

Jaiprakash Associates Ltd vs Competition Commission Of India & Ors on 25 July, 2018

1

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NEW DELHI

IN THE MATTER OF:

TA(AT) (Compt)No.22 of 2017
(Old Appeal No.61/2016)
Along with TA (AT) (Compt.) No. 26 of 2017
Old Appeal No. 65/2016

Ambuja Cements Limited

.... Appellant

Versus

Competition Commission of India & Ors.

.... Respondents

TA (AT) (Compt.) No. 8 of 2017
Old Appeal No. 46/2016
Along with TA (AT) (Compt.) No. 09 of 2017
Old Appeal No. 47/2016

ACC Limited

.... Appellant

Versus

Competition Commission of India & Ors.

.... Respondents

TA (AT) (Compt.) No. 11 of 2017
(Old Appeal No. 49/2016)
Along with TA (AT) (Compt.) No. 12 of 2017
Old Appeal No. 50/2016

Jaiprakash Associates Ltd.

.... Appellant

Versus

Competition Commission of India & Ors.

.... Respondents

2

TA (AT) (Compt.) No. 13 of 2017
(Old Appeal No. 51/2016)
Along with TA (AT) (Compt.) No. 27 of 2017
Old Appeal No. 66/2016

Cement Manufactures' Association (CMA) Appellant

Versus

Competition Commission of India & Ors. Respondents

TA (AT) (Compt.) No. 14 of 2017
(Old Appeal No. 52/2016)
Along with TA (AT) (Compt.) No. 15 of 2017
Old Appeal No. 53/2016

Century Textiles & Industries Ltd. Appellant

Versus

Competition Commission of India & Ors. Respondents

TA (AT) (Compt.) No. 16 of 2017
(Old Appeal No. 54/2016)
Along with TA (AT) (Compt.) No. 25 of 2017
Old Appeal No. 64/2016

The Ramco Cements Limited Appellant

Versus

Competition Commission of India & Ors. Respondents

3

TA (AT) (Compt.) No. 17 of 2017
(Old Appeal No. 55/2016)
Along with TA (AT) (Compt.) No. 30 of 2017
Old Appeal No. 72/2016

J.K. Cement Limited ...Appellant

Versus

Competition Commission of India & Anr.

...Respondents

TA (AT) (Compt.) No. 18 of 2017
(Old Appeal No. 57/2016)
Along with TA (AT) (Compt.) No. 19 of 2017
Old Appeal No. 58/2016

The India Cements Limited

.... Appellant

Versus

Competition Commission of India & Ors.

.... Respondents

TA (AT) (Compt.) No. 20 of 2017
Old Appeal No. 59/2016
Along with TA (AT) (Compt.) No. 21 of 2017
Old Appeal No. 60/2016

Ultra Tech Cement Limited

.... Appellant

Versus

Competition Commission of India & Ors.

.... Respondents

4

TA (AT) (Compt.) No. 23 of 2017
(Old Appeal No. 62/2016)
Along with TA (AT) (Compt.) No. 24 of 2017
Old Appeal No. 63/2016

Nuvoco Vistas Corporation Limited

.... Appellant

Versus

Competition Commission of India & Ors.

.... Respondents

TA (AT) (Compt.) No. 28 of 2017
(Old Appeal No. 68/2016)
Along with TA (AT) (Compt.) No. 29 of 2017

Binani Cement Limited

.... Appellant

Versus

Competition Commission of India & Ors.

.... Respondents

Present:

For Appellants (Ambuja Cements Limited):- Mr. C.A. Sundaram, Senior Advocate and Mr. Ramji Srinivasan, Senior Advocate assisted by Ms. Nisha Kaur Uberoi, Ms. Soumya Hariharan, Mr. Gautam Chawla, Ms Atreyee Sarkar, Ms. Ankita Gulati, Mr. Apoorv Tripathi and Ms Harshita Parmar, Advocates.

For Appellants (ACC Limited): Mr. Gopal Subramaniam with Mr. Ramji Srinivasan, Senior Advocates assisted by Mr. Harman Singh Sandhu, Mr. Tushar Bhardwaj, Mr. Sohil Yadav and Mr. Prateek Bhattacharya, Advocates.

For Appellant (Jaiprakash Associates Ltd):- Mr. Amit Sibal, Senior Advocate assisted by Mr. G.R. Bhatia, Ms. Nidhi Singh, Ms. Modhulika Bose, Shri Chandramauli Dwivedi, Mr Kanika Chaudhary Nayar, Mr. Tahir Siddique and Mr Abdulla Hussain, Advocates.

5

For Appellant (Cement Manufacturers' Association):- Mr. Ramji Srinivasan, Senior Advocate assisted by Mr Jeevan Prakash and Mr. Tushar Bhardwaj, Advocate.

For Appellant (Century Textiles & Industries Limited):-Mr Pramod B. Agarwala and Mr Aayush Agarwala, Advocates.

For Appellant (The Ramco Cements Ltd.): - Mr. Mohan Parasaran, Senior Advocate assisted by Mr. T. Srinivasa Murthy, Advocate and Ms. Shruti Iyer, Advocate.

For Appellant (The India Cements Ltd):- Mr. C.S. Vidyanathan, Senior Advocate assisted by Mr Aditya Verma, Advocate.

For Appellant (UltraTech Cements Limited):- Shri Gourab Banerji, Sr. Advocate assisted by Shri Sameer Parekh, Ms. Sonali Basu Parekh, Shri Lalit Chauhan, Shri Aditya Sharma, Ms. S. Lakshmi Iyer, Mr Subhro Prokas Mukherjee, Mr. Sarthak Gaur, Mr. Sahil Tagotra and Ms. Tanya Chaudhary, Advocates.

For Appellant (Nuvoco Vistas Corpn. Ltd):- Mr. Somasekhar

Sundaresan, Ms. Nandita Sahai, Mr. Dinoo Muthnia, Ms. Nisha Kaur Uberor, Shravani Shekhar, Ms. Nandini Pahari, Advocates.

For Appellant (Binani Cement Limited):- Mr. Abhinav S
Raghuvanshi, Mr Prateek Tiwari and Ms Sagarika Rawat, Advocates

For Appellant (J.K Cement Limited):- Mr. A.N. Haksar, Senior
Advocate assisted by Sh. P.K. Bhalla, Advocate.

For Respondent (Competition Commission of India): - Sh. Salman
Khurshid, Sr. Advocate assisted by Mr Vaibhav Gaggar, Ms Neha
Mishra, Mr. Rishabh Juneja Mr. Adarsh Chamoli, Ms. Anandita Sen
Gupta, Ms. Sweta Rathand Mr. Shiv Johar, Ms Azra Rehman, Ms.
Geetanjali Kapur, Ms. Sakshi Kotyal, Mr. Zafar Khurshid, Mr. Ibrahim
and Ms. Arpit Shukla, Advocates.

Sh. Samar Bansal, Ms Shreya Singh, Ms Gitanjali Kapur, Ms Sakshi
Kotiyal, Advocates.

For Respondent (Builders Association of India):- Mr. Vasanth
Rajasekaran, Mr. Ankush Walia, Mr. Saurabh Babulkar and Ms.
Gayatri Verma, Advocates.

6

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The 'Builders Association of India' filed information under Section 19(1) (a) of the Competition Act, 2002, alleging anti-competitive agreement against the 'Cement Manufactures' Association' (hereinafter referred to as "CMA"- the 'Opposite Party No.1') and 11 Cement Manufacturing Companies- ('Appellants' herein). After receiving the aforesaid information, the Competition Commission of India (hereinafter referred to as "Commission") formed prima facie opinion and assigned the matter to the Director General (hereinafter referred to as "DG") for detailed investigation as per procedure prescribed in the Competition Act, 2002. The DG after detailed investigation, reported the matter against the 'CMA' and other Cement Manufacturing Companies.

2. The Commission, on hearing, initially passed an order on 20th June, 2012, held that the Opposite Parties are in contravention of Section 3(3)(a) & (b) of the Competition Act, 2002 imposed penalty and directed the Opposite Parties to cease and desist from indulging in such activity. The CMA was ordered to disengage and disassociate from its wrong prices.

3. The aforesaid order of the Commission was appealed before the 'Competition Appellate Tribunal' (hereinafter referred to as "COMPAT"), which by its judgment dated 11th December, 2015, set aside the said order and remanded the matter to the Commission with following observations:

"99. The Commission shall hear the advocates/ representatives of the appellants and BAI and pass fresh order in accordance with law. We hope and trust that the Commission shall pass fresh order as early as possible but within a period of three months from the date, which may be notified after receipt of this order.

100. The parties shall be free to advance all legally permissible arguments. They may rely upon the documents, which formed part of the record of the Jt. DG or which may have been filed by them before the commencement of hearing on 21.02.2012. The parties shall also be free to press the applications already filed before the Commission. However, no application, which may be filed hereinafter for cross-examination of the persons, whose statements were recorded by the Jt. DG or for any other purpose shall be entertained by the Commission."

4. After remand, the Commission again heard the parties and by impugned order dated 31st August, 2016 held that the Opposite Parties ('Appellants' herein) by acting in concert fixed cement prices, limited and controlled the production and supply in the market and thereby they have contravened the provisions of Section 3(1) read with Section 3(3)(a) and 3(3)(b) of Competition Act, 2002.

5. The Commission while holding so directed the Opposite Parties (Appellants) to cease and desist from indulging in any activity relating to agreement, understanding or arrangement on prices, production and supply of cement in the market and also imposed penalty. The CMA has been directed to disengage and disassociate itself from collecting wholesale and retail prices through the member cement companies or otherwise and also imposed penalty under the provisions contained in Section 27(b) of the Competition Act, 2002.

Submission on behalf of the Ambuja Cements Limited

6. The main argument was advanced by Mr. C.A.Sundaram, learned Senior Counsel appearing on behalf of 'Ambuja Cements Limited' which also covers similar arguments advanced by learned counsel for the rest of the Appellants.

7. It was submitted that the Commission has failed to establish an "agreement" to 'cartelize amongst the 11 cement companies' ("Cement Companies" for short) as required under section 3 of the Competition Act, 2002.

8. The Commission has also failed to show any direct or indirect evidence of an "agreement" between the Cement Companies to cartelize.

9. According to Appellants, in order to establish an infringement of the Competition Act, 2002 the Commission must prove collusion/meeting of minds through a coherent body of indirect evidence and indicia. The globally accepted principles state that competition authorities need to produce sufficient evidence to exclude the possibility that parties acted under normal market conditions. In particular, the evidence must show that the conduct of the parties cannot be explained other than as a result of a concerted practice (i.e. the "but for" test).

