NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Competition Appeal (AT) No. 56 of 2022

[Arising out of the Order dated 24.08.2022 passed by the 'Competition Commission of India in Case No. 24 of 2022]

IN THE MATTER OF:

M/s Apaar Infratech Private Limited
E-2, First Floor, Sector 63,
Noida, UP – 201301,

Authorised Representatives:
KK Sharma Law Offices, 4th Floor,
Sishan House, 119, Shahpur Jat
New Delhi-110049 **...Appellant**

Versus

1. **Competition Commission of India**
9th Floor, Office Block-1,
Kidwai Nagar (East), Opp. Ring Road,
New Delhi – 110023 **...Respondent No.1**

2. **Maharashtra State Road Development Corporation Limited**
Public Works Department Compound,
Nepean Sea Road Priyadarshini Park
Mumbai, India 400036 **...Respondent No.2**

3. **Nagpur Mumbai Super Communication Expressway Limited**
Ground Floor PWD compound,
Nepean Sea Road Priyadarshini Park
Mumbai, India 400036 **...Respondent No.3**

4. **Penetron India Private Limited**
Balaji Indus Park, Gala No. A-13
Tondre Village, Panvel Raigarh
Maharashtra India-410206 **...Respondent No.4**

5. **Penetron International Limited Inc.**
45, Research Way, Suite 203 East Setaukey,
New York 11733 U.S.A **...Respondent No.5**

6. **Crystal Deep Seal Corporation Limited**
45, Research Way, Suite 203 East Setaukey,
New York 11733 U.S.A 11733-6401 **...Respondent No.6**

7. **CD Seal Waterproofing**
2150 South 1300 East,
Suite 500 Salt Lake City, Utah-84106 **...Respondent No.7**

8. **Slurry Inc.**
400. Renaissance Center, Suite 2600. Detroit.
Michigan-48243 **...Respondent No.8**

Present:

For Appellant	**:**	Mr. K.K. Sharma, Mr. Aman Karan and Mr. Suryansh Singh, Advocates
For Respondent	**:**	Mr. Kunal Sharma, Ms. Aakshi Sharma and Ms. Aakansha Arora, Advocates for R-1. Mr. Dinesh Chandra, Dy. Director CCI. Mr. Samar Bansal, Ms. Unnati Agrawal, Mr. Swapnil Singh Shekhawat and Mr. Hrishav Kumar, Advocates for R-4.

J U D G M E N T
(Hybrid Mode)

[Per: Arun Baroka, Member (Technical)]

This is an Appeal under Section 53B against the order dated 24.08.2022 of the Competition Commission of India (CCI) under Section 26(2) of the Competition Act, 2002, ('Act'), in Case No. 24 of 2022. The Appellant seeks to set aside the impugned order and seeks direction for investigation to be caused by Director General into the matter.

2. We have heard the counsels of both sides and also perused the material placed on record.

3. The Appellant – M/s Apaar Infratech Private Limited had provided information filed against three entities for bid rigging and abuse of dominant position against the Respondent No. 4 – Penetron India Private Limited, Respondent No.5 – Penetron International Limited Inc. and Respondent No. 6 – Crystal Deep Seal Corporation Limited. The synopsis of information under Section 19(1)(a) of the Act provided by the Appellant to the Commission is at pages 84 to 190 of the APB, which is noted as below:

> "1. This information is about violation of Section 4 of the Competition Act, 2002 ('the Act') leading to another violation of Section 3 of the Act.
>
> 2. Prolonging the productive life of Heavy Infrastructure Projects ('HIPs') is a constant concern of engineers in all HIPs. One of the important factors, which affect the life of any HIP, is water seepage. There is a constant quest amongst engineers to reduce the degree of seepage and the consequent damage to HIPs.
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> 3. As on date, one of the most effective agents ensuring that the water is blocked from entering the inner structure of any RCC structure or expressways or similar structures or if it enters it is effectively blocked, is known as Crystalline Durability Admixture ('CDA'). On account of its proprietary chemicals, it ensures that even extremely micro pores in the structures are totally blocked by the changes in the chemical, on coming into contact with water, resulting, in a near 100% waterproofing to these structures and, therefore, leading to higher life of the projects.
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> 4. The issue in question, in this Information, relates to the guidance and direction to the contractors assigned to execute 'Hindu Hurudaysamrat Balasaheb Thackeray Maharashtra Samruddhi Mahamarg 'Nagpur Mumbai Super Communication

Expressway' ('MSM Project'/'the Project') being constructed by Nagpur Mumbai Super Communication Expressway Limited ('NMSCEL'/'OP-2') under the overall supervision, guidance and direction of Maharashtra State Road Development Corporation ('MSRDC'/ 'OP-1').

5. According to the procedure for identification of various input materials in construction, entire identification and approval of all the materials was with OP-1/ MSRDC. It identified and prepared an 'Identified Vendors List for different materials, including CDA, which is being used as a waterproofing chemical in the MSM project.

6. The contractors executing different packages of the project are duty bound to source CDA from one of the vendors included in the Identified Vendors List and not from outside. Therefore, to be eligible to supply its product/material, any vendor can only succeed if its name is included in the Identified Vendors List.

7. It was in this connection that one of the potential vendors, named Apaar Infratech Private Limited ('Apaar'/ 'Informant'), wanted to get into the Identified Vendors List by following the due process set by the OP-1. The Informant, Apaar, was approached by one of the executing contractors of the MSM project for more than 2500 Metric tons supply of CDA, and this contractor asked Apaar to pursue for approval of MSRDC.

