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With this thought, we hereby present to you

**WHITE BLACK LEGAL: THE LAW JOURNAL**

# **CEMENT CARTEL CASE: AN ANALYSIS OF ITS IMPACT ON COMPETITION LAW**

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## **Builders Association of India v. Cement Manufacturers Association & Ors.**

**Citation:** 2012 Comp LR 629 (CCI)

**Case Number:** Case No. 29/2010

**Court:** Competition Commission of India

**Bench:** Mr. Devender Kumar Sikri (Chairperson)

**Members:** Mr. S. L. Bunker, Mr. Sudhir Mital, Mr. Augustine Peter, Mr. U.C. Nahta, Mr.

Justice G. P. Mittal

**Date of Judgment:** June 20, 2012

## **INTRODUCTION**

The cement industry in India has always been a flourishing unit, it forms a crucial element in the economy as it makes the fifth largest contribution to the nation's gross domestic product (GDP) and provides employment to as many as 1 million people approximately. The industry was operated by the government until the 1980's after which the government began partially deregulating parts of the industry and finally in 1982, the industry was completely deregulated through effective legal policies. This marked the beginning of an unparalleled growth for the Indian cement Industry. Today, India is regarded as both the world's second largest producer and consumer of cement with China being on the top<sup>1</sup>. The country's cement production was estimated to be around 329 million metric tons during 2020(financial year). Despite its sky-high growth the industry suffers from severe anti-competitive practices such as Cartelisation and pre-determined pricing, which has significantly hindered the growth of the trade. The Competition Commission of India (CCI) has attempted to curb this practice to a great extent by adjudicating upon matters of anti-competitive practices and passing

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<sup>1</sup> <https://www.cmaindia.org/about-us/introduction/>

necessary orders and directions thereof. One such landmark ruling of the CCI on the practice of cartelisation and the abuse of dominant position was provided in the case of Builders Association of India v. Cement Manufacturers Association & Ors., where concrete guidelines and high economic fines for such practices was emphasised upon.

### **FACTS OF THE CASE**

The Builder's Association of India (BIA), the informants in the instant case are an association of entities who are engaged primarily in the business of construction and have been registered under the Society Registration Act, 1860. In 2010, the informants, intimated the CCI of a possibility of a cartel between 11 Cement manufacturing companies and the Cement Manufacturers Association (CMA), which is an association of all major cement producing firms in India, on the grounds that, the CMA assisted the 11 alleged companies to engage in sharing highly confidential and sensitive business information such as production capacity, price estimates and dispatch strategies, which enabled them to control the supply of cement and create an artificial scarcity, in order to establish high prices for cement so as to increase their profits.

### **PRIMARY ALLEGATIONS OF THE INFORMANT**

- The informant alleged that the Opposite Parties (OP's) were restricting the production and supply of cement in order to create an artificial scarcity of the commodity which would ultimately result in high prices for the procurement of cement, thereby enabling them to control the prices thereof. This action of the manufacturers would amount a restrictive trade practice.
- The informants alleged that the market was territorially divided into five zones (Central, North, South, East and West) by the manufactures in order to facilitate an easy control over the supply and prices of cement, hence indulging in 'collusive price fixing' across the territory, which was in contravention of Sec. 3 of the Competition Act, 2002.
- The CCI was notified by the informant that OP1 to OP9 enjoyed more than 57.23% of the market share, and their act of controlling the supply and prices thereof would mean an abuse of their dominant position according to Sec, 4 of the Act.
- The informants further pointed out that since the manufacturers operated out of different zones and locations across the country, it was not possible for the price of cement to increase in a uniformed manner as the cost of production of cement would differ among various zones and locations.

- It was also alleged that the cement manufacturers were creating an artificial scarcity by not optimally using their production capacity, and that this act of the OP's has impaired the functioning of the real estate sector and has a severe adverse effect on the ultimate consumers.

On the basis of the allegations made by the Informants, the CCI had formed a prima facie case against the OP's for the contravention of Sec. 3 and 4 of the Competition Act and by virtue of Sec. 26(1) ordered for an investigation to be conducted in this regard. After the completion of investigation process the Director General (DG) in his report stated the following:

- The utilisation capacity of the cement manufacturers was reduced significantly from 90% in 2005-06 to 73% in 2010-11
- The price index and cost of raw materials for cement production was different for all manufacturers
- The cement market was oligopolistic and that the demand for cement was inelastic in nature and there was no firm holding a significant market share
- There was no formal mechanism to fix the prices for cement and that the price was set by the market leader in a particular region and the cost of production is not a deciding factor for the price of cement.
- The uniform increase in the price of cement was noticed after the meeting held by the High Power Committee of the CMA in which non-CMA members had also participated
- The publication of the CMA contained sensitive information such as price, production and dispatch details which facilitated the practice of collusion to a great extent.
- The DG concluded that the cement manufacturers had entered into an agreement to minimise the utilisation capacity and create an artificial scarcity for cement with an intent to control prices and make high profits.