10. According to Appellants, the globally accepted standard is that circumstantial evidence is not sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion based on concerted action, but equally could also be the result of competitive processes, or where they give equal support to inconsistent conclusions.

11. Learned Senior Counsel placing reliance on decisions of the Hon'ble Courts of the United States and of the Foreign Courts, which we will discuss at appropriate stage submitted that legal test (under Indian law, EU law, and US law) should have been applied by the Commission to evaluate whether there are other plausible reasons as advanced by the Cement Companies, could have given rise to the alleged parallelism, such as inherent market transparency of the commodity product like cement, its natural cycles of fluctuation in demand, seasonality, and the general tendency of smaller producers to swiftly and intelligently adapt their prices / output in reaction to larger producers' market behaviour.

12. According to Appellants, the investigation conducted by the Director General (DG) and the Impugned Order fails to meet this legal standard of proof. The Commission, despite having the data for the entire period from January 2007 to March 2011, has randomly identified points in time where it alleged parallelism and assumed collusion on the basis of two CMA meetings dated 3rd January 2011 and 24th February 2011 (which in point of fact were never attended by Ambuja Cements Limited).

13. Learned Senior Counsel contended that there is no evidence to support the allegation that Ambuja Cements Limited adhered to any agreement to co-ordinate prices/output or discussed such an agreement at the said meeting. The Commission has simply assumed the existence of collusion since market prices increased in January and February 2011. There is no data on record to establish this as neither the DG nor the Commission collected data post CMA meetings to demonstrate that prices increased as a result of the said CMA meetings. This would be the case even if one looks at the records of the entire period afresh, i.e. 2007-2011, and not just the periods as looked at by the DG and the Commission. In fact, even in the arguments before this Appellate Tribunal, no such record has been pointed out by the Commission. Cement prices vary from week to week. If there is a cartel and the increase post CMA meetings would need to be analysed, then the weekly prices should be looked and the monthly weighted average prices will not be indica.

14. Further, the Commission has not carried out any analysis to dispel the existence of any alternate plausible explanation but for cartelization, which alternative explanations were offered by the Cement Companies. Therefore, the Commission has not discharged its burden of proof. Instead, in complete disregard to Indian law, EU law and US law, the Commission is contending, that the Cement Companies should prove that they have not colluded, which would amount to requiring the Cement Companies to prove the negative.

15. It was submitted that the approach of the Commission is completely erroneous as, if the Commission found that the CMA was the platform of the alleged cartelization, then the Commission could not have carved-out the 11 Cement Companies as being part of the cartel without examining the behaviour and role of: (i) all the attendees of the contentious high powered committee meetings;

and (ii) all the CMA members. It is alleged that the Commission has attempted to carve out an alleged cartel within an alleged cartel, without any justification. To carve out a species from the genus that it belongs to, it must be established that the species in question has certain specific and unique characteristics that distinguish it from the rest of the species in the genus. However, such assessment was not done by the Commission or the DG in the instant case. The data collected by the DG for five other small cement companies i.e., J.K. Lakshmi, Birla Corporation, Shree Cements, OCL and Prism Cement ("Other Source Companies"), but nowhere in the discussion was such data even referred to, nor were such Other Source Companies treated as part of the alleged cartel, despite having similar price movement as the Cement Companies.

16. According to the Appellant, the Commission cannot (i) treat some of the CMA members as being part of the alleged cartel without showing that the other members acted differently (when in point of fact, the records disclose that they did not), and (ii) selectively identify some companies who attended the CMA high powered committee ('HPC') meetings as having allegedly shown a uniform trend without demonstrating that the other companies who also attended the CMA, High Powered Committee meetings but were not investigated acted differently (when in point of fact the record demonstrates that they acted the same).

17. Further, according to learned Senior Counsel, the attempt to carve out the 11 Cement Companies as being a separate species on account of these Cement Companies accounting for 75% of the market, is unintelligible. If it is the market share of the company that is to be treated as the unit for the purposes of establishing a cartel, then the DG itself stated that five of the companies comprised more than 50% of the market, they would ipso facto be a different species from the remaining four companies (out of the 11 Cement Companies).

18. With regard to parallel behaviour amongst the Cement Companies, it was submitted that apart from failing to prove collusion, the Commission has not even established its starting point, i.e. the alleged parallelism. The data collected and relied on by the Commission is inconsistent and scattered, disqualifying the Commission's analysis and is far from sufficient to meet the threshold of even preponderance of probability as claimed by the DG and the Commission.

It is also submitted that the price data available on record is not uniform and therefore incomparable. As such, there can be no conclusions and findings of price parallelism based on comparison of such inconsistent price data as shown below:

S. No.	Manufacturers	Level	Price
1	ACC Limited ("ACC")	Weighted monthly average prices	Net Selling Price
2	ACL Cements Limited	Average Price	Average price
3	Ultra Tech Limited ("Ultra Tech")	Average price	Average bills rate
4	Jaiprakash Associates (Jaypee Cements) ("JAL")	Beginning of month	Average price
5	The India Cements Limited	Beginning of month	Average Retail Price

	("India Cements")		
6	JK Cements Limited ("JK Cements")	Gross Price	Depot prices
7	Century Cements Limited	Month wise prices	F.O.R. / ex-
	("Century")		dump/ex-depot
8	Madras Cements Limited ("Madras Cements")	Month wise prices	F.O.R./ex-go down price
9	Lafarge India Private Limited, now Nuvoco Vistas Private Limited ("Nuvoco")	Month wise prices	Invoiced Prices
10	Binani Cement Limited	End of month price	Price for Grade Cement

According to him, the Commission mixed state-average prices together with city-average prices in its parallelism analysis (only three Cement Companies had provided State-wise prices). In other words, the DG and the Commission have not paid attention to standard competition law principles and failed to distinguish between different relevant product markets (wholesale/retail level), different geographic markets (state/city) and different variables (actual prices/depot prices).

19. Further, according to the Appellants, there is no data which indicates price changes immediately after CMA meetings, i.e. the material on record does not show that there was an actual increase in price following a meeting.

20. Further, according to learned counsel, the prices change every week and there is no data on record to show what the price difference was in the week following the High Powered Committee meeting. Merely taking an average price would include periods before the High Powered Committee meeting and well after the High Powered Committee meeting and therefore cannot indicate in any manner that the agreement sought to be established was arrived at the High Powered Committee meeting.

21. According to learned counsel, price parallelism can never be a standalone factor to determine a cartel when it is a case of an increase of prices, while predatory pricing through decrease in prices (even below cost of production) would indicate an attempt to stifle competition as selling at a higher price would be the natural desire of any player in the market who would want to maximise profit. Such increases in price to profit out of market demand can never be a factor to determine cartelization unless the increase in price is artificially created, which would be done through a reduction in production and therefore, a cartel, if at all, can only be established through showing a

concerted effort to decrease production by all members of the cartel so as to decrease the supply and create a scarcity which can be taken advantage of, through all members of the cartel increasing their price.

22. The methodology for price determination and its nexus with costs was also challenged by learned Senior Counsel for the Appellant. According to him, in a market for a commodity product, the prices will tend to be within a band and market players will be conscious of each other's prices from publicly available data. However, this structure of the cement industry and the commoditized nature of cement giving rise to the existence of similar conditions is what allows manufacturers to independently respond to the behaviour of their competitors in the industry. This is precisely why there may be a similar movement of prices.

23. The cement being a commodity product, according to Appellant, the price parallelism is an expected and natural characteristic of pricing patterns, as producers compete with each other mainly on the basis of price. Since similar demand, supply and cost factors affect all the producers (including the seasonality of the product), production and dispatch parallelism is an expected characteristic of the Indian cement industry.

24. According to learned counsel for the Appellants, how much of the cost increase can be passed on to the consumers depends largely on the characteristics of demand. In the case of a product such as cement, where there is significant short-run volatility in demand, prices that consumers are willing to pay will depend on their immediate needs (especially given the fact that cement cannot be stored). Therefore, cost increases can be passed on to consumers in the short-run only when demand is high. However, in the long-run, cost increases can gradually be incorporated into prices.

25. According to economic theory, market price is determined by the interaction between demand and supply. If demand is greater than supply, there is a situation of excess demand which leads to an increase in price. However, if demand is less than supply, there is excess supply in the market, which leads to a decrease in price. Therefore, there is always a mismatch between demand and supply in the market on a day-to-day or month-to-month basis, as a result of which prices increase or decrease or remain constant. Further, supply is also affected by various factors including production, dispatch, stock in hand and other unforeseen factors (e.g. labour strikes, availability of railway rakes, storage capacity, etc.).

More so, in the case of cement, which by its very nature has a very short shelf life and therefore, constant decisions have to be taken by manufacturers based on reasonable prediction of the supply to decide on their quantum of production.

26. In response to the alleged unusual production and price trends identified by the Commission, according to the learned counsel for the Appellant, the Commission comparison between production and price on a month-to-month basis is flawed due to three key reasons: -

- i. Production is not necessarily equal to supply. Production refers to the quantity produced by a company at its manufacturing plant, which may or may not be

available for sale in the market. Therefore, in determining whether there is a rise or fall in production, it is inter alia necessary to see whether for that period, the Cement Companies had stock on hand which was required to be sold and would therefore necessitate a lower production for that month. Nowhere do the records show (nor did the DG ever seek) the data with respect to the opening stock (for a month) from any of the Cement Companies.

ii. The price movements being assessed by the DG and Commission is an all India price, averaged across all cities. The Commission have relied on incomparable price data which includes different price metrics for all Cement Companies, inconsistent period/levels for which price data was collected, inconsistent data on location (state v. city wise data), and the use of a representative city analysis, which is not part of the record.

However, cement is a regionally fragmented market with significant variations in price across regions/cities. Further, there are also seasonal variations which affect demand and pricing across regions, depending on factors such as different timing of -- (i) access to limestone quarries, which helps in delineation of the relevant regional market, as cement is a perishable commodity; (ii) timing of major festivals (e.g. Diwali in North India, Ganesh Chaturthi in West India, Pongal in South India and Durga Puja in East India); and (iii) timing of monsoons, which affect construction activity significantly. Therefore, using a single national average price for comparison with production is erroneous. Any such analysis should be undertaken at a regional or city level by comparing changes in regional/city price vis-à-vis excess demand/excess supply in the region/city. iii. In order to correctly assess the relationship between price and demand and supply, an analysis of the variables over a longer period of time (instead of a month-to-month comparison) is required, using a statistical technique such as a regression analysis.