8. After being presented with this opportunity, the Apaar went through the different guidelines, as contained in communications from the MSRDC to different contractors, to check the eligibility criteria for being selected as a vendor for the MSM project. However, to its dismay, Apaar found that, because of not fulfilling one of the parameters contained in guidelines viz. accreditation with Indian Road Congress ('IRC'), it was not eligible to even being considered for the MSM project. Purely driven by curiosity, the Apaar enquired

and found that the Identified Vendors List for CDA has three names in the list, as under:

1. CD Seal Waterproofing, USA
II. Penetron India Private Limited
III. Slurry Inc., USA

9. The IRC accreditation is applicable only for new products and not applicable for established proven products, having a successful track record, as was the case of Xypex product being supplied by the Apaar. Further, the IRC accreditation process itself would have its own timelines for clearance, and due to all this the Apaar merely blamed his luck for the lost opportunity.

10. Very soon, to its shock, the Apaar discovered that out of three vendors in the Identified Vendors List only one viz. Penetron India Private Limited ('OP-1') had the IRC accreditation, with other two viz. CD Seal Waterproofing and Slurry Inc. not having any IRC accreditation at all. Not just this, one of the vendors in this list viz. Slurry Inc. did not even exist.

11. The Apaar was merely wondering how come every other vendor included in the Identified Vendors List, except one should be lacking in a very important qualifying eligibility approvals. With two vendors in the three names in Identified Vendors List having no such approvals, it became a virtual monopoly for the only vendor, OP-3, having that particular approval and in a position to supply the material to the contractors of the MSM project.

12. As if this was not enough, the Apaar was in for some still bigger shock. As stated before, on slight further investigation, it was discovered by Apaar to its shock and disbelief that, except having a website, the third entity in the Identified Vendors List viz. Slurry Inc. did not even have any existence at all in the purported state of United States of America. The other entity was indeed registered but had no business in India at all. The Apaar, through further research, found that these two vendors, CD Seal Waterproofing and

Slurry Inc., are closely connected with the OP-4, which supplies product to OP-3.

13. The Apaar, with all these revelations, discovered that, for whatever reasons, the first condition of IRC accreditation already denied the opportunity of even making an effort to be in the Identified Vendors List of MSRDC but, despite so many vendors opting out, voluntarily believing in the sanctity of the identification and approval process, two parties with dubious credentials having no capacity to supply and actually not supplying the required material, i.e. CDA, were included in the Identified Vendors List.

14. Furthermore, many independent efforts, including filing of right to information application, were taken by the Informant to gather details about the procedure for short-listing the vendors in the Identified Vendors List by the OP-1. However, till date nothing has been revealed by OP-1 about the process of selection of vendors in the Identified Vendors List.

15. In retrospect, it became obvious that the MSRDC being the sole procurer of this material and having a dominant position in the relevant market had unfairly and discriminatorily included this condition of IRC accreditation in its requirements which, by itself, were not adhered to while making the final Identified Vendors List.

16. Apparently, this abuse of dominant position by MSRDC facilitated a collusive conduct of Penetron India Private Limited ('OP-3'). This resulted in OP-3 and its associate companies to manage entry of ineligible parties in the Identified Vendors List without fulfilling the basic eligibility condition and either not existing or not having the capacity to do any supplies of CDA.

17. Because of the aforesaid violations of the Act, many vendors, including the Informant were denied market access on a huge scale of projects, the type of which are not available to vendors every day and hence this Information."

4. Basis information provided under Section 19(1)(a) of the Competition Act, 2002, the Appellant had sought the following reliefs from the Commission:

> "12.1. The OP-1 [MSRDC] had indulged in abuse of dominant position, violative of Section 4 of the Act, through the insertion of 'IRC Accreditation', which had restricted the entry of Informant and other vendors into the MSM project. The Informant, like a reasonable vendor, after not fulfilling the eligibility criteria did not apply for the 'Identified Vendors List'. Similarly, many other vendors would have kept themselves away from the project due to being ineligible. Hence, the unfair and discriminatory conditions set by OP-1 restricted the entry of Informant and other vendors in the MSM project, and therefore was in violation of Section 4 of the Act.
>
> 12.2. Further, the OP-1, in an unfair and discriminatory manner, included the names of 'Slurry Inc.' and 'CD Seal Waterproofing' in the Identified Vendors List, even after both the enterprises being ineligible.
>
> 12.3. The anti-competitive conduct of OP-1 led to creation of an environment where cartelisation amongst OP-3 – [Penetron India Private Limited], OP-4 – [Penetron International Limited Inc.], and OP-5 – [Crystal Deep Seal Corporation Limited] was facilitated.
>
> 12.4. The OP-3, OP-4, and OP-5 indulged into cartelisation and it resulted in OP-3 directly determining the sale price of the CDA, controlling the production & supply of CDA, thus causing an appreciable adverse effect on competition and violation of section 3(3)(a) and 3(3)(b) read with Section 3(1) of the Act.
>
> 12.5. Despite having been informed by the NCC Limited of the demand of CDA in the MSM project, the Informant, after finding itself ineligible as per the conditions set by OP-1, was deprived

market access. After all this, the Informant later found out that two of the vendors selected in the Identified Vendors List by the OP-1 were not having IRC Accreditation but were also dummy enterprises having no independent identity.

12.6. Therefore, due to the unfair and discriminatory conduct of OP-1, the Informant was denied market access.

No litigation or dispute is pending between the Informant and the Parties before any Court, Tribunal, Statutory Authority or Arbitrator in respect of the subject matter of this Information."

