



SCHOOL OF LAW

G. D. Goenka Moot Court Competition

March 3-5, 2017

MOOT PROPOSITION

**IN THE SUPREME COURT OF INDEGENIA
AT DELPHI**

In the matter of

SLP (C) No. 103 of 2016

Competition Commission of Indegenia (CCIn) Petitioner

Vs.

CMAI and 8 others Respondents

CLUBBED WITH

SLP (C) No. 356 of 2016

Tango International Petitioner

Vs.

Competition Commission of Indegenia (CCIn) Respondents

CMAI and 8 others

Appeal No. 7 of 2016

Association for Builders of Indegenia (ABI) Appellant

Vs.

CMAI and 8 others Respondents

Competition Commission of Indegenia (CCIn)

CLUBBED WITH

Appeal No. 4 of 2016

Mr. Janardan Reed, Secretary CMAI Appellant

Vs.

Competition Commission of Indegenia (CCIn) Respondents

1. *Indegenia* is a sovereign republic in Asia with its capital in Delphi. It is a developing country with a good rate of growth and is considered as one of the fastest growing economies of the world by *Goldman Sachs* rating. Due to this growth, a huge amount of construction work is going on in the country both private and public. The laws including competition law (the Competition Act of 2002) in *Indegenia* are in *pari materia* with the laws in **India**. The Competition Act superseded the archaic Monopolies Prohibition Law (in *pari materia* with the MRTP Act of **India**). The Competition Act of *Indegenia* came into force on 31st March 2010 which also happens to be the Republic Day of the Country.
2. The Competition Commission of *Indegenia* (CCIn) has its Principal Office in *Delphi* with benches in other three metropolitan cities of *Indegenia*, i.e. *Gotham*, *Gurvar*, and *Kulina*. The CCIn is guided by the principles of natural justice and subject to other provisions of the Competition Act and of any rules made by the Central Government is empowered to regulate its own procedure. As the CCIn is new, it looks towards the decisions of European Union and India having persuasive value. However, the precedents from CCIn shows that while deciding the matters relating to vertical agreements it relies mainly on the US decisions.
3. The construction industry in *Indegenia*, as indicated above, is under heavy pressure of shortage of raw materials, especially Cement and Steel while there is a plenty of availability of Bricks due to huge availability of clay which is the main raw material for making bricks. There are many MSMEs operating to produce bricks even at the district and village level. There are three different associations for each of these industries, i.e. Cement, Steel and Bricks known as Cement Manufacturers Association of *Indegenia* (CMAI), Steel Producers Association of *Indegenia* (SPAI) and Bricks Manufacturers Association of *Indegenia* (BMAI). There is also an Association for Builders of *Indegenia* (ABI) which protects the interest of Builders and helps in negotiating rates cumulatively for the Builders and sets standards for the Builders.
4. The role of these trade associations have been customarily providing a platform for the industry to discuss common issues, setting standards and also to lobby for the industry and get different policies in their favour. The roles of these trade associations have been under the scanner of CCIn recently in pharmaceutical industry and certain practices were found to be illegal. In view of the fact that the law is new and many associations have been carrying out activities that is treated illegal under Competition Law, CCIn has also organized several competition compliance advocacy programs for the Trade Associations and has also published a guideline on dos and don'ts for the Trade Association.
5. There was a newspaper report published on June 24th 2009 that the price of cement bags have been raised by Rs. 35-50 per bag across country. The decision to this effect was made by CMAI held on June 10th, 2009. The rise was necessitated by the rising price

of coal, gas, and other raw material dolomite. The order of Supreme Court of Indegenia banning the dolomite excavation across some major parts of Indegenia was also mentioned as one of the reasons. CCIn took *suo motu* cognizance of the matter and ordered an internal investigation of the matter. It may be noted that the CCIn had made a submission before the parliamentary standing Committee on the issue of cartelization by the cement industry in Indegenia on 15th December, 2009.