27. Learned Senior Counsel for the Ambuja Cements Limited also explained the reasons for lower production in one or other month, such as November, 2010 as follows:

For November 2010, the decision of the Ambuja Cements Limited to produce less cement can be explained as a rational decision being based on the following business considerations:

The production changes for 2007-2010 for Ambuja Cements Limited, were as follows:

S.No.	Year	October	November
a.	2007	+19%	-7%
b.	2008	+5%	+1%
c.	2009	+8%	+1%
d.	2010	+18%	-18%

The abovementioned data suggests that in years when there are large changes (i.e. increase) in production in October (2007 and 2010), it was observed that production is much lower in November. On the other hand, in years when production only increased slightly in October (2008 and 2009), production increased in November.

Comparing the production figures across the four years from 2007 to 2010, it was observed that November is generally a lean month in terms of production of cement every year for Ambuja Cements Limited, regardless of whether or not Diwali falls in that month (even though Diwali was in November 2010).

In all years (2007-2010), November production was lower than December, and in 2007 and 2010 it was also lower than October production.

28. The fact that November 2010 was a lean month in terms of production of cement by Ambuja Cements Limited is explained by a variety of factors in 2010 such as: (a) high levels of production in the previous month (October increased by 18%); and (b) high levels of stock to start the month. When a company already has a large stock of cement, which is a perishable good and cannot be stored for long periods, the company will use up the existing inventory and will accordingly reduce production.

29. Learned Senior Counsel for the Ambuja Cements Limited also explained the following details of inventory levels of Ambuja Cements Limited in October and November (2009 and 2010) as under:

Indicators	Oct-09	Nov-09	Dec-09	Oct-10	Nov-10	Dec-10	Production(1,497,631
	1,511,698	1,737,297	1,750,011	1,437,233	1,788,512	MT)	Production 8% 1% 15% 18%
	-18%	24%	Growth	Opening 112,720	148,035	107,559	138,210
	141,381	169,228	Stock				
	in Plant (a)	Opening 154,625	214,892	172,985	146,335	226,206	255,259
	Stock in						
	Warehouse						

(b) Total Stock	267,345	362,927	280,544	284,545	367,587	424,487	Available (a+b)
Festival	Yes	No	No	No	Yes	No	Month

30. Therefore, according to learned Senior Counsel for the Ambuja Cements Limited that it emerges from the table above that Ambuja Cements Limited decision to decrease production in November 2010 was rational. In fact, despite the decrease in production in November, Ambuja Cements Limited had approximately the same quantity of cement in stock in November 2010 compared to November 2009.

31. Similar reasons for alleged price increases in January and February, 2011 was explained as follows:

Cement demand is generally on an upswing between January and March, as these are months when construction activity picks up due to lower rainfall and no festivals. Therefore, price increase during these months in all years is due to demand pressure. In order for the Commission to credibly demonstrate that the price increase in early 2011 resulted from collusion, the Commission must at least demonstrate that demand-and-supply dynamics in early 2011 were very different from previous years so that a price increase in early 2011 was not in line with normal market dynamics. Revealingly, the Commission has not attempted to carry out such an analysis. Further, the Commission has also not carried out a comparison of prices prior to and post the alleged meetings on 3rd January 2011 and 24th February 2011 (and 4th March 2011), to establish that prices rose after the said CMA meetings.

32. In relation to Ambuja Cements Limited prices, in the month of November 2010, prices decreased in 12 out of the 18 states (as assessed by the Commission compared to the previous month (October 2010). Also, there is price decrease in all States during December 2010 as shown below:

S. State Sep-10 Oct-10 Nov-10 Dec-10 Jan-11 Feb-11 No

1. ANDHRA 174 220 238 238 243 255 PRADESH

2. CHANDIGARH 232 240 238 230 239 267

3. CHHATTISGARH 186 211 205 181 191 217

4. DELHI 233 245 236 226 227 258

5. GUJARAT 177 196 215 217 221 248

6. HARYANA 238 246 238 230 239 267

7. HIMACHAL 273 274 274 274 277 296 PRADESH JAMMU & 248 258 257 254 260
287

8. KASHMIR

9. JHARKHAND 252 265 255 234 242 261

10. KERALA 234 295 309 309 304 313 MADHYA 211 214 218 211 211 237

11. PRADESH

12. MAHARASHTRA 237 252 258 250 255 271

13. ORISSA 236 251 246 213 226 256

14. PUNJAB 252 260 254 246 233 220
15. RAJASTHAN 215 223 217 211 221 254
16. UTTAR PRADESH 233 240 235 224 227 262
17. UTTARAKHAND 241 254 244 234 239 268
18. WEST BENGAL 265 279 278 246 255 283

33. It was submitted that owing to decrease in prices in the previous quarter, there was a marginal increase in prices (approximately 1.9% on an average basis) in 16 of the 18 States in January, 2011.

34. It is accepted that after the High Powered Committee meeting held on 24th February 2011, an analysis of price changes after the meeting in 20 cities across India shows that Ambuja Cements Limited weekly prices increased in 18 cities after 24th February 2011, however prices were already on the rise in 16 of those cities (i.e. except Amritsar and Rohtak) prior to the meeting.

35. Reasons for alleged price increases in Southern India from October 2010 was also explained, as noticed below:

36. It was submitted that the cartelization would have been made out if there was similarity of percentage increase or decrease in production and price. However, based on the data provided by the Cement Companies, it is clear that there is absolutely no similarity amongst the Cement Companies in percentage increase or decrease in production and price.

37. It was further submitted that mere increase or decrease in prices or production by the Cement Companies amounts to a cartel, then it is telling that the non-cartel members i.e. Non-OPs also exhibited a similar increase or decrease in price and production. This clearly establishes that there is no cartel amongst the Cement Companies and their behaviour is in line with market forces in a commodity industry, which is characterized by seasonality and a limited shelf life of the product.

38. Learned Senior Counsel for the Ambuja Cements Limited also highlighted the plus factors and submitted that mere parallelism cannot be decisive of cartelization. It was submitted that plus factors such as, capacity additions, production trends, capacity utilization, dispatch levels, and profit margins, all of which not established in the case of Ambuja Cements Limited as explained below.

39. Learned Senior Counsel highlighted the plus facts of Ambuja Cement Limited as follows:

A. Capacity addition and production

40. Contrary to the allegation of suppression of supplies, Ambuja Cements Limited has added 75 lakh tonnes of capacity between 2007 and 2010, and there has been increase in Ambuja Cements Limited overall production from 2007 till 2010.

41. The table below shows capacity additions by Ambuja Cements Limited across different regions.

(2007 and 2010) (in lakh tonnes)

Region	2007	2010	ACL	Capacity Addition
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Year	Production (million Tons)	Change in Production
2007	16.87	
2008	17.75	5%
2009	18.84	6%
2010	20.13	7%
2011*	9.14	

*till May 2011 Source: Based on ACL data submitted to DG B. Dispatch

42. There has been no suppression of dispatched by Ambuja Cements Limited, as their dispatches never fell below 99.94% of production.

43. The Commission has failed to note that Ambuja Cements Limited total dispatches in 2010-11 were 20093 MT, which was 7% higher than the total dispatches in 2009-10 i.e. 18833 MT.

44. Further, Ambuja Cements Limited total dispatches in October- December 2010 i.e. 4994 MT were 5% higher than total dispatches in October-December 2009 i.e. 4734 MT.

C. Capacity utilization

45. Ambuja Cements Limited specifically submitted to the DG and the Commission that its capacity utilization on the basis of nameplate capacity was 83% and on the basis of actual available capacity it was 88.5% during the period 2010-11, (which was much higher compared to the industry average i.e. 73%). However, it is submitted that while the Commission has recorded the submission of Ambuja Cements Limited in the impugned order, it has failed to address thus specific factor pertaining to Ambuja Cements Limited in the impugned order.

46. Further, Ambuja Cements Limited average capacity utilization for the period 2006-2010 was 93.24% compared to industry average of 88.00%. The chart below highlights the difference in capacity utilization levels between the industry and the company. Ambuja Cements Limited capacity

utilization has been higher than the industry level for the period 2006-2010, except in the year 2008.

47. It was submitted that the Commission has failed to give any consideration to key factors, such as, nameplate capacity versus available capacity, ramp-up period for new plants, etc. while determining the capacity utilization levels.

D. Profit margins

48. According to Appellant, the Commission has ignored the fact that Profits after Taxes ("PAT") margins of Ambuja Cements Limited have actually declined during the period from 2007 to 2010. The PAT margins have declined every year during this period and the same trend is observed in Ambuja Cements Limited return on average capital employed ("ROACE") between the period of 2007 to 2010. In fact, in capital intensive industries like cement, a minimum of 30% to 40% return on capital employed ("ROCE") is required to give a reasonable return and to conserve some funds for future expansion. Therefore, it is clear that Ambuja Cements Limited has neither engaged in profiteering nor earned abnormal profits.

49. The other grievances of the Appellants are that the Commission has failed to define the relevant market, which is required to be determined in view of the decision of the Hon'ble Supreme Court.

50. Alternative arguments was also advanced on the question of penalty on the ground that only for the period November 2010, January and February, 2011, certain deficiencies were detected. Submissions on behalf of ACC Limited

51. Mr. Gopal Subramaniam, learned Senior Counsel appearing on behalf of the ACC Limited submitted that ACC Limited has rebutted each of the presumptive conclusions of the Commission arrived at in the impugned order, inter alia, as under:

a) Capacity utilization of the cement plants of ACC Limited (an average of 92.2% for 2007-2010) has been substantially higher than that of the industry average of 73%;

b) Dispatches were directly related to the demand in the marketplace based on orders placed by distributors;

c) ACC Limited actual data (in terms of production, prices, capacity utilization, dispatches etc.) for the period between May 2009 and March 2011 was at variance with the "big picture" trend sought to be drawn by the Commission relying on the Cement Manufacturers' Association data (which does not include ACC Ltd.

or Ambuja data);

d) The Commission's own Economics Division concluded that the cement companies were behaving independently and these concrete findings have not been addressed by the Commission at all; and

e) ACC Limited did not attend any meeting of the high powered committee (HPC) of the Cement Manufacturers Association (CMA) as alleged by the Commission. Without prejudice to this fact, ACC Limited price movements, when compared to that of its competitors, bore no collusive trend. In fact, even when prices increased in certain regions, they dropped in other regions. This trend was visible both before and after the HPC meetings of the CMA meetings dated 3rd January 2011, 24th February 2011, and 4th March 2011, the minutes of which do not disclose either the participation of ACC Limited or the discussion of pricing behaviour. In fact, the ACC Limited prices in various regions (for example, Delhi, West Bengal, Uttar Pradesh, Assam, Odisha, Madhya Pradesh etc.), after these alleged meetings were lower than the prices prevailing at various points in time in the previous year. In addition, the Commission's analysis is inherently flawed given that it has considered incorrect monthly prices.