5. On 19.11.2019, MSRDC [OP-1] had issued guidelines, specifications and variations for use of Crystalline Durability Admixture (CDA) for construction packages 3 to 7 of NMSCEW. Perusal of guidelines issued by the MSRDC at page 198 of APB, shows that "For mandatory use of this material, the Authority shall provide the cost variation at the rate of INR 285/ KG, to the respective EPC Contractor, considering supply, transport, storage, wastage, and all other expenditures, GST at 18% shall be paid extra." Per this guidelines, MSRDC allowed cost variation for the use of Crystalline Durability Admixture (CDA) for Construction Packages 3 to 7 for NMSCEW project work upto the rate of Rs. 285 per KG to the respective EPC contractor. It is claimed by the Appellant that the identified vendor list for CDA, prepared by MSRDC, had only three names in the list given as under:

(i) Penetron India Private Limited (OP-3)
(ii) CD Seal Waterproofing, USA (OP-6)
(iii) Slurry Inc., USA (OP-7)

Only these suppliers could have supplied the CDA to the EPC Contractor. Appellant claims that apart from Penetron India Private Limited, the other two are dummy business entities and do not really exist. The other two entities also didn't have Indian Road Congress (IRC) accreditation and still they were in the identified vendor list. It is brought to our notice that MSRDC is the sole authority to identify the vendor list. They put an arbitrary condition that vendors having IRC accreditation only could the suppliers. But while shortlisting the identified vendor list, MSRDC did not follow this condition and included CD Seal Waterproofing (R7) and Slurry Inc. (R8) in the identified vendor list. Appellant claims that MSRDC abused its dominant position and violated the provisions of the Act.

6. We observe that the commission had issued the following in the impugned order, which is reproduced as follows:

> "19. In view of the foregoing, the Commission is of the opinion that no case of contravention of, the provisions of the Act is made out against OPs, and the matter is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.
>
> 20. It is, however, made clear that nothing stated in the present order shall be tantamount to an expression of opinion on the allegations made in the Information, and the Informant shall be at liberty to avail its remedies in accordance with law, if so desired."

7. We note that in this case, the procedure which was followed by the Commission is noted at paras 7, 8, 9 of the impugned order and is reproduced hereunder.

> "7. The Commission considered the Information in its ordinary meeting held on 13.07.2022 and decided to forward a copy thereof to OP-1, with a direction to file its reply by

30.07.2022, with an advance copy to the Informant. OF-1 did not file any reply by the due date. In these circumstances, the Commission considered the matter in its ordinary meeting held on 10.08.2022 and decided to pass an appropriate order in due course.

8. Having considered the averments and allegations made in the Information, the Commission notes that the Informant is primarily aggrieved of alleged cartelisation by OP-3, OP-4 and OP-5 in supply of goods to OP - 1 and also of alleged abuse of dominant position by OP-1 by way of insertion of IRC accreditation as a condition for procurement of CDA for MSM.

9. At the outset, the Commission notes that the case relates to the MSM Project being constructed by OP-2 under the overall supervision, guidance and direction of OP-1. MSM Project is a Heavy Infrastructure Projects ('HIPs'), which requires CDA for waterproofing. CDA, on account of its proprietary chemicals, ensures that even micro pores in the structures are totally blocked by the changes in the chemical on coming into contact with water, resulting in near-100% waterproofing of these structures, therefore leading to the higher life of the projects. OP-1 identified and prepared an 'Identified Vendors List' for different materials, including CDA, which is being used as a waterproofing chemical in the MSM Project. The contractors executing different packages of the project are duty-bound to source CDA from one of the vendors included in the Identified Vendors List."

8. We note that that Commission had initially considered the information in its meeting held on 13.07.2022 and decided to forward a copy thereof to OP-1 i.e. MSDRC and decided with a direction to file its reply by 30.07.2022 with an advance copy to the Informant. OP-1 did not file any reply by the due date. In

these circumstances, the Commission considered the matter in its ordinary meeting held on 10.07.2022 and decided to pass an appropriate order in due course.

9. The Commission has noted that informant is primarily aggrieved of alleged cartelisation of OP-3, OP-4 and OP-5 in supply of CDA goods to OP-1 and also of alleged abuse of dominant position of OP-1 i.e. MSRDC by insertion of Indian Road Congress (IRC) accreditation as a condition for procurement of CDA for MSM project (Nagpur Mumbai Super Communication Expressway).

10. The background of the case has been noted by the Commission at para 9 hereinunder:

> "9. At the outset, the Commission notes that the case relates to the MSM Project being constructed by OP - 2 under the overall supervision, guidance and direction of OP-1. MSM Project is a Heavy Infrastructure Projects ('HIPs'), which requires CDA for waterproofing. CDA, on account of its proprietary chemicals, ensures that even micro pores in the structures are totally blocked by the changes in the chemical on coming into contact with water, resulting in near-100% waterproofing of these structures, therefore leading to the higher life of the projects. OP-I identified and prepared an 'Identified Vendors List' for different materials, including CDA, which is being used as a waterproofing chemical in the MSM Project. The contractors executing different packages of the project are duty-bound to source CDA from one of the vendors included in the Identified Vendors List."

11. The allegations of the Appellant have also been noted at para 10, 11, page 76 reproduced below:

> "10. The Commission also notes from the Information inter-connections between OP-3, OP-4 and OP-5 with overline OP -6. and OP-7. As per the Information, OP-3 is an importer of Penetron Products" in India from OP - 4 and OP - 5 stated to be related to OP-4, an international enterprise, which is situated in New York, United States, having the same address as well as the same CEO. The Informant has also submitted that OP-6 is a dummy entity and a virtual extension of OP-5, whereas OP-7 is a totally non-existent entity created by OP-4.
>
> 11. The Informant has alleged that OP-3 OP-4 and OP-5 entered into an agreement regarding provision of CDA to OP-1 and getting the entire market share for OP-3, thus causing an appreciable adverse effect on competition and violating the provisions of Section 3(3)(a) and 3(3)(b) read with Section 3(1) the Act."

12. OP-1 – MSRDC is claimed to be enjoying the dominant position in the relevant market of State of Maharashtra. It abused its dominant position in contravention of Section 4(2)(a)(i) and Section 4(2)(c) of the Act on the following grounds. With reference to Section 4(2(a)(i) MSRDC had imposed an unfair and discriminatory condition of IRC accreditation in the purchase of CDA by the contractors.

