B of the Indian Evidence Act in respect of the said emails has been made available placed on record.

56. We have noted the arguments of Keshav Bihani regarding issue of punishment v/s penalty as well as income v/s turnover and will not repeat the same. On these issues, we observe that the penalty imposed upon Mr. Keshav Bihani (active Partner of M/s Hari Narayan Bihani Firm) vide Order 22.6.2022 under Section 38 of the Competition Act (Impugned Order 2) is legally correct and in the same proportion (@ 5% of the average three years turnover)(against maximum 10% permissible) as was imposed on the Firm M/s Hari Narayan Bihani itself and in accordance with Section 27 read with Section 48(1) of the Competition Act, prior to the 2023 Amendment. The contentions raised by the Appellants in Appeal No 44 of 2022 that penalty cannot be legally imposed on individual since the word used in Section 48 (1), prior to the 2023 Amendment , was “punished” and not “penalty” and there was no mention of the term “income” in the Competition Act is not convincing since the legislature used two words together “punished accordingly” which means that the punishment (or penalty , as the case may be) to be imposed on the individual found liable under Section

48 of the Competition Act, shall be in the same scale as that imposed on the Firm/Company under Section 27 of the Competition Act. We have noted pleading of the CCI that since in case of individuals there can be no “turnover” but only “income”, the penalty cannot be imposed only on the average annual income of last three financial years in the same ratio on which it was imposed on the Firm by imposed penalty at the same rate, i.e. @5%, of the average of the last three years annual income of Mr. Keshav Bihani. The reliance placed by the Appellants on the Supreme Court Judgement of Excel Crop Care Limited Versus Competition Commission of India and Another (CIVIL APPEAL NO. 2480 of 2014) is found as not applicable as the Hon’ble Supreme Court of India in this case recognized the concept of relevant turnover for imposing the penalty on the Companies under section 27 of the Competition Act. The Hon’ble Supreme court in its judgement had neither accepted the concept of relevant and turnover for the penalty imposed on the individual under Section 48 of the Competition Act, nor had discussed this aspect of in its judgement.

57. We observe that there exists direct as well as circumstantial evidence implicating the Appellants in the cartel as the Appellants remained actively involved in the cartel during the period from July 2019 to June 2020.^o, the evidence relied upon by the CCI includes, inter alia, the leniency application filed by Jai Poly Pan Pvt. Ltd. (OP No.4 during the CCI proceedings) admitting its involvement with other 6 members, including the Appellants in the cartel, and

contemporaneous eight incriminating emails exchanged between the Appellant and other cartel members.

58. Now we will examine the defence of the Appellants about not furnishing all e-mails to the Appellants. In this connection we note that ten emails were exchanged between the Appellants and other cartel participants on 25.07.2019, 20.09.2019, 07.10.2019, 11.11.2019, 12.11.2019, 15.11.2019, 03.02.2020, 10.02.2020, 08.06.2020, and 29.06.2020. During the proceedings before this Appellate Tribunal, the contents of each of these emails were placed on record indicating evidence about the allocation of market shares and distribution of tenders amongst the Appellant and other cartel members. We note that out of the total 10 emails exchanged amongst the alleged cartel members, in 8 incriminating emails, the Appellants were marked with specific shares of the order to be allocated. It ranged from 16.67% and 14.30% which establish communications among the cartel members, including the Appellants, concerning tenders issued by various Zonal Railways for the procurement of polyacetal protective tubes. We have already noted that the Appellants never denied the sender of the emails, which is expected from any law abiding citizens. It is noted that despite acknowledging receipt of such e-mails, the Appellants have not brought out any evidence demonstrating that it refused to participate in or dissociated itself from such cartel conduct. The fact that the Appellants received and was privy to such information while submitting bids in tenders floated by Indian Railways clearly establishes its involvement in contravention of the provisions of the Competition

Act. These communications disclose the modus operandi of collusion, carried out through a coordinated cartel arrangement among the cartel members, including the Appellants. The emails evidence, inter alia, the allocation of tenders amongst cartel members, periodic revision of sharing arrangements, induction of new members into the cartel (including the Appellants), determination of prices to be quoted, complaints regarding undercutting, and concerted directions to withdraw bids. These e-mails demonstrate collusive conduct resulting in manipulation of the tendering process of Indian Railways for the procurement of polyacetal protective tubes. In this background, the allegations of the Appellants for the alleged non supply as mentioned in the two emails dated 10.2.2020 and 08.06.2020, does not seem convincing. It is important to take into consideration that the Appellants did not deny the fact of receipt of these 8 out of 10 emails, thus, it can be safely presumed that the appellants knew about the affair of the cartel which proves the involvement of the Appellants in the cartel, amounting to the Appellants tacit admission by omission. The Appellants failure to object to or distance itself from the cartel communications received after July 2019 onwards, demonstrates its assent to cartel.

59. Now, we will take up the issue of the Appellants regarding illegality of the Impugned Order in absence of judicial member in the CCI. In this connection, we have taken response of the CCI into consideration that the Hon'ble High Court of Delhi in *Cadd Systems and Services Private Limited vs Competition Commission of India*, W.P.(C) 6661/2019, decided on 17.07.2019, while deciding

the contention whether the Orders passed by the CCI in the absence of the judicial member were in contravention of the law laid down by the Division bench of this Hon'ble Court in *Mahindra & Mahindra Ltd. & Ors v. Competition Commission of India & Anr.*: W.P.(C) 11467 of 2018. The Hon'ble High Court held in *Cadd Systems (supra)* that although the appointment of a judicial member was held to be "necessary", there was no direction restraining the functioning of the CCI in its absence, and, therefore, the adjudicatory function of CCI could continue. It further relied on Section 15 of the Competition Act to hold that any vacancy or defect in the constitution of the CCI does not invalidate its proceedings. Consequently, orders passed by the CCI during the period of such vacancy cannot be set aside on this ground alone. Moreover, the judgment of the Delhi High Court in *Mahindra & Mahindra (supra)* has been challenged by the CCI on this very point and its SLP is pending before the Hon'ble Supreme Court. We tend to agree with pleading of the CCI do not find arguments of the Appellant on this ground, convincing.

60. The Appellant's contention that it was denied an opportunity to cross-examine witnesses seems untenable since no request or application seeking cross-examination was ever made by the Appellant before the CCI, and therefore, the question of denial does not arise. Incidentally, the right of cross-examination is not an absolute right under the Competition Act, 2002 as in terms of Section 36(1) of the Competition Act, the CCI is guided by the principles of natural justice and is not bound by the strict rules of the CPC, 1908. Further, Section 36(2) empowers

the CCI to regulate its own procedure, including matters relating to summoning and examination of witnesses. Regulation 41(5) of the CCI (General) Regulations, 2009 provides that the CCI or the DG may grant an opportunity for cross-examination if it is considered necessary or expedient. The use of the term “may” clearly indicate that cross-examination is discretionary and not mandatory.

61. In view of above detailed discussion, we do not find any merit in either of the appeal. Both appeals fail and stand rejected. No order as to cost. I.A.’s, if any, are closed.

**[Justice Mohammad Faiz Alam Khan]
Member (Judicial)**

**[Naresh Salecha]
Member (Technical)**

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