52. According to him, the Commission has failed in meeting the standard of proof, as all ACC Limited behaviour, taken individually or collectively, have strong objective justifications which are plausible explanations of behaviour, demonstrating that collusion is not the only explanation.

53. It was submitted that the ACC Limited behaviour, individually, is consistent with competitive behaviour. Learned Senior Counsel submitted that the Commission has failed to address the conclusions arrived at by its own Economic Division.

According to him, analysis of the data and conclusions reached by Commission's Economics Division demolish the impugned order. The conclusions of the Commission's Economics Division in its report titled 'Economic Analysis of Cement Data' are contrary to the Commission's own findings. The Commission's Economics Division concludes, inter alia, that:

- a) ACC Limited exhibited behaviour independent of other cement manufacturers (both OPs and non-OPs) in the States of Tamil Nadu, Haryana, Punjab, Chandigarh, Rajasthan, Maharashtra, West Bengal, Odisha, Madhya Pradesh;
- b) In some States, market players exhibited behaviour completely different from all other market players in that state, with no positive correlation existing (e.g. India Cements in Uttar Pradesh);
- c) Prices are target driven. Companies aim to sell a certain quantum of cement in a budget year, and price movements depend on such targets over and above the opportunities to charge higher prices during high demand and charge low prices during low demand;
- d) Desired and actual prices are based on market feedback;
- e) Among top firms the identity of the price leader is not known, as all the top companies have been independently taking price decisions;

f) Price change data reveals that the price movements are sequential and not simultaneous; and

g) Firms under observation have taken these price decisions independently at various points of time.

54. It was submitted that the Commission has completely skirted these issues, which demonstrates the shaky foundations on which the impugned order is based and the fact that a closer look at the data does not bear out any collusive conduct.

55. According to learned Senior Counsel for ACC Limited, January- March is a period of increasing demand. In most States, demand picks up in the first quarter of the calendar year due to the absence of rain and any major festivals, which leads to a price increase in this period every year. In most cases, the price increases in 2011 are actually lower than price changes in previous years. The following table shows percentage of ACC Limited price changes over the previous calendar month for various states in January and February 2011.

State	January				February			
	2008	2009	2010	2011	2008	2009	2010	2011
Andhra Pradesh	0%	-1%	6%	3%	0%	0%	5%	5%
Chhattisgarh	0%	-3%	6%	6%	-4%	3%	8%	13%
Goa	1%	0%	1%	0%	0%	0%	5%	2%
Jharkhand	0%	-4%	0%	0%	0%	3%	3%	5%
Karnataka	1%	0%	0%	-1%	0%	-1%	4%	1%
Kerala	2%	0%	5%	1%	1%	0%	7%	1%
Maharashtra	-1%	-1%	1%	3%	1%	0%	2%	6%
Puducherry	NA	0%	5%	-3%	0%	0%	6%	4%
Tamil Nadu	2%	-1%	2%	0%	0%	1%	4%	1%
Uttar Pradesh	-1%	0%	5%	4%	0%	10%	12%	15%

56. It was contended that Costs increased substantially in late 2010. It is normal that price increases lag cost increases by a few months. Notably, the per unit costs of production for all except one ACC Limited plant were higher in the second half of 2010, compared to the first half. Disruptions in several plants in mid-2010 forced ACC Limited to rely on higher cost plants. Across all plants, the increase in average cost of production between the first and second half of 2010 was 13%.

57. The stand of the learned Senior Counsel for the ACC Limited that the production trends are consistent with competitive behaviour. The following facts were highlighted.

58. Relationship between production and dispatch. Cement has an extremely short shelf life, which means production and dispatch would necessarily move together. Therefore, all arguments/factors

in relation to production parallelism will also apply to dispatch parallelism.

59. Parallelism in production is consistent with competitive behaviour. Any parallelism in production is expected in an industry faced with seasonal demand fluctuations, as producers respond similarly to reduced or increased demand. The factors causing seasonality in the cement industry include:

- a) Local climatic factors. The nature of cement is such that it cannot set and dry in wet weather. Construction activity, and consequently the demand for cement, reduces substantially during wet weather, and picks up when the weather is dry and warm. Thus, the South West monsoon, the North East monsoon and winter precipitation in north India reduces demand whenever they occur in any given State.
- b) Local cultural factors. Major festivals cause both demand and supply changes: (i) demand would reduce from the construction sector, as labourers would take time off to return to their native places to celebrate with their families; and (ii) supply is expected to reduce as workers in the cement plants also go home. The sum total of both these effects would be to reduce production. In this regard, the periods surrounding major festivals like Diwali, Navaratri, Durga Puja, Christmas and New Year face reduced demand.
- c) Other factors. The month of February has only 28 days (or 29, in leap years), which makes it as much as 10 per cent shorter than months like January and March, which have 31 days each.

Thus, it is only natural that aggregate demand in February would be lower than in January or March even if the demand on any given day is the same.

d) ACC specific factors. There were a series of significant disruptions to ACC Limited production in mid-2010 such as refractory failure in the Madhukkrail plant and significant power failure at the Gaga plant in August 2010; machinery breakdown and power failure issues in August and September 2010. These led to reductions in supply in mid-2010 during the disruptions, leading to reduced production. Subsequently, as the disruptions were resolved by the end of September 2010, supply would have increased in the following months as the production process returned to normal, showing up as an increase in production.

60. It was further submitted that the production trends are better explained by climatic factors and festivals, which affect underlying demand and supply. These include (i) retreat of south-west monsoons over large parts of India, (ii) onset of winter rainfall in November in the Southern states, (iii) Diwali, (iv) Navratri culminating in Dussehra, and (v) Durga Puja in the Eastern states. As a result of these seasonal factors, it is observed that, in relation to ACC Limited actual data:

- i. In the month following the retreat of the south-west monsoon there was an increase in production due to an increased demand from the construction sector, for those

States which receive the bulk of their rainfall from the south-west monsoon. ii. For southern States where the primary rainy season is the north- east monsoon, production did not spike in October but reduced in November as the rainy season started. iii. When festivals such as Navaratri, Durga Puja, or Diwali fell in a particular month, there was either a fall in production, or the increase in production due to the monsoon season ending was moderated.

iv. For states with no winter rainfall and where Diwali or Durga Puja are not big festivals, there was little change in production during this period.

Submissions on behalf of Jaiprakash Associates Ltd.

61. Mr. Amit Sibal, learned Senior Counsel appearing on behalf of Jaiprakash Associates Ltd. submitted that the Appellant expanded its production in the year 2008-09 and 2009-10 by commissioning new units in Haryana, Uttar Pradesh, Gujarat, Madhya Pradesh, Himachal Pradesh and Uttarakhand, increasing its installed capacity from 7 million tons in 2007-08 to 19.10 million tons by the end of 2009-10.

62. It was also submitted that the Commission has wrongly relied upon the DG's calculation of the Appellant's capacity utilisation in 2009-10 as 57.7%. This figure is not at all indicative of the actual capacity utilisation by the Appellant. Instead of using pro-rated capacity, the DG has taken the figures for the installed capacity of the whole year. When calculated correctly, the actual capacity utilisation for 2009-2010 is 81.7%, which is much higher than the DG's calculation which has been relied upon by the Commission.

63. According to learned Senior Counsel, when a new plant is installed, the ramp up of the capacity utilization to optimum level takes considerable time due to the teething problems encountered in the initial period. The Commission has not taken this fact into account or made any adjustments to provide a stabilisation period for these plants whilst calculating and assessing the average capacity utilisation. As per the DG report itself, in its first year of production a plant is only able to produce 50% of its installed capacity. The Commission has wrongly relied upon the figure of 75.27% of 2010-11 even though if ramp up is taken into account, the correct capacity utilisation for 2010-11 will be 93.1%. extracts of the comments to the DG Report filed by the Appellant before the Commission dated 14th February, 2012 on capacity utilisation and ramp up time of new plants.

64. It was further submitted that the increase in the Appellant's production in 2010-11 over 2009-10 has been 38%. There has been maximum increase in capacity of the Appellant and it is only due to the gestation periods that the plants require for stabilisation that the capacity utilisation has not been the maximum possible.

65. It is also contended that the Appellant has recorded the largest increase in dispatches, more than any other cement manufacture for the alleged period of cartelization i.e. January 2009 to December 2010.

66. The Appellant has been shown the net profit margins of its cement division is 28.22%, 24.60%, 15.92% and 5.79% in 2007-08, 2008-09, 2009-10 and 2010-11 respectively. The net profit margins had been declining over the period 2007-08 to 2010-11.

Particulars	2010-2011	2009-2010	2008-2009	2007-2008	2006-2007	2005-2006
Sales	541,833	394,307	249,955	224,051	207,270	144,368
Realisation Profit before tax	31,379	62,762	61,495	63,226	46,159	12,641
Tax % of	5.79%	15.92%	24.60%	28.00%	22.27%	8.76%

Profit before tax with sale realisation Submissions on behalf of UltraTech Cement Ltd.

67. While taken similar plea, Mr. Gourab Banerji, learned Senior Counsel appearing on behalf of the Appellant submitted that the Respondents have failed to consider the Macro Factors. It was contended that certain Macro Factors invariably occur when there is a cartel. Thus, since the Commission was basing its finding on economic analysis, they ought to have seen the macro factors which would have shown that there could not have been any cartel.

68. Learned counsel for the Appellant further submitted that normally cartels exist when there are entry barriers in the market. However, in the instant case there is no evidence to suggest existence of any entry barriers. This is evident from the fact that during the period 2007-08 and 2010-11, ten new large players entered the market with a total capacity of 12.3 MT. further, market share of Cement manufactures has also seen frequent changes.

It was also submitted that the Mandatory Tests laid down under Section 19(3)(a)(b) & (c) were not conducted before arriving at finding of cartelisation.

69. The Appellant has also taken plea that there was a substantial increase in installed capacity which was increased during the period 2007-2011 from 179.1 MT to 286.38 MT i.e. almost 50% increase. Further, ten players doubled their capacity from 20.4MT to 46.20MT.

70. According to learned counsel for the Appellant, increase in profit margin is one of the indicators of cartel. The data on record shows that there is decrease in pre-tax and post-tax margins of major Cement manufactures during the years 2007-2011.