> "11.2. SECTION 4(2)(a)(i): The OP-1 had directly imposed an unfair and discriminatory condition of IRC Accreditation, in purchase of CDA by the contractors. The OP-1 had indulged into an exclusionary conduct of discriminating between the vendors on the basis of IRC Accreditation. As already mentioned, the IRC is not mandatory in nature but rather recommendatory. Further,

only new materials can avail IRC accreditation, but the Informant being in the market for several decades and the Xypex product being in the market for over 50 years, shall not be compelled to avail IRC Accreditation.

11.3. Therefore, inclusion of IRC accreditation led to exclusion of several other suppliers/vendors like the Informant. The impact of insertion of IRC led to creation of an environment where cartelisation was bound to occur. Further, in absence of any equal alternative sales opportunity for other market players, they suffered huge losses as they missed out on supplying Xypex in the MSM project. In addition to this, the contractors lacked any option apart from OP-3 in the Identified Vendors List, thus they accepted the price decided by OP-3.

11.4. The whole insertion of IRC accreditation as a condition and then directing the contractor to source CDA from the names of vendors in the Identified Vendors List was done in an opaque, unfair and discriminatory manner. No one was aware of the selection procedure of these three selected vendors. Further, the inclusion of a non-existent 'Slurry Inc.' in the Identified Vendors List clarifies that the OP-1 had included the names of the vendors as per its own wish, without giving any due regards to the rules set by itself. This is a clear example of abuse of dominant position, as the OP-1 is eliminating or selecting vendors as per its own will.

11.5. SECTION 4(2)(c): Additionally, the insertion of IRC Accreditation by the OP-1 resulted in denial of market access to other market players. The other market players kept themselves away from the MSM project, as they were not having IRC accreditation at that time. Further, many other vendors such as the Informant would have stayed away from the project due to the condition of IRC accreditation. Hence, the inclusion of IRC accreditation led to creation of a barrier, which restrained the Informant from entering the market.

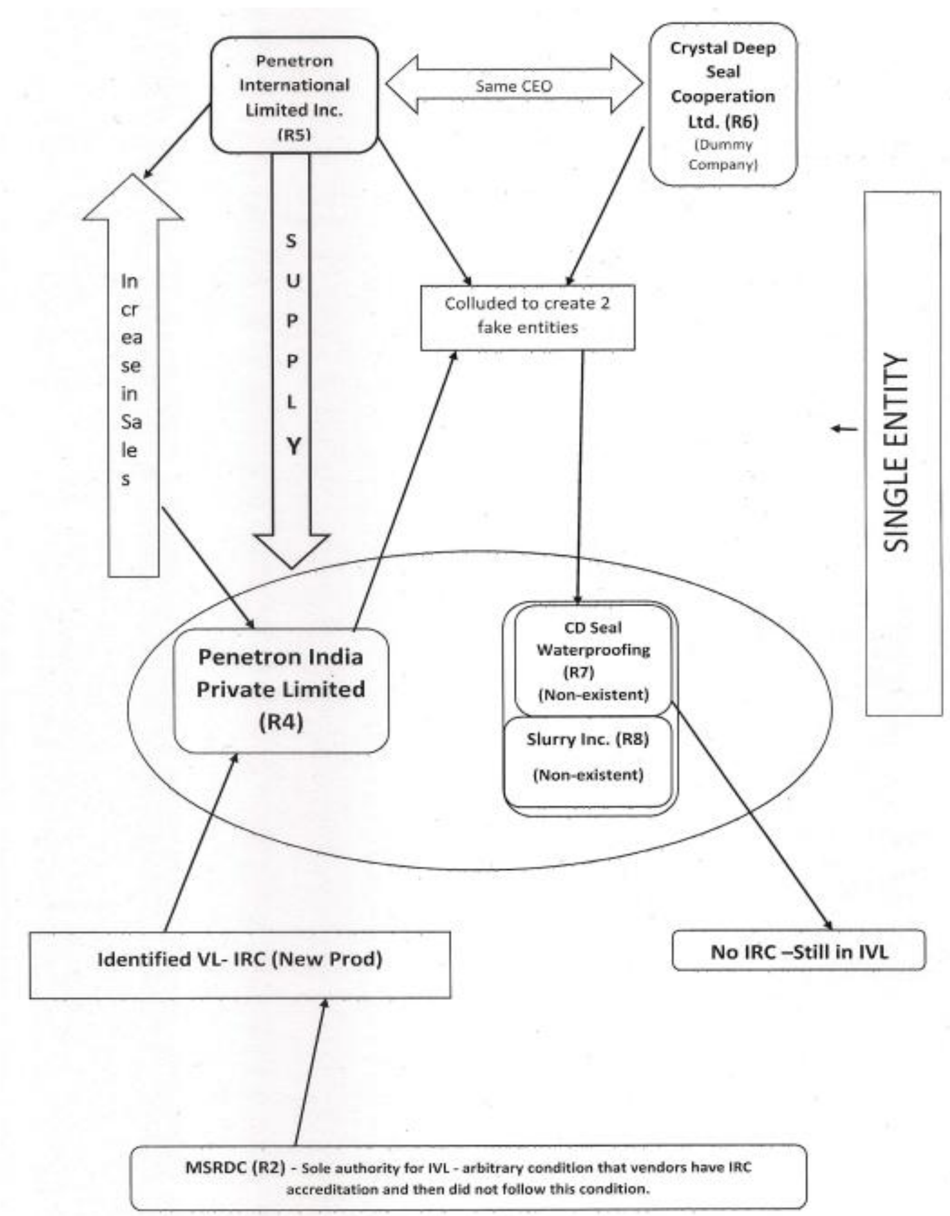
11.6. The elimination of competition from the MSM project, by the OP-1, resulted in the violation of Section 4(2)(a)(i) and Section 4(2)(c) of the Act. It is submitted that this offence is more grievous as it prohibited the vendors of CDA to provide their product to the contractors of the MSM project. It is evident from the above-mentioned that the act of OP-1 resulted in restriction of the entry of certain vendors in the market.”