### **CONTENTION OF THE OPPOSITE PARTIES**

- The OP's in their argument before the CCI, emphasised that the Cement Industry was oligopolistic in nature and thus, the prices of cement produced by different manufacturers would increase and decrease in a uniform manner.
- The OP's pointed out that just like any other market, the cement market also had a market leader and that the prices of cement were determined in accordance with the prices set by such a market leader, and hence it seemed uniformed.

- The OP's justified the obvious price parallelism by stating that the commodity in question (cement) is homogeneous in nature and thus the cost of production would not have very high variations and would remain similar throughout the country.
- The OP's also contended upon procedural matters and alleged that the investigation conducted by the DG and the subsequent findings mentioned in the report could not be considered as a deciding factor because the report was based only on areas where the production capacity was high and regions with a low production/utilisation capacity was not taken into consideration. Further the principles of natural justice was violated as the OP's were not given an opportunity to cross-examine the witness upon whose statement the DG relied on during the investigation procedure.

### **PRIMARY ISSUES RAISED**

1. Whether the respondents had acted in contravention of Sec.3 of the Competition Act by entering into an anti-competitive agreement to form a cartel?
2. Whether the respondents abused their dominant position according to Sec.4 of the Act?

### **LEGAL PROVISIONS IN QUESTION**

- Sec.3(3)(a) and (b) of competition Act, 2002, which deals with anti-competitive agreements that result in an appreciable adverse effect on competition.
- Sec.4 of Competition Act, 2002 which deals with the Abuse of Dominant Position by an individual or a group of individuals operating in a market.

### **RULING OF THE CCI**

The CCI after hearing both sides satisfactorily, dealt with the issues systematically and addressed them one after the other. The CCI first held that there was no violation of the principles of natural justice because by virtue of Regulation 41 of the CCI (General) Regulation, 2009, it is the discretion of the DG or the CCI to deny the cross-examination of a witness if it is of the opinion that there is no valid reason to conduct the process of cross-examination, when evidence is given orally to the CCI or the DG. Further, the CCI examined the exchange of confidential and sensitive information between the market players of the cement industry and the role of the CMA in facilitating such exchange that resulted in the collusion of companies and on the basis of significant decisions in the EU, pointed out that price uncertainty in an oligopolistic market is an underlying factor for firms to make good pricing decisions and the act of exchanging information pertaining to price and production

strategy was inconsistent with competition law principles as such an act is capable of restricting or eliminating competition. By using the “Coefficient Correlation Method”<sup>2</sup>, the CCI found that the coefficient correlating was as high as 0.9 and that this figure clearly indicated the existence of a price collusion. The CCI further concluded that, the production of cement significantly reduced during a period of increased demand and the prices were uniformly rising, this indicated the existence of an artificial sacristy that was created by the CMA and other cement manufacturers. Finally the CCI pointed out that the problem in question was not the increased prices, because an independent firm can by all means fix prices in accordance with market factors, such as demand and supply, however the issue in the instant case was that the prices were collusively fixed by a unilateral decision as a result of exchanging price and supply information among firms with the assistance of the CCI. On the basis of the above stated reasons, the CCI held that the OP’s have acted in contravention of Sec. 3(3)(a and (b) and Sec. 4 of the Competition Act and the CCI in accordance with the provisions of Sec. 27(b), imposed a penalty of 0.5 times of the net profits for 2009-10 and 2010-11 for the Cement manufacturers and a penalty at the rate of 10% of total receipts for two years (2009-10 and 2010-11) for the CMA.<sup>3</sup>

### **ANALYSIS OF THE CASE**

The practice of cartelisation has been viewed very strictly in most jurisdictions in the application of competition policy. A cartel is said to have been created when a group of market entities dealing in the same product collude with each other for the purpose of determining prices that work favourably for them to earn greater profits. In the general sense, a cartel is said to have an appreciable adverse effect on competition and the market on the whole, because it creates a restrictive barrier for new entrants to the trade as well as for the other market players who are not part of the cartel. Restrictive barriers to trade would deprive the consumers of receiving commodities of a better quality for a low price and would also result in a lack of choice among the same commodity. In these instances the consumers are forced to buy the commodity in accordance with the price and quality determined by the

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<sup>2</sup> The Coefficient Correlation method is one in which prices in one geographic area are associated with prices in another geographic area. If the prices of the two geographic areas move perfectly in line with each other, the correlation coefficient is one. If there is no relationship between the prices, the correlation coefficient is zero. [https://ec.europa.eu/competition/publications/cpn/2009\\_1\\_12.pdf](https://ec.europa.eu/competition/publications/cpn/2009_1_12.pdf)