71. It was submitted that the Commission relied on the existence and the role of CMA to reach a finding of cartelization. However, the Commission with respect to CMA is completely different if not opposite. The Commission considered the CMA meeting as a basis to state that the conduct of the Appellants/Cement Companies needs to be investigated. The Commission does the exact opposite and after carrying out economic analysis, not having found any actual evidence of agreement relies on the factum of existence of CMA meetings to reach the conclusion of cartelization. Apart from the fact that the findings of the Commission are inherently contrary and contradictory. They are erroneous for obvious reasons which are as follows:-

i. Right to Assemble:

All industries and persons have a right to form an association as guaranteed by the Constitutional right, no adverse inference can be drawn from the fact that the Cement Manufacturers had formed an association and used to hold meetings.

ii. No Price Discussed in Meeting The Commission have quoted Minutes of Meeting of the CMA extensively. However, a bare perusal of the same shows that none of the minutes of the Meetings show any discussion on price. The issues discussed at the CMA meetings related to the industry like imposition of taxes etc. iii. Collection of Data on the Instructions of Government of India (GoI) CMA collected data with respect to the price of cement etc. has been held against the Appellants. It was submitted that this is fundamentally erroneous. After enactment of the Competition Act, the CMA had specifically inquired from the Government of India- Department of Industrial Policy and Promotion (DIPP) as to whether it should continue to collect such historical price and production data. The Government of India vide letter dated 28th July, 2008 specifically required the CMA to continue collecting and forwarding such data. Thus, no adverse inference can be drawn from such collection of historical data and supplying of the same to DIPP/Government of India. In fact, collection and supply of data is found to be valuable to Government of India for purpose of planning etc. and the Government of India uses this data for various policy matters.

iv. Collection of Historical and Generic Data:

According to Appellant, the fundamental error made by the Commission is to assume that CMA collects the actual data, that too for various Cement Companies on real time basis. This is fundamentally erroneous on all counts. The data provided by CMA is notional price of cement based on the relevant Cement Companies enquiring from the retail vendors. This does not contain the actual data of each of the Companies. The data does not show any discreet changes in price of any of the companies. v. Cherry Picking with respect to CMA Meeting:

There have been seven CMA meetings during the period under consideration by the Commission. The Commission by selectively picking three meetings has reached a finding that there must have been an agreement among the cement manufacturers. According to Appellant, this finding is patently erroneous for the following reasons:

Picking three out of seven meetings is in fact a case of cherry picking. In fact, the price fell after four meetings and went up after three meetings. Thus, showing no discernible pattern.

In any case, the finding that the price went up after the CMA meetings is itself wrong. Commission has taken the average monthly price. It does not show the price before and after the meetings. Further, Commission has used retail price in its analysis which is in any case irrelevant for the manufacturers of cement who are concerned with factory gate price and at the most wholesale price. Parties, in particular UltraTech has provided discreet price changes over a period of both before and after the CMA meeting and the same do not disclose any pattern.

72. It was further contended that there was failure to define relevant market as argued in their other cases. Further, according to learned counsel for the Appellant price parallelism alone cannot be the basis of coming to the conclusion of anti-competitive behaviour. Submissions on behalf of Cement Manufacturers Association:

73. Mr. Ramji Srinivasan, learned Senior Counsel appearing on behalf of Cement Manufacturers Association ('CMA' for short) submitted that CMA was collecting cement prices (minimum and maximum) on a weekly basis as were earlier collected by DCCI. Though CMA sought clarification after the enactment from the DIPP, but no effort was made to seek legal advice or clarification after notification of the provision of the Competition Act.

The collection of prices by CMA either at the behest of the Ministry or otherwise in itself is not anti-competitive unless such information is shared with or disseminated/published to cement companies.

74. It was submitted that Commission overstepped its jurisdiction while passing Cease and desist order against the CMA from compiling, publishing and distributing the business statistics.

75. It was also submitted that the business statistics are in public interest for the reasons-

a. it helps to create well informed, transparent and competitive market and essential for educating policy makers, various other stake holders, institutional buyers, stock market, investment and new entry;

b. commercial operations become more intelligent; c. It is not interest of the economy to let the suppliers to take a decision in dark in particular when the cement involves various precious natural resources and further the shelf life of cement is maximum three months;

d. The statistics helps the other various stakeholders to take decisions such as development of the heavy goods transport system, railways for allocation of wagons; addition of storage capacity/godown at every local market, allocation of coal and other natural resources; conduct of research and other study in the interest of economy growth and development of the cement industry; for various regulators for policy issues, e. Thus, for enhancing the efficiency of production, supply, distribution and storage and control of cement.

76. Reliance has been placed on the decision in "Maple Flooring Manufacturer's Association vs United states, 268 US 563 (1925)" in which the majority decision upheld, that trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption as did these defendants and who, as they did, meet and discuss such information and statistics without, however, reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce.

77. Further, according to learned counsel CMA cannot be construed as a common platform for collusion. The Commission considered irrelevant and inadmissible evidence for finding that CMA platform is for cartelization.

78. It was contended that the CMA has maintained the minutes of all meetings. Further, there is no finding or allegation that CMA has recorded the minutes wrongly or manipulated its minutes. Without such finding, it is unjust to condemn the CMA to act as a platform of collusion for any anticompetitive activity.

Submissions on behalf of Respondent No.1 (CCI)

79. Mr. Salman Khurshid, learned Senior Counsel appearing on behalf of the Commission while opposing the appeals submitted that the Appellants are habitual offenders.

80. It was also submitted that the Cement industry is the second largest profit-making industry in the country after Mining and the Cement prices in India are the second highest in the world after Japan. Keeping in mind the aforementioned fact, Holcim Group has been penalised and held guilty of acts of anti-competitive activities all over the world. It was also highlighted that "Lafarge India", a subsidiary of the French building materials major 'Lafarge', has already been fined in the years 1994, 2002 and 2008, for committing irregularities in different jurisdictions.

Further, it was contended that CMA and some of the Appellants have also been found to have been engaged in restrictive trade practices in the past by the erstwhile MRTP Commission in Restrictive Trade Practices Enquiry (hereinafter referred to as "RTPE") No. 21 of 2001 & RTPE 99 of 1990. In RTPE No. 99 of 1990 dated 20th December, 2007, a cease and desist order was issued against some Cement Companies. The MRTP Commission at Para 100, Page No. 156 of the MRTP order in RTPR no. 99 of 1990 dated 20th December, 2007 noted that "CMA was collecting price information on very short intervals and was reviewing the price situations through the marketing committees."

In the instant case, in view of the economic and other circumstantial evidence available on record against the Appellants, Commission has reached to the conclusion that the Appellants by entering into an 'arrangement' and 'concerted action' have clearly violated Sections 3(1) read with sections 3(3) (a) and 3(3) (b) of the Competition Act, 2002. Learned Senior Counsel referred to different paragraphs of the impugned judgment in support of the submission.

81. One of the questions arises for consideration is whether the activity of the Appellants and CMA amounts to 'cartel' as defined in Section 2(b) and (c) respectively of the Competition Act, 2002.

82. "Agreement" is defined in Section 2(b) of the Competition Act, 2002, which includes any arrangement or understanding or action in concert and reads as follows:

"2(b) "agreement" includes any arrangement or understanding or action in concert, □

(i) whether or not, such arrangement, understanding or action is formal or in writing;
or

(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

[(ba) "Appellate Tribunal" means the Competition Appellate Tribunal established under sub-section (1) of section 53A;]"

83. Section 2(c) defines 'cartel' which includes an association of producers, sellers, distributors etc. as quoted below:

"2(c) "cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit control or attempt to control the production, distribution, sale or price of, or trade in goods or provision of services."

Therefore, it is clear that all cartels arise out of any agreement but all agreements are not cartel.

84. Chapter II of the Competition Act, 2002, deals with "Prohibition of Certain Agreements, Abuse of Dominant Position and Regulation of Combination". Section 3 deals with 'Anti-competitive agreements', whereas Section 4 prohibits the 'abuse of dominant position'.

85. In the present case, as the Commission held the action of the part of the Appellants in violation of Section 3(3)(a) & (b). Therefore, it is desirable to refer to the said provision, relevant of which reads as follows:

"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--

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

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

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub- section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

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

86. Thereby it is clear that Sub-section (3) of Section 3 relates to all agreements entered into between enterprises or associations of enterprises or persons or association of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-- (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services etc. will be presumed to have an appreciable adverse effect on competition.

87. The Competition Law seeks to protect the competition process but not an individual competitor. Violations, if alleged must be based upon demonstrable economic effects rather than upon formalistic line drawing. The main issue to be seen as to whether the agreement, unilateral (exclusionary) conduct or cartel, enhance or facilitate powers. Market power is the ability to control prices or exclude competition, but not all market power is bad. Market power can be shown through direct/or indirect evidence.

88. 'Market power' has not been defined in the Act but as per Section 3 Anti-competitive agreements require an actual or likely appreciable adverse effect on competition.

89. Some concerted acts/ agreements, which may result into horizontal price-fixing agreement i.e. directly or indirectly determines purchase or sale prices or limits or controls production, supply, markets, technical development, investment or provision of services, it will not be legal as in terms of Section 3(3), it shall be presumed to have an appreciable adverse effect on competition.

90. If the behaviour factors of the Appellants are seen, the following facts emerge:

Exchange of Data: The most significant and clinching evidence that the Appellants were in fact, acting in concert was the fact that the Companies using the platform of CMA met at regular intervals, discussed pricing and sensitive information relating to production, capacity, dispatch etc. with each other All competitive restraints and competition policies were given a total go by the Appellant cement companies. 90.1. Sections 3 and 4 of the Competition Act, 2002 came into force on 20th May, 2009, though the Competition Act was enacted in the year 2002.

However, before Section 3 given effect 20th May, 2009 the CMA started discussing the sale price of Cement in its platform. For instance:

90.2. In CMA in its different Meetings discussed the price of the cement and circulated among the members, the sale price of cement to its member will be evident from proceedings of different meetings.

"Minutes of the 84th Meeting of the Managing Committee of Cement Manufacturers' Association held on 15.03.2007 in Mumbai.