13. We observe that the Appellant had filed an information under Section 19(1) of the Competition Act, 2002, alleging the violation of Section 4 and 3 of the Act. We note that Nagpur Mumbai Super Communication Expressway ("MSM Project") was being constructed by Nagpur Mumbai Super Communication Expressway Limited ("Respondent No. 3") in the State of Maharashtra, India under the overall supervision, guidance and direction of Maharashtra State Road Development Corporation Limited ("Respondent No. 2"). As such, Respondent No. 2 was responsible for identifying and preparing an 'Identified Vendors List' ("IVL") for different materials, including crystalline durability admixture ("CDA"). CDA is one of the most effective chemical combinations which is used to ensure that water is blocked from entering into the inner structure of any reinforced cement concrete ("RCC") highways or expressways or similar structures. On 19 November 2019, Respondent No. 2 published Guidelines, Specifications and Variation ("GS&V") for the use of CDA for package nos. 3 to 7 of the MSM Project. In accordance with the GS&V established by Respondent No. 2, and the qualifying criteria identified for CDA used in the MSM Project, the IVL included

three entities namely: (a) Respondent No. 4 / OP-3-Penetron India; (b) CD Seal Waterproofing ("Respondent No. 7 / OP-6"); and (c) Slurry Inc. ("Respondent No. 8 / OP-7").

14. The Appellant during hearing placed the following graphic to canvass his arguments:

Schematic representation of allegations



15. Appellant argues that if any query arises before arriving at a decision to form a prima facie opinion, it is a clear case of investigation, which was not done by the Commission. Further it argues that R4 has entered into an agreement with R5 and R6 regarding provision of the product called CDA to R2 and limiting its supply, thereby violating Section 3(1) r/w Section 3(3) (a) and Section 3(3) (b) of the Act. Appellant further contends that prescribing IRC accreditation as a condition for inclusion in the IVL violated provisions of Section 4(2)(a)(i) and 4(2)(c) of the Act.

16. The case of the Informant was that the opposite parties i.e., R2-Maharashtra State Road Development Corporation [MSRDC], R3-Nagpur Mumbai Super Communication Expressway Limited, along with R4 to R6 were acting in violation of the Competition Act. It was the case of the Informant that R2- MSRDC a corporation established and owned by Government of Maharashtra, was carrying out the public development works, which were earlier being carried out by the Public Works Department, Govt. of Maharashtra. The R3- MSM was the concessionaire who had entered into a tripartite concession agreement with R2-MSRDC and the Government of Maharashtra whereby the R3-MSM had the right to develop, maintain and operate the Nagpur-Mumbai Super Communication Expressway (hereinafter the MSM Project) and that R4-Penetron India, R7-CD Seal Waterproofing and R8-Slurry Inc were the Identified Vendors for supply of Crystalline Durability Admixture (CDA), which was being used as a waterproofing chemical in the MSM project. It was the case of the informant that any contractor executing any part of the project was bound to

source Crystalline Durability Admixture (CDA) from one of the vendors included in the Identified Vendor List, prepared by the R2-MSRDC and therefore to be eligible to supply its product/material, a vendor ought to have his name in the Identified Vendor List. It was the case of the Informant that for being included in the Identified Vendor List, the R2-MSRDC had prescribed a condition that a vendor ought to have accreditation from Indian Road Congress (IRC). It was Appellant's case that out of the three vendors in the Identified Vendor List, i.e., R4, R7 and R8, only R4 had the Indian Road Congress (IRC) accreditation and the other two were included in the Identified Vendor List in violation of the norm prescribing Indian Road Congress accreditation. The Informant further alleged that out of the three vendors in the Identified Vendor List, i.e., R4, R7 and R8, the later two i.e. R7 and R8 did not even exist. By prescribing Indian Road Congress accreditation as a condition for inclusion in the Identified Vendor List violated provisions of Section 4(2)(a)(i) and 4(2)(c) of the Act and that R4, R5 and R6 had entered into an agreement regarding provision of Crystalline Durability Admixture to R2 with the objective of determining the sale price of Crystalline Durability Admixture, increasing the production and supply of Crystalline Durability Admixture and getting the entire market share for R4 which had appreciable adverse effect on competition and was in violation of Section 3(3)(a) and 3(3)(b) read with Section 3(1) of the Act.

17. The Commission held that the agreements envisaged under Section 3(3) of the Competition Act, 2002 were agreements between the entities at the same stage of production chain, generally between two rivals for either fixing prices or

limiting production whereas in the present case the R4 was an importer of Penetron products, importing them from R5 and therefore the relationship between R4 and R5 was vertical in nature and the only relation between R4 and R6 was having a common registered address and CEO. The Commission therefore held that the allegation made by the Informant was bald and not supported by any evidence to show any arrangement/collusion between R4, R5 and R6 which could be examined within the framework enshrined under Section 3 (3) of the Competition Act, 2002.