<sup>3</sup> <https://www.cci.gov.in/sites/default/files/Final%20Order%20of%202010%2031.08.2016%20.pdf>

cartel, thereby disregarding the true essence of competition. One of the chief characteristics of a cartel is that the cartel of businessmen prevents the market forces from operating smoothly and to the benefit of consumers. It, in-turn, tries to increase its own profits by raising prices of the goods or by cutting the output to create conditions of scarcity for raising prices thereof. The monopoly created by the cartel is as such, not conducive to progress. It retards growth and impedes the improvement of the levels of living of the people.<sup>4</sup> In the instant case, the cartel formed by the CMA and the 11 cement manufacturers to create an artificial scarcity of cement and control the supply and price of cement thereof, had hindered the operation of market forces. This act had a substantial negative bearing on the construction sector as the real estate market was at a rise during the period of 2009-10 and 2010-11 and it was during the same period that the supply of cement drastically reduced and uniform rise in cement prices was noticeable. It is evident from this fact that CMA and the other alleged parties in the instant case have used the situation to their favour and deliberately minimised the utilisation capacity of all cement manufacturing firms, with a notion to gain tremendous profits. One of the terms used by the informants in their allegations was “Price Parallelism”. Price parallelism is an inevitable effect of an oligopolistic market which is characterised by a few sellers manufacturing identical or similar commodities. These markets are highly closed and concentrated and it becomes extremely hard to determine whether the price parallelism is due to the market situation or a result of a cartel. The only point of determination would be to analyse the market situation and identify any trend that indicates that the price parallelism is due to the cartel. In the instant case, the cement manufacturers contended that the cement market was an oligopolistic market and that the uniformed increase in price was due to this factor. However, the CCI’s probe into the market situation clearly identified that the uniformed increase in price was because the cement manufacturers exchanged price, production and distribution strategies among each other with the assistance of the CMA, which enabled them to determine the supply and price of cement. Further, in an oligopolistic market, since homogenous products are produced, the cost of production is usually the same thereby resulting in price parallelism, however in this case the CCI found that the cost of production of cement varied from region to region and there was no interlink between the production cost, despite this fact the prices of cement across the country was uniformly increasing. These facts clearly establish that the price parallelism in the cement industry was due to the cartel and not the oligopolistic nature of the market. In the case of *All India Tyre*

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<sup>4</sup> Competition Law in India 2nd Edition, Abir Roy and Jayant Kumar

*Dealers Federation v. Tyre Manufacturers*<sup>5</sup>The CCI established that price parallelism does not per se violate the provisions of the act as long as such a parallelism is resulting out of purely economic circumstances. Another crucial point in this matter is the question of abuse of dominant position. In an oligopolistic market situation, since there are a few sellers, it is quite difficult to identify the firm that actually holds a dominant position and to confirm that such a position is being abused. In reality the firms in an oligopolistic situation enjoy a position of collective or joint dominance and in the instant case it can be said that the cement manufacturers are enjoying a collective dominance over the cement industry. However, the act does not provide for the abuse of such kind of dominance as a result of which there are many instances where market players are absolved of this liability. There is a dire need to include this form of dominance in the act in order to prevent such anti-competitive behaviour.

### **IMPACT ON THE MARKET**

The decision of the CCI in the Cement Cartel case played an instrumental role in setting a deterrent against the formation of cartels. This case changed the outlook of the way in which cartels were identified and treated. The CCI applied the rule of reason approach and adopted a detailed analysis into the matter in order to arrive at its decision. The CCI had also passed a cease and desist order to the CMA and prohibited it from facilitating exchange of information. The orders passed by the CCI ensured that the prices were in reality determined in accordance with market forces of demand and supply and not by the unilateral decision taken by the manufacturers. The findings and rules laid down in this case were applicable to all commodities and this significantly reduced the anti-competitive practice of cartelisation. Further, the huge fine imposed by the CCI acted as a deterring factor to all firms and prevented them from engaging in any anti-competitive practice.

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<sup>5</sup> MRTP Case: RTPE No. 20 of 2008 ([https://www.cci.gov.in/sites/default/files/202008\\_0.pdf](https://www.cci.gov.in/sites/default/files/202008_0.pdf))

## **CONCLUSION**

*The underlying premise behind competition law is that a free market with open and healthy competition between multiple suppliers would result in lower cost and better quality of goods and services. The suppliers will have to cater to the needs of the consumer and operate in an efficient manner in order to make better profits and sustain in the market. The CCI plays a vital role in ensuring that this true essence of competition jurisprudence is upheld and through numerous decisions has checked and curbed all such anti-competitive practices that create an appreciable adverse effect on the market and the consumers at large.*