06. The post-budget 2007-08 ten days were hectic since the President of CMA along with captains of the industry had meetings with Hon'ble Shri P. Chidambaram, Union Finance Minister and Hon'ble Shri Kornai Nath, Union Minister of Commerce and Industry as also Dr. Ajay Dua, Secretary (IPP), MOCI and others. During the discussion there has been pressure from government to reduce cement prices and avail of the excise duty concession. All attempts have been made to establish that pre-budget ruling cement prices (Feb 07) have been lower than the inflation adjusted prices prevailing in 1995 (April 95)-lower by Rs 12 to Rs 48 per bag. All members would reiterate that improvement in the GDP has improved in all sectors of economy and cement is no exception. However, Cement industry has been ploughing back the profits in creation of additional capacities, which is the need of hour. The cement industry is producing at the optimal level of more than 95% and to meet the growing demand for cement in the XI Plan period (2007-08 to 2011-12), the cement companies have planned for addition of adequate capacity, which would require huge investment.

Forced Price Reduction resulting in reduction on margin would adversely affect capacity materialization in time. "

90.3. Meeting of CMA dated 26th March, 2009, they discussed the issues related to supply of cement, which reads as follows:

" Minutes of the 92nd Meeting of the Managing Committee of Cement Manufacturers' Association held on 26.03.2009 in New Delhi 7 (a) Supply of Cement in the State of Uttar Pradesh Secretary General, CMA mentioned that Secretary (DIPP) had called a Meeting of Chief Executives of Cement Companies supplying

cement in the State of UP and also CMA on 16.03.2009, to discuss the complaint by the UP Govt. Departments, wherein Secretary (DIPP) insisted that the prices be brought down to reasonable levels within 4 weeks' time, failing which he would be obliged to resort to recommending. withdrawal of CVD and SAD on Cement Imports and also reintroduction of Ban on Cement Exports.

Shri Rahul Kumar, COO (Cement), Jaiprakash Associates Ltd. informed Secretary (DIPP) that while the growth of cement supplies during the period April- Oct '08 was only 2.6% over the corresponding period of the previous year, the sudden spurt in demand during Nov.08 to Jan 09 was 24%.

Shri Rahul Kumar, further apprised CMA after attending the Meeting taken by Chief Secretary, Govt. of UP in Lucknow on 17.03.2009 where the cement manufacturing cement to UP were also resent and on behalf of Jaypee Cement that it was agreed by Jaypee to supply cement to the Govt. Departments during the month of March 2009 at the rate of Rs 245/-per bag. The UP Govt. was satisfied and orders were being placed for supply of cement. The other suppliers also similar(ly) responded by offering similar special rates for Govt. supplies and assuring to meet the requirements."

Similarly, on 18th December, 2008, there were discussions on dissemination of data which were circulated to the cement companies, as quoted below:

" Managing Committee of CMA held on
18.12.2008 in Mumbai

3.5 Further Company-wise, Factory-wise data

regarding capacity, production, dispatches, exports etc. are being collected and regularly furnished by CMA to Ministry of Commerce and Industry and also circulated to Cement Companies."

90.4. The minutes of the 95th Meeting of Managing Committee of CMA held on 30th November, 2009, decided weekly retail cement prices to DIPP, which reads as follows:

"Meeting of Managing Committee of CMA held on 30.11.2009 in New Delhi are quite pertinent to note:

10.1 Weekly Retail Cement Prices to DIPP 10.1.2 President informed the meeting that CMA has been furnishing weekly Retail Cement Prices to DIPP every Wednesday for the period pertaining to the previous week. The information so furnished gives only the range of prices prevailing in each of the markets (Minimum and Maximum) for the relevant period. CMA, traditionally, has been collecting this information from representatives of certain Cement Companies.

10.1.3 In addition, CMA has also been required to furnish Wholesale Prices to Economic Adviser, Ministry of Commerce and Industry as on the last working day of each month by the 10th of the following month. For this, the companies have been designated by DIPP itself after a meeting of Cement Companies and CMA in Feb.2009. This is the information, which is used by DIPP for working out Wholesale Price Index (WPI). 10.1.4 President further informed that in view of the recent developments, the Stations covered by ACC Ltd. and Ambuja Cements Ltd. would have to be served by some other representatives of the Cement Companies who have a presence in each one of these places.

10.1.5 President requested Members to come forward and voluntarily take this up on a regular basis so that a system and procedure is put in place for collection of this information. The concerned Companies were also requested to send the names of their Nominated representatives to CMA, with their contact numbers, e-mail details, etc. 10.1.6 The following cement companies agreed to furnish range of the Wholesale and Retail cement prices details for the cities mentioned against their names.

Co./Station	Retail Cement Price Grasim Inds. Ltd.	Wholesale price
Chandigarh	Retail Cement Price	
Ludhiana	-do-	
Jammu	-do-	
Simla	-do-	
Mumbai	UltraTech Cement Ltd. Retail Cement Price	(Already being given by Grasim Inds. Ltd.)
Ahmedabad	-do-	Wholesale Price
Nagpur	-do-	
Pune	-do-	
Rajkot	-do-	
Baroda	-do-	

decided that Jaiprakash Associates Ltd. may furnish the information for Retail Cement Price and also Wholesale Cement Price.

Faizabad	Retail	Cement		
			Price	
Bhopal		-do-		Wholesale
				Price

may also contribute in the exercise for collecting the prices giving maximum and minimum range in whichever market they are comfortable for supplying the price details."

90.5. From the perusal of the minutes of the High Power Committee meetings held on 3rd January, 2011, 24th February, 2011 and 4th March, 2011, it is apparent that CMA provides a platform to the members for meeting.

90.6. 'ACC Ltd.' and 'Ambuja Cements Ltd.' themselves specifically stated that the reason for them to withdraw from the activities of CMA was that they are likely to get into deep trouble with the Anti-Trust in European Union.

90.7. The CMA itself decided to amend its regulations post issue of notice dated 20th August, 2010 by the Commission under Section 41(2) of the Competition Act, 2002. The amendments made in its

meeting dated 23rd September, 2010, leave no manner of doubt that prior to the amendment, even formally and on record the purpose of the association was to bring about 'greater cooperation' between the Cement Companies and undertake activities which could be nothing else but acts of cartelization. 90.8. Further, while the CMA had been directed by the DIPP to collect information relating to indicative retail price ranges in 34 centres across India on a weekly basis and wholesale price index from 10 centres and submit it to the Government, the CMA chose to have the information collected at a retail level for 34 centres from various cement companies among themselves (Leaders in their respective areas). Effectively therefore, while it was never intended that the cement companies should have access to details such as prices, production capacity etc. of its competitors but it is the very same competitors who were collecting the said information from other competitors.

91. It was vehemently urged by the learned counsel for the Appellant that CMA was collecting prices of cement for transmission to the concerned authorities in the Government. However, CMA was also sharing this data with its members, is apparent from decisions taken in its meetings, as noticed above.

92. From the proceedings of CMA and the High Power Committee, it is clear that the information collected by individual cement companies provided clear opportunities for the cement companies to share commercially sensitive information because the prices were collected over phone and emails.

93. Most importantly, the information that was authorised to be collected by the DIPP was never meant to be shared by the CMA with the individual cement companies. However, CMA admittedly was publishing and circulating details of production, capacity utilisation, prices etc. of all the cement companies in its executive summaries which were circulated every month.

94. It is also important to notice that the non-High Power Committee meetings which ACC Ltd. and Ambuja Cements Ltd. claimed to have attended instead of the HPC meetings held on the same date i.e. 24th February, 2011 and 4th March, 2011 are at the same venue i.e. at Hotel Orchid Mumbai as that of the HPC meetings. All three meetings, they did not choose to attend, are after the information was received by the Committee.

95. In "Technip SA vs. SMS Holding (P) Ltd. & Ors." (2005) 5 SCC 465, the Hon'ble Supreme Court went into the "concept of Action in Concert" and observed:

"54. The standard of proof required to establish such concert is one of probability and may be established "if having regard to their relation etc., their conduct, and their common interest, that it may be inferred that they must be acting together: evidence of actual concerted acting is normally difficult to obtain, and is not insisted upon".

55. While deciding whether a company was one in which the public were substantially interested within the meaning of Section 23A of the Income Tax Act, 1922 this Court said:-

"The test is not whether they have actually acted in concert but whether the circumstances are such that human experience tells us that it can safely be taken that they must be acting together. It is not necessary to state the kind of evidence that will prove such concerted actings. Each case must necessarily be decided on its own facts".

56. In Guinness PLC and Distillers Company PLC the question before the Takeover Panel was whether Guinness had acted in concert with Pipetec when Pipetec purchased shares in Distillers Company PLC. Various factors were taken into consideration to conclude that Guinness had acted in concert with Pipetec to get control over Distillers Company. The Panel said :-

"The nature of acting in concert requires that the definition be drawn in deliberately wide terms. It covers an understanding as well as an agreement, and an informal as well as a formal arrangement, which leads to co-

operation to purchase shares to acquire control of a company. This is necessary, as such arrangements are often informal, and the understanding may arise from a hint. The understanding may be tacit, and the definition covers situations where the parties act on the basis of a "nod or a wink". Unless persons declare this agreement or understanding, there is rarely direct evidence of action in concert, and the Panel must draw on its experience and common sense to determine whether those involved in any dealings have some form of understanding and are acting in co-operation with each other".

96. The test of proof balance of probabilities or strict proof was considered by the Hon'ble COMPAT in "M/s. International Cylinder (P) Ltd. v. Competition Commission of India & Ors. □Appeal No. 21/2012" wherein Appellate Tribunal held:

"30. The burden in this behalf cannot be equated with the burden in the criminal cases where the prosecution has to prove all allegation beyond the reasonable doubt. A strong probability would be enough to come to the conclusion about the breach of the provisions of the Competition Act. Some of the learned counsel argued that their participation or the preconcerted agreement would have to be proved beyond doubt. We do not think so. It is obvious that an agreement cannot be easily proved because it may be a wink or a nod or even a telephone call. What is required to be proved is a strong probability in favour of a pre-concerted agreement and the factors which we have highlighted go a long way in that direction and as plus factors."

97. While discussing "presumption of cartel offences" in "Excel Crop Care Ltd. v. Competition Commission of India □(2017) SCC OnLine SC 609", the Hon'ble Supreme Court observed:

"41. Sub-section (2) of Section 3 specifically makes such agreements as void. Sub-section (3) mentions certain kinds of agreements which would be treated as ipso factor causing appreciable adverse effect on competition."

50. Thus, onus was on the appellants in view of Section 3 of the Act, and that too heavy onus, to justify the above trend, but they have failed to discharge this burden. We are, therefore, of the opinion that ingredients of Section 3 stand satisfied and the CCI rightly held that provisions of Section 3(3)(a), 3(3)(b) and 3(3)(d) have been contravened by the appellants."