18. Moreover, we note that R5 and R6 are not vendors in the Identified Vendor List and therefore, the R2 had no commercial dealings with it. We also observe that R5 is an entity incorporated in New York, the United States of America. It holds majority (i.e., 75%) equity stake in R4, indirectly and hence R4 is a subsidiary of R5. As per the definition enshrined under explanation (b) of Section 5 of the Act, 'group' means:

> (b) "group" means two or more enterprises where one enterprise is directly or indirectly, in a position to--
> (i) exercise twenty-six per cent. or such other higher percentage as may be prescribed, of the voting rights in the other enterprise; or
> (ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or
> (iii) control the management or affairs of the other enterprise;

19. Based on this definition of 'group' R4 and R5 are part of the same group for the purposes of the Act. Further, we are informed that the remaining 25% equity stake of R4 is held by the Managing Director of R4. We note that when

entities are part of the same group, it cannot be said that such entities have colluded in violation of Section 3(3) of the Act. Given that R4 is an indirect-subsidiary of R5, R5 exercises decisive influence over R4 and they form part of the same group. Since both R4 and R5 are part of the same group and since, there cannot be a case of any anticompetitive agreement of the nature mentioned in Section 3(3) of the Act among the entities of same group, therefore, agreements between R4 and R5, if any, cannot be scrutinized under Section 3(3) of the Act. It cannot be said that R4 and R5 have formed a cartel. The allegations of collusion between R4 and R5 are therefore, flawed as also untenable and not as per the provisions of the Act. Therefore, the allegation of the Appellant that R4 and R5 deserve to be rejected and the Appeal needs to be dismissed on this count.

20. We also observe that CCI in the Impugned Order has observed that Respondent No. 4 is an importer of 'Penetron products', importing these products from Respondent No. 5. Therefore, the relationship between Respondent No. 4 and Respondent No. 5 is vertical in nature. The relevant extract is as follows:

> "13. It is abundantly clear from the provisions of Section 3(3) of the Act that horizontal agreements are arrangements between entities at the same stage of the production chain, generally between two rivals, for either fixing prices or limiting production or sharing markets, etc. In the present case, as per the Information, OP-3 is an importer of 'Penetron Products', importing these products from OP-4. Therefore, the relationship between OP-3 and OP-4 is vertical in nature. As regards OP-5, it has been alleged that

OP-4 and OP-5 are related by way of a common registered address and CEO.”

21. Thus, we don’t find any infirmity in such observations and they are just, legally tenable and does not warrant any interference from our side.

22. We also find from the perusal of the Appeal that the Appellant is aware that R4 imports CDA from R5 and supplies the same in the market in India under the brand name 'Penetron'. Further, R5 does not operate directly in the same business as R4, i.e., the sale of CDA in India. Therefore, R4 and R5 operate at different level of production chain and hence there exists a vertical relationship between R4 and R5.

23. To appreciate whether there is a violation of Section 3(3) of the Act we extract the provision as follows:

> **“Section 3. Anti-competitive agreements.**
>
> (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 sub-section (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—"

24. Perusal of Section 3(3) of the Act as highlighted above indicates that only agreements between entities *"engaged in identical or similar trade of goods or provision of services"* fall within its ambit. Given that R4 and R5 are not competitors and do not operate in the same market in India, Section 3(3) of the Act will not apply in the present factual matrix. The same has also been held by the CCI at paragraph 13 of the Impugned Order. Therefore, it does not merit any interference by us. Furthermore, we don't find any evidence to establish that R4 and R5 are engaged in the same business activity (i.e., at the same horizontal level) in India. Further, there is no evidence that R4 and R5 have acted as competitors for sale of CDA in India. Therefore, we find that the arguments of the Appellant are bereft of sound reasons or legal rational.

25. Thus, we can conclude that the allegation of collusion i.e., an allegation of cartelisation between competitors in violation of Section 3(3) of the Act between R4 and R5 are not tenable under the scheme of the Act, as: (a) R4 and R5 are part of the same 'group'; and (b) R4 and R5 operate at different levels of production chain.

26. Further, with respect to <u>the allegation of abuse of dominant position</u> by R2 in prescribing Indian Road Congress (IRC) accreditation, the Commission held that the relevant product market, in which dominance sought to be examined, ought to be taken as Crystalline Durability Admixture in Heavy Infrastructure Projects. The Commission found that the Crystalline Durability Admixture as a water proofing material was used in various civil structure involving

cement/concrete in Heavy Infrastructure Projects such as expressway, dams, thermal power projects etc., and therefore such projects could not be said to be limited to State of Maharashtra as such works are being carried out throughout the country and therefore, the relevant market was market for procurement of Crystalline Durability Admixture in Heavy Infrastructure Projects in India and further held that R2 was not a dominant player in the aforesaid market as it had operations only in Maharashtra and therefore, there was no case for contravention of provisions of Section 4 of the Competition Act, 2002 and accordingly the matter was closed under Section 26(2) holding that there exists no prime facie case. It has concluded as follows:

> "16. The Commission now proceeds to analyse the case on the touchstone of the provisions of Section 4 of the Act. For analysing the allegations brought out in the Information under provisions of Section 4 of the Act, the delineation of a relevant market is required, followed by the assessment of OP-1's position in the said relevant market, after which the alleged abusive conduct needs to be examined.
>
> 17. In the present case, looking at the nature of averments and allegations, the relevant product market in the present case may be taken as *"Crystalline Durability Admixture (CDA) in HIPs".* CDA as a waterproofing material used in any civil structure involving cement/concrete in HIPs, such as expressways, dams, hydro or thermal power projects, etc. Furthermore, HIPs are not limited to the State of Maharashtra and are also being developed all over the country. Therefore, the demand for CDA is not restricted to the State of Maharashtra, and hence, the relevant geographic market appears to be whole of India. Further. the Informant has submitted in the Information that it had supplied the Xypex CDA product to other

smaller projects in India as well. Therefore, the relevant market may be delineated as "*Market for procurement of Crystalline Durability Admixture (CDA) in HIPs in India".*

18. As noted earlier, OP-1 is a corporation established and fully owned by the Government of Maharashtra, mainly dealing with the properties and assets comprising movables and immovables, including land, road projects, flyover projects, toll collection rights and works under construction vested with the State Government and under the control of the Public Works Department. These have been subsequently transferred to OP-1. But OP-1 is responsible for the development of HIPs in the State of Maharashtra only, and not all over India. There are many public and private sector companies such as National Highway Authority of India (NHAI), Larsen & Toubro Infrastructure Development Projects Limited, etc. in India that are presently involved in developing numerous HIPs across India. Thus, OP-I cannot be said to be the dominant player in the relevant market delineated supra."

27. From the facts and circumstances of the case we find that the relevant product market as provided by the Appellant is "Use of Crystalline Durability Admixture (CDA) in Heavy Infrastructure Projects (HIPs)". The CCI has agreed with this delineation of the product market in the impugned order. However Relevant geographic market as submitted by the Appellant is Maharashtra. The CCI has, however, delineated the whole of India as the relevant geographic market. Appellant in the Information filed has not even alleged, let alone support the contention that CDA is used only in Maharashtra. Therefore, the delineation of the relevant geographic market as Maharashtra is without any basis and has, hence, we find that it has been correctly rejected by the Commission.

28. Furthermore, it was the case of the Informant itself that CDA as a waterproofing material is used in any civil structure involving cement/concrete in HIPs such as expressways, dams, hydro and thermal power projects and such projects are being built all over the country and consequently, Commission has held the relevant geographic market to be the whole of India. The Information supplied has no basis to conclude that MSRDC was a dominant procurer of CDA in whole of India.

29. We also note that in the present Appeal, the Appellant has not challenged the delineation of the relevant geographic market as the whole of India, rather it has submitted that the MSRDC is dominant in the whole of India. The Appellant has relied upon a list of road projects named as expressways and has stated that the requirement of CDA was very high in the Mumbai-Pune Expressway. We find that the meagre data provided by the Appellant gives no basis to conclude that MSRDC's requirement was so high that it could be treated as a dominant enterprise in the whole of India, especially when it was doing one road project. Additionally, we find that, usage of CDA is not limited to Expressways alone. Admittedly, MSRDC is not a supplier and has, in fact, been referred to as a consumer and to bring in the concept of consumer dominance, reliance was placed on **Adcept Technologies Pvt. Ltd. vs. Bharat Coking Coal Limited**. We find this case to be materially distinguishable from the present case.

30. Furthermore, we find MSRDC is not a consumer of CDA but is a consumer of construction services and MSRDC has only fixed eligibility conditions for

purchase of CDA by contractors. The Appellant states that the condition of IRC accreditation by MSRDC was unfair and discriminatory. This contention deserves to be rejected outright. As correctly held by the Commission, mere prescription of IRC accreditation as an eligibility criterion by MSRDC does not, by itself, amount to unfairness or discrimination under the Act.

31. Thus, we find no infirmity in the conclusions of the Commission that MSRDC is not dominant in the relevant market and in the absence of dominance, the question of abuse of dominance under Section 4 does not arise.

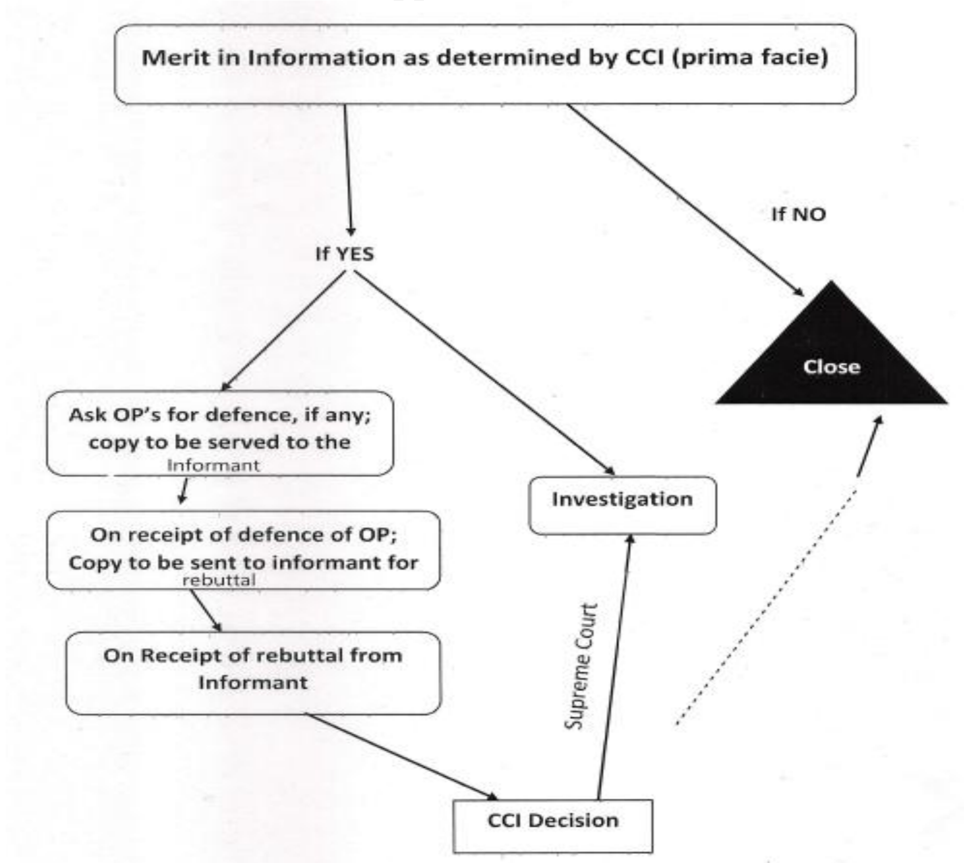
32. Appellant also claims that the Competition Commission of India is the only authority in India, duty bound under Section 18 of the Competition Act, 2002 ('Act') to eliminate anti-competitive conducts, by any entity private or Government (Section 2(h) of the Act) and also has the powers of recommendation to other statutory authorities (Section 21A of the Act). In this case, we find that CCI has come to a conclusion that it has no jurisdiction over the unfair and discriminatory conduct of a non-dominant enterprise i.e. R2-MSRDC. Section 21A relied upon by the Appellant would have been applicable if *"an issue is raised by any party that any decision which, the Commission has taken during such proceeding or proposes to take, is or would be contrary to any provision of [an Act] whose implementation is entrusted to a statutory authority, then the Commission may make a reference in respect of such issue to the statutory authority."* And in this case, we do not find the conduct of Respondent No.2 – MSRDC which is found to be a non-dominant enterprise and therefore, there is no requirement

for a reference by the Commission to another statutory authority. We do not find any infirmity in such a conclusion and the Commission could not have recommended to other such statutory authorities under Section 21A as it had not found any anti-competitive conduct by MSRDC as was found to be not a dominant enterprise under Competition Act, 2002. We therefore don't find any infirmity in the order of the Commission that the Commission has no jurisdiction over the unfair and discriminatory conduct of a non-dominant enterprise. The Appellant is always free to approach other statutory authorities for appropriate relief as per the applicable laws.