98. The COMPAT in the case of "National Insurance Company Ltd. and Ors. v. Competition Commission of India" MANU /TA/0060/2016"

held:

"15.2 The presumption under Section 3(3) of the Act takes away the applicability of rule of reason. Bid rigging has been statutorily determined to be anticompetitive. Presumption in a substantive law is irrefutable and conclusive. Once a conclusion of bid rigging is reached, contravention of Section 3(1) of the Act is also established. We see no reason to interfere in the conclusion of the Commission that the Appellants entered into an Anti-competitive Agreement, resulting in bid rigging which had an appreciable adverse effect on competition"

99. In some of the foreign judgment, the 'agreement' has been noticed and defined on the basis of the European Law in line with the case-law of the Court of Justice of the European Union. The concept of a 'concerted practice' refers to 'a form of coordination' between undertakings by which, without it having reached the stage where an agreement properly so-called has been concluded, amounts to cooperation between them has been knowingly substituted for the risks of competition.

100. Information exchange can constitute a concerted practice if it reduces strategic uncertainty in the market thereby facilitating collusion, that is to say, if the data exchanged is strategic. In European Union Law, the aforesaid proposition has been shown in the guidelines on the applicability of Article 101 of the Treaty on the functioning of the European Union to horizontal co-operation agreements while explained.

101. In India the horizontal agreements if directly or indirectly determines purchase or sale prices, in effect will attracts Section 3(3)(a).

If it limits or controls production, supply, markets, technical development, investment or provision of services it will attracts Section 3(3)(b). Once agreement is noticed and any one or other ingredients of Section 3(3)(a) or Section 3(3)(b) is found, the automatic presumption will be that such agreement has an adverse Anti-competitive effect on competition.

102. Anti-competition effect factors noticed in Section 19(3) (a) to (c) relates to creation of barriers to new entrants in the market; driving existing competitors out of the market and foreclosure of competition by hindering entry into the market. This is contrary to the pro competitive effects factors shown in Section 19(3)(d) to (f) which provides accrual of benefits to consumers; improvements in production or distribution of goods or provision of services and promotion of technical, scientific and economic development by means of production or distribution of goods or

provision of services.

103. In the present case, what we noticed and discussed above that in the meeting of CMA, the member Cement Companies since 15th March, 2007 i.e. prior to coming into force of Section 3 was discussing sale price of Cement in their platform which they continued to hold all the time even thereafter till they desisted when the Commission issued notice on 20th August, 2010 under Section 41(2) of the Competition Act, 2002. Only thereafter the member Cement Companies desisted by amending its earlier resolution in its meeting held on 23rd September, 2010. They were openly circulating the sale price of cement of each of the Cement Companies, though they were competitors. The Government of India if called for details of the Companies, the respective companies could have sent it themselves in a sealed cover. But, it was sent to the competitors who were discussing not only the sale price of the cement but also the order issued by one of the company from Government of U.P. From the aforesaid facts based on evidence, there will be one conclusion that there was meeting of minds between the Appellants with regard to the fixation of sale price of cement and for regulating its supply and production.

104. Now the question arises whether such 'agreement' attracts any of the provisions of Section 3(3)(a) or Section 3(3)(b) of the Competition Act, 2002.

A) Price Parallelism Admittedly, the DG had sought month wise/ Plant wise data from the Cement Companies in respect of installed capacity, production, dispatch and prices of cement from January, 2007 to February, 2011. However, the Appellants chose to supply data as convenient to them.

The rise in price in February 2011 was unusually high compared to previous years. In fact, if the price charts submitted by the Commission before the Appellants, based on data submitted by the Appellants are perused, it is clear that there are absolute change in price of Appellants in each state which would show clearly that the Appellants without any reason or justification grossly hiked the prices totally departing from their normal trends over the previous years.

B) Price Charts A perusal of the table as handed over to the bench on 11th October, 2017 shows a Region/State wise break of the range of percentage change in prices (2007-2011). The same reflects on the Range of Percentage change in the month of October over September (2007-2011) for the Southern States and for the month of February over January (2007-2011) for Central, Northern and Eastern States highlighting the unprecedented trend for the percentage increase in the prices which was not the case in the previous years for the corresponding months. For instance, in Southern States (T.N, Kerala, AP and Karnataka), the percentage change in the month of October 2010 over September 2010 went upto 29.93%. The increase continued upto Feb 2011. In Western, Eastern and Central/ Northern Indian states the percentage increase in February, 2011 over January 2011 was more than in any of the previous months of the year or of the previous years. The increase in prices by all companies, due to their co-ordinated behaviour was violative of Section 3(3)(a) of the Competition Act, 2002.

The chart showing price rise since 2007 of four states of Southern Region, based on the record submitted by the Appellant is enclosed:

This will be also evident from prices analysis provided by the counsel for the Ambuja Cements Limited with regard to month on month percentage prices changes for the years 2007 to 2011, some of which are extracted below: -

Even if it looks into the aforesaid chart submitted by one of the Appellants, it cannot be alleged that the Commission cheery pick datas to show price parallelism. C) Dispatch & Production Coordination:

a. For analysis on the Dispatch Trends, data was considered from January 2009 - December 2010 for all the Appellant Cement Companies which showed that in November 2010 there has been a decrease in dispatch by all companies compared to October 2010. b. The table under Para no. 262, Page No. 153 of the impugned order gives a clear picture that while there was an increase or decrease in dispatches for different companies during November 2009 over October 2009, however all companies uniformly had a decrease in supply in November 2010 over October 2010. That even when there was a decrease for some companies in the previous year of 2009, eg. JK, Madras, Lafarge and ACC the decrease in 2009 was very marginal if any. However, the decrease in 2010 was huge and across all companies.

c. Lower dispatches in the months of November-December, 2010- 11 in comparison to actual consumption in the corresponding months of 2009-10 coupled with lower capacity utilisation in these months even though there were no demand constraints-given the strong positive growth in the construction industry, establishes that the cement companies indulged in controlling and limiting the supply of cement in the market.

d. Further, Commission inquired into the trends relating to Production and looking at the figures of various states the Commission found that the production fell drastically in all cases in November 2010-11 while that was not the case in November 2009-

10.

Rajasthan Company	2009			2010			(in tonnes)
	October	November	Remarks	October	November	Remarks	
ACC	103327	88425	Decrease	120695	115481	Decrease	
Shree	701611	708686	Increase	869064	655290	Decrease	
Ultra	275423	249253	Decrease	490792	348675	Decrease	
India Cements	316365	300175	Decrease	305757	261469	Decrease	
ACL	149654	152995	Increase	173758	132051	Decrease	

Birla	206659	185529	Decrease	234887	200098	Decrease
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Madhya Pradesh

Company

2009

2010

	October	November	Remarks	October	November	Remarks
ACC	196936	180052	Decrease	211029	170027	Decrease
Century	270295	323544	Increase	383555	320774	Decrease
Jaypee	445236	539645	Increase	549274	383390	Decrease
Ultra	294250	286842	Decrease	322006	216861	Decrease

Karnataka

Company

2009

2010

	October	November	Remarks	October	November	Remarks
ACC	329822	356502	Increase	411030	393274	Decrease
Madras	17132	14727	Decrease	11802	11701	Decrease
Ultra	253456	275136	Increase	273023	202847	Decrease

Chhattisgarh

Company

2009

2010

	October	November	Remarks	October	November	Remarks
ACL	120011	111012	Decrease	124043	115123	Decrease
Century	162780	163880	Increase	180980	160400	Decrease
Lafarge	337981	294215	Decrease	366239	316538	Decrease

Tamil Nadu

Company

2009

2010

	October	November	Remarks	October	November	Remarks
ACC	79212	78652	Decrease	79452	68483	Decrease
Ultra	169795	153401	Decrease	184430	121582	Decrease
India Cements	365833	334334	Decrease	343304	239878	Decrease

Gujarat

Company

2009

2010

	October	November	Remarks	October	November	Remarks
ACL	565768	615864	Decrease	721665	576275	Decrease
Jaypee	2888	9322	Increase	121584	103533	Decrease
Ultra	430472	412498	Decrease	466749	397585	Decrease

Andhra Pradesh						
Company	2009			2010		
	October	November	Remarks	October	November	Remarks
India	425797	465583	Decrease	449985	317488	Decrease
Ultra	250027	276440	Increase	347702	287377	Decrease
Madras	147632	148362	Increase	112957	104343	Decrease

e. The trends in Production when compared with the related demand sectors also shows that while the Construction Industry grew considerably during the period 2010-11 as compared to 2009-10, the growth in cement production and dispatch only grew marginally in comparison.

f. Another interesting fact is when the Cement Production is compared to the dispatches shows that in the months of November and December 2010-11 over 2009-10, production in absolute terms actually fell by (-5.43) and (-3.41%). Similarly, the dispatch during the same periods actually fell by (-6.33%) and (-4.90 %) thus showing that in fact the dispatches fell even more than the fall in production. (Note: Data taken from CMA and Ministry of Statistics).

Month	Cement Production and Dispatches					
	Cement Production			Cement Dispatches		
	In Absolute		%age	In Absolute		%age
	2010-11	2009-10	change in 10-11 over 09-10	2010-11	2009-10	change in 10-11 over 09-10
April	14.70	13.40	9.70	14.44	13.26	8.90
May	14.47	13.28	8.96	14.18	13.06	8.58
June	13.77	13.19	4.40	13.81	13.32	3.68
July	13.23	13.01	1.69	13.30	12.73	4.48
August	12.85	12.51	2.72	12.81	12.39	3.39
September	12.67	11.83	7.10	12.68	11.74	8.01
October	14.87	12.39	20.02	14.58	12.22	19.31
November	11.84	12.52	-5.43	11.69	12.48	-6.33

December	13.59	14.07	-3.41	13.60	14.30	-4.90
January	14.70	14.65	0.34	14.61	14.59	0.14
February	14.78	13.93	6.10	14.73	13.75	7.13
March	16.82	15.97	5.32	16.72	16.00	4.50
Overall			4.74%			4.75%

g. The Appellants cement companies reduced production and

dispatches of cement across all sectors in a period when the demand from the construction sector was positive during November and December, 2010 over corresponding months of in the previous year and thereafter raised prices in the months of January and February, 2011 over January and February 2010. In this context the third party statements made by the dealers such as Stellar Venture (P) Ltd, & M/s Noida Limited are also important to be considered. It was brought to the notice of the DG that prices were increased by some of the cement companies in January, 2011 and also from February 2011 onwards the booking in the non-trade segment was completely stopped by almost all the cement companies and that there was a shortage of supply of cement by the cement companies. D) Low Level of Capacity Utilisation Data when the data is computed from the years 2005-06 to 2010-11, it shows low level of capacity utilisation, as shown below:

Installed Capacity and Production of Cement Year Installed Growth in Production
Growth in Capacity in MMT Capacity in % % utilisation in MMT % a. Comparison of the years 2008-09 with 2009-10 and 2010-11 would show that (a) while the installed capacity was the highest in 2009-10 and thereafter in 2010-11 thus signifying a continuous increase in demand and the market, the growth in production however fell from 12.87% in 2009-10 to merely 2.85% in 2010-11 over 2009-2010. (b) Capacity utilization fell from 83% in 2009-10 to 73% in 2010-11. (c) Further the argument that it takes time for functional stability etc. and the nameplate capacity argument gets blurred considering that despite an increase in capacity in the previous year the production increased substantially which was not the case in the year 2010-11.

b) The following table also further reiterates the fact that even post exclusion of ACC and ACL, the capacity utilization was only 75%.