33. Furthermore, reliance by the Appellant on Section 2 (h), Competition Act, 2002 to say that a government department is included in the definition of enterprise is wholly misleading since the effect of the section is to bring them within the ambit of competition law, but the pre-condition of dominance is not done away with.

34. Furthermore, it is the case of the Appellant that having forwarded a copy of Information to Maharashtra State Road Development Corporation on 13.07.2022 with a direction to file its reply by 30.07.2022, the Commission ought not to have closed the matter under Section 26(2) and was bound to proceed under Section 26(1) of the Competition Act, 2002 and direct the Director General to cause an investigation into the matter. To canvass his argument, it placed the following graphic:

Schematic Representation of the Procedure Approved by SC/ Appellate Tribunal



35. Appellant argues that the Commission by not directing investigation by the Director General despite R2 not replying even after the Information was shared with them, is in contravention to the directions of Hon'ble Supreme Court of India, in the land mark case of **Competition Commission of India v Steel Authority of India Ltd (2010) 10 SCC 744** as well as of the Appellate Tribunal in a large number of cases, including **The Air Cargo Agents Association of India v Competition Commission of India and Ors. COMPAT (Appeal No. 98 of 2015), North East Petroleum Dealers Association v Competition Commission of India and Ors. COMPAT (Appeal No. 51 of 2014), Cadila Healthcare Limited Anr v Competition Commission of India LPA 160/2018**

(Delhi High Court), Gujarat Industries Power Company Limited v Competition Commission of India and Ors. COMPAT (Appeal No. 3 of 2016), spelling out very clearly that if any query arises before arriving at a decision to form a prima facie opinion, it is a clear case of investigation. Appellant argues that the impugned order under Section 26(2) of the Commission dated 24.08.2022 in Case No. 24 of 2022 is vitiated, amongst others as it disregarded the concrete documentary evidence submitted before the CCI by the Informant as also the clear cut established judicial position by both Hon'ble Supreme Court of India and NCLAT/Tribunal/COMPAT that an occasion of evaluation/analysis of evidence only arises after a direction for investigation, by DG, is given by the CCI. Appellant further contends that unless there is an ambiguity in law, a literal interpretation is the way forward.

36. On the so-called procedural lapse of CCI, the case of the Appellant is that since the CCI had issued a notice to the opposite party, it should be deemed to have found a prima facie case or at least should have provided a copy of the reply filed by Respondent 2 (OP1) to the Appellant, thereby giving it an opportunity to respond. From the facts and circumstances of the case we find that the CCI had forwarded a copy of the Information to Respondent 2 (OP1 MSRDC) giving it time till 30.07.2022 to file its reply. However, no reply was filed by OP1 and consequently the CCI, on 10.08.2022 noted that OP1 had neither filed a reply nor sought an extension of time to file the same and consequently, the CCI decided to pass an order in due course. The application for extension belatedly

filed by Respondent 2 (OP1) was never considered by the CCI and therefore, no prejudice has been caused to the Appellant.

37. We observe that Section 26(1) requires that a *prima facie* case must exist and only then, an investigation may be ordered by the CCI against the opposite parties. The Hon'ble Supreme Court in **Competition Commission of India (supra)** has observed that: *"[...] in exercise of its powers, the Commission is expected to form its opinion as to the <u>existence of a prima facie case</u> for contravention of certain provisions of the Act and then pass a direction to the Director General to cause an investigation into the matter."*

38. From the perusal of records and the submissions we note that Commission in its ordinary meeting could have sought a reply from the opposite party which in itself does not mean that the Commission found a prime facie case, for if the Commission had found a prima-facie case, it would have proceeded further in the matter. Furthermore, the Commission has power to conduct preliminary conference under Regulation No. 17 of the Competition Commission of India General Regulations, 2009 to invite the Information provider or any other person to form an opinion as to whether a prime facie case exists. No person can be condemned unheard. However, since the proceedings were closed, the non-receipt of reply was of no consequence, as the order has been passed on the basis of the material on record, which showed no prima facie case. We note that whether a prima facie case exists or not could be seen from the information itself. Thus, we don't find any procedural lapse on the part of the Commission.

39. Thus, we find that the Commission was correct in its approach and decision in not directing for investigation by the DG before arriving at a decision to form a prima facie opinion. Further we conclude that R4 has not entered into an agreement with R5 and R6 regarding provision of the product called CDA to R2 and limiting its supply, and we don't find any violation of Section 3(1) r/w Section 3(3) (a) and Section 3(3) (b) of the Act. We also conclude that prescribing IRC accreditation by R2 as a condition for inclusion in the IVL does not violate provisions of Section 4(2)(a)(i) and 4(2)(c) of the Act.

Orders

40. Basis above analysis we do not find any infirmity in the orders of the Commission and accordingly the Appeal is dismissed. Appellant is always free to approach other statutory authorities for appropriate relief as per the applicable laws. No orders as to costs.

[Justice Mohammad Faiz Alam Khan]
Member (Judicial)

[Arun Baroka]
Member (Technical)

New Delhi.
January 20, 2026.

Pawan