Capacity utilisation based on available and installed capacity Total Installed capacity excluding ACC 234.30 MMT Ltd. and ACL as on 31.03.2011 Total Installed capacity including ACC 286.38 MMT

Ltd. and ACL as on 31.03.2011 Actual available capacity excluding ACC 224.41 MMT Ltd. and ACL as on 31.03.2011 Capacity utilisation excluding ACC Ltd. 168.29 MMT and ACL on 31.03.2011 % Capacity utilisation excluding ACC Ltd. 75% and ACL on actual available capacity of 224.41 MMT as on 31.03.2011 % Capacity utilisation including ACC Ltd. 73% and ACL on reported installed capacity of 286.38 MMT as on 31.03.2011

c) Capacity Utilization was quite low during 2010-11 even when the available capacity is taken as on 31st March, 2010 and capacity additions for the current year are not considered.

d) The fact that low capacity utilization was witnessed by the companies is apparent even from the Annual Reports of the Companies.

e) Month wise Capacity Utilization is also analyzed in table, as shown below shows that capacity utilisation in 2010-11 November onwards is the lowest as compared to any other year.

Month-wise capacity utilisation 2005-06 to 2010-11 Month 2005-06 2006-07 2007-08 2008-09 2009-10 2010-11 the year

f) Table below which is Month-wise Capacity and Production Parallelism shows that while the capacity went up from 16.69 - 18.5 MMT, the production actually went down from 12.52 -11.84 MMT.

Month-wise capacity and production during 2009-10 and 2010-11 Months Capacity Production in MMT % of Capacity utilisation 2009-10 2010-11 2009-10 2010-11 2009-10 2010-11 Oct. 16.69 18.52 12.39 14.87 76 81 Nov. 16.69 18.52 12.52 11.84 77 65 Dec. 16.75 18.52 14.07 13.59 86 74 Jan. 17.31 19.04 14.65 14.70 87 78 Feb. 17.40 19.16 13.93 14.78 82 78 Mar. 18.55 19.53 15.97 16.82 88 87 Total 199.21 224.41 160.75 168.29 83 76

g) Even if Diwali was to be made the benchmark - As it was 17th October 2009 and 7th November 2010 and the trends of one month prior to such event are considered, i.e. November of 2010 to be compared with October of 2009 - then also it is clear that the month of Diwali in 2009 saw an increase in production over the previous month and the month after Diwali in 2009 saw a further increase in production. On the other hand, in 2010 the month of Diwali saw a huge reduction from 14.7 to 11.84 MMT while the month of December, i.e. after Diwali saw a marginal increase only.

The Appellant cement companies reduced production and dispatch exhibited their coordinated behaviour resulting in limit over supplies and production which was violative of Section 3(3)(b) of the Competition Act.

While concluding it is relevant to state that the test to be adopted for proving a cartel under Competition law in India as well as globally is one of 'balance of probabilities' as distinguished from 'beyond reasonable doubt' as envisaged under criminal law [Please refer to M/s International Cylinder (P) Ltd. and Ors. v. Competition Commission of India, 2014 Comp LR184 (CompAT). In the present case, even if the strictest standard was to be adopted, there is no doubt that the

Appellants have violated both sections 3(3)(a) and (b) of the Competition Act and deserve to be punished as such.

105. Even if we go into the question of dispatch and production coordination, the fact that there are agreement which amounts to cartel and there being a percentage change in the prices and particularly in the month of October over September (2007-2011) for the Southern States and for the month of February over January (2007-2011) for Central, Northern and Eastern States highlighting the unprecedented trend for the percentage increase in the prices which was not the case in the previous years for the corresponding months, shows that the agreement has direct bearing on Section 3(3)(a) and for the said reasons, we also agree with the findings that the Appellants violated the provisions of Section 3(3)(a) and the penal order and the order of disengage has rightly been passed. 'Relevant Market'

106. Whether the Commission or the DG is required to look into the 'relevant market' fell for consideration before the Hon'ble Supreme Court in "Competition Commission of India v. Coordination Committee of Artistes and Technicians of West Bengal Film and Television and Ors." [2017] 5 SCC 17", wherein the Hon'ble Supreme Court observed and held:

"32. While inquiring into any alleged contravention, whether by the Commission or by the DG, and determining whether any agreement has an appreciable adverse effect on competition under Section 3, factors which are to be taken into consideration are mentioned in sub-section (3) of Section 19, which are as follows:

"19. Inquiry into certain agreements and dominant position of enterprise. (1)-(2) (3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:-

- (a) creation of barriers to new entrants in the market;
- (b) driving existing competitors out of the market;
- (c) foreclosure of competition by hindering entry into the market;
- (d) accrual of benefits to consumers;
- (e) improvements in production or distribution of goods or provision of services;
- (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

33. The word 'market' used therein has reference to 'relevant market'. As per sub-section (5) of Section 19, such relevant market can be relevant geographic market or relevant product market. The factors which are to be kept in mind while determining the relevant geographic market are

stipulated in sub-section (6) of Section 19 and the factors which need to be considered while determining the relevant product market are prescribed in sub-section (7) of Section 19. These two sub-sections read as under:

"19.(6) The Commission shall, while determining the relevant geographic market', have due regard to all or any of the following factors, namely:-

- (a) regulatory trade barriers;
- (b) local specification requirements;
- (c) national procurement policies;
- (d) adequate distribution facilities;
- (e) transport costs;
- (f) language;
- (g) consumer preferences;
- (h) need for secure or regular supplies or rapid after-

sales services.

(7) The Commission shall, while determining the relevant product market, have due regard to all or any of the following factors, namely:-

- (a) physical characteristics or end-use of goods;
- (b) price of goods or service;
- (c) consumer preferences;
- (d) exclusion of in-house production;
- (e) existence of specialised producers;
- (f) classification of industrial products.

It is for this reason, the first and foremost aspect that needs determination is: "What is the relevant market in which competition is effected?"

34. Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings behaviour and of preventing them from behaving independently of effective competitive pressure.

35. Therefore, the purpose of defining the 'relevant market' is to assess with identifying in a systematic way the competitive constraints that undertakings face when operating in a market. This is the case in particular for determining if undertakings are competitors or potential competitors and when assessing the anti-competitive effects of conduct in a market. The concept of relevant market implies that there could be an effective competition between the products which form part of it and this presupposes that there is a sufficient degree of inter changeability between all the products forming part of the same market insofar as specific use of such product is concerned.

36. While identifying the relevant market in a given case, the CCI is required to look at evidence that is available and relevant to the case at hand. The CCI has to define the boundaries of the relevant market as precisely as required by the circumstances of the case. Where appropriate, it may conduct its competition assessment on the basis of alternative market definitions. Where it is apparent that the investigated conduct is unlikely to have an adverse effect on competition or that the undertaking under investigation does not possess a substantial degree of market power on the basis of any reasonable market definition, the question of the most appropriate market definition can even be left open. The relevant market within which to analyse market power or assess a given competition concern has both a product dimension and a geographic dimension. In this context, the relevant product market comprises all those products which are considered interchangeable or substitutable by buyers because of the products' characteristics, prices and intended use. The relevant geographic market comprises all those regions or areas where buyers would be able or willing to find substitutes for the products in question. The relevant product and geographic market for a particular product may vary depending on the nature of the buyers and suppliers concerned by the conduct under examination and their position in the supply chain. For example, if the questionable conduct is concerned at the wholesale level, the relevant market has to be defined from the perspective of the wholesale buyers. On the other hand, if the concern is to examine the conduct at the retail level, the relevant market needs to be defined from the perspective of buyers of retail products.

38. It is to be borne in mind that the process of defining the relevant market starts by looking into a relatively narrow potential product market definition. The potential product market is then expanded to include those substituted products to which buyers would turn in the face of a price increase above the competitive price. Likewise, the relevant geographic market can be defined using the same general process as that used to define the relevant product market.

39. Bearing in mind the aforesaid considerations, we concur with the conclusion of the Tribunal. It is the notion of 'power over the market' which is the key to analysing many competitive issues. Therefore, it becomes necessary to understand what is meant by the relevant market. This concept is

an economic one.

The information is only against showing the dubbed serial on the television and it has no relation whatsoever with production, distribution, etc. of any film or any other material on the TV channels."

107. From the aforesaid decision, it is clear that the power of the market being the key analysis, it becomes necessary to notice the 'relevant market'.

108. While dealing with the price chart, we have noticed that the Commission not only looked into 'State-wise Market' but also 'Region-wise Market' and range of percentage change in prices between 2007-2011. The Commission has noticed the Range of Percentage change of different years for the months of October over September (2007-2011) for 'Central, Northern and Eastern States'. The Commission also highlighting the unprecedented trend for the percentage increase in the prices in all the five regions namely-- Central Region, Northern Region, Eastern Region, Western Region and Southern Region. Therefore, it is clear that the Commission while dealing with the market dealt with the 'relevant market' i.e. all regional markets of Cement, which are the relevant geographical market i.e. relevant product market of Cement. The aforesaid fact has been determined by the Commission in terms of sub-section (6) of Section

19. The other factors which are needed to be considered while determining the relevant product market prescribed in sub-section (7) of Section 19 has also been noticed and considered by the Commission.

109. So far as the quantum of penalty order is concerned, as we find that the Commission has imposed mere minimum penalty, no interference is called for against the same.

110. We find no merit in these appeals. They are accordingly dismissed. All Interlocutory Applications filed in these appeals stand disposed of. No costs.

(Justice S.J. Mukhopadhaya) Chairperson (Mr. Balvinder Singh) Member(Technical) NEW DELHI
25th July, 2018 AR