6. On 5th April 2010, ABI filed an information before CCIn under Section 19(1)(a) alleging that certain Cement Manufacturers (Fecto Cements – OP2, Fauji Cements OP3, Gharibwal Cement OP4, and Dewan Hattar Cement OP5) were cartelizing under the banner of CMAI (OP1) with an effect that cement prices have risen by 15% over the last three months. CCIn found a prima facie case in this matter and ordered an investigation under section 26(1) by its Director General.
7. Director General issued show cause notices to CMAI and other cement manufacturers named in the information by ABI. During investigation, DG discovered that there are four more prominent cement manufacturers and may be involved in the cartelization (Raterhat Cements (OP6), Jhilmil Cements (OP7), Tango Limited (OP8) and Dingi Cements (OP9). Accordingly DG issued a show cause to these cement manufacturers also. These cement manufacturers protested their inclusion before DG, however, cooperated with the DG in investigation. DG submitted a detailed report to the Commission post investigation with the following key findings:
 - 7.1 There are 45 companies operating in Indegenia with more than 175 large cement plants other than many mini plants located around limestone clusters. The capacity utilization of these plants have been decreasing since 1990s with the capacity utilization in 2010-11 as 83%, 2011-2012 as 73%, 2012-13 as 72%.
 - 7.2 The structure of the Cement Industry in the Country is such that there are three major groups having pan India Presence i.e. Fecto Cements (with 40% of the total market share) having its base in Gotham, Jhilmil Cements (with 20% market share) having its base in Gurvar and Tango Limited (with 18% market share) having its base in Kulina.
 - 7.3 Tango Limited is a subsidiary of a multinational enterprise Tango International (with maximum shareholding permitted as per the laws of Indegenia) having its operation also in the area of Steel production and Bricks manufacturing in India. Tango Limited gets its 40% of its total turnover from the cement business.
 - 7.4 For the purpose of marketing, the cement Industry has been divided into four zones of *Delphi*, *Gotham*, *Gurvar* and *Kalina* and the presence of major players are as per its base except Delphi where majority supply is by one *Dewan Hattar Cement* and *Tango Limited*.

- 7.5 DG found that the transportation of cement being a low value high volume product, over a long distance is uneconomical which makes the transportation of cement an important cost component. The high transportation cost has created fragmented markets, which are catered by the plants located in the vicinity, making the cement industry largely regional in nature. Accordingly, the factors of demand and supply situation vary from region to region.
- 7.6 DG has found that the cement industry is oligopolistic in nature. The nature of the product being almost homogenous in nature facilitates oligopolistic pricing. DG has submitted that the price of cement charged by all companies is not at competitive levels and the cement manufacturers have been operating at a profit margin of more than 25%.
- 7.7 The Development Commissioner of Cement Industry (DCCI) in Indegenia under the aegis of Department of Industrial Policy and Promotion have been closed and accordingly CMAI has been bestowed with the role of collecting and submitting data which was earlier collected by DCCI, and accordingly CMAI has been collecting indicative retail and wholesale prices of cement from across Indegenia. It has been found that the price of cement has been rising faster than the input prices.
- 7.8 DG has found that the prices are also affected by the price changes made by the market leaders. The examination of small players revealed that they simply follow the trend of major players.
- 7.9 DG has found that the opposite parties were not able to substantiate reasons for low capacity utilization even during the period when demand was high which was not in line with the overall growth of Indian Economy. DG found that the reduction in capacity utilization was deliberate in order to limit the supply in a concerted manner to charge a higher price.
- 7.10 DG has found that in the guise of the meetings of the High Power Committee, the cement manufacturers are entering into some arrangements and understanding to manipulate the prices of cement in violation of the Act. The internal publication of CMAI by the name Indegenia Cements provides the minute details of production, dispatch of each company which facilitates that member companies to exchange the production related information and decide production strategy in line with other member companies.
- 7.11 DG found that there appears to be a pattern of market allocation between the cement manufacturers.
8. The aforesaid DG Report was sent to the parties for their comments by CCIn and after hearing the parties as well as considering the internal investigation by its officers on the Cement Industry (Sectoral Report) CCIn passed the following order on 21st April 2013:

- 8.1 The Opposite Parties have been found in contravention of Section 3(3)(a), 3(3)(b), and 3(3)(c) read with section 3(1) of the Act.
- 8.2 The Commission further imposed the following amount of penalty on the Opposite Parties:

NAME OF THE PARTY	Average Gross Turnover for 2010-11, 2011-12, and 2012-13 (in crore)	10% of the average of the turnover for the last three preceding financial years u/s 27(b) (in crore)
Fecto Cements – (OP2)	1000	100
Fauji Cements (OP3)	200	20
Gharibwal Cement (OP4)	200	20
Dewan Hattar Cement (OP5)	300	30
Raterhat Cements (OP6)	150	15
Jhilmil Cements (OP7)	400	40
Tango Limited (OP8)	350	35
Dingi Cements (OP9)	100	10

- 8.3 CCIn concluded as regards CMAI that it has provided platform to the cement companies and facilitated cartelization imposed a token penalty of Rs. 50 lakhs.
- 8.4 CCIn also found that the Secretary of CMAI, *Mr. Janardan Reed* actively participated in the cartelization and accordingly imposed a penalty of Rs. 25 lakhs under Section 48(2).
9. The aforesaid orders of CCIn made big news in *Indegenia* and many interviews of CCIn chairperson were published in the prominent newspapers. This affected the stock prices of the cement companies involved in the cartel.
10. The Cement Manufacturing companies as well as CMAI preferred an appeal under section 53(B) against the order of the CCIn raising the following key issues:
- 10.1 The CCIn did not follow the principles of natural justice and the procedure adopted by the Commission was vitiated due to bias and lack of fairness.
- 10.2 The Chairperson CCIn signed in the final order however he was not present during the three days of the hearing and violated the rule that ‘only one who hears can decide’.
- 10.3 Without prejudice, Tango Limited specifically challenged the imposition of penalty on the gross turnover and advocated the concept of ‘relevant turnover’.

- 10.4 Some of the parties challenged that they were not provided an opportunity to cross – examine the witness from ABI and thus their right to be fairly heard was violated.
- 10.5 *Mr. Janardan Reed* challenged the order of the CCIn imposing penalty against him on the ground that he acted on behalf of the CMAI in official capacity and cannot be made personally liable.
- 10.6 Raterhat Cements (OP6), Jhilmil Cements (OP7), Tango Limited (OP8) and Dingi Cements (OP9) challenged the orders of CCI on the basic premise that the DG could not have broadened the investigation when informant had not mentioned their name in the information.
11. Competition Appellate Tribunal of Indegenia (CATI) admitted the appeal by imposing a condition that the appellants may pay 10% of the imposed penalty. This order was challenged by *Mr. Janardan Reed* before the Hon'ble Supreme Court of Indegenia (SCI) under section 53T and an order of stay was given by Supreme Court of Indegenia. *Mr. Reed* also raised the maintainability of the penalty against an individual violative of due process and de hors the provisions of Section 48 of the Competition Act.
12. On 1st January 2016, after a detailed and elaborate hearing of the matter CATI set aside the order of the CCIn and remitted the same for fresh adjudication of the issues relating to the alleged violation of sections 3(3)(a), 3(3)(b) and 3(3)(c) read with section 3(1) of the Act. The appellant shall be entitled to withdraw the amount deposited by them in compliance of the interim order passed by the Tribunal.
13. While dealing with the appeal, CATI found that Tango Limited had a foreign holding company and the DG-CCIn had not investigated that. CATI passed an order directing DG-CCIn to investigate the role of Tango International in the alleged cartel.
14. CCIn challenged the aforesaid the orders of CATI dated 1st January 2016 in para 12 and Tango International has challenged the order made in para 13 in Special Leave Petition before SCI, however, no stay was granted in the matters.
15. The aforesaid SLP is listed for hearing before the SCI on March 4, 2017. CCI had passed the final orders in the matter on 15th June 2016 restoring the similar position per its order dated 21st April 2013. CATI after considering the matter again quashed the fresh orders on merits finding no violations were made by the cement companies. ABI has preferred an appeal against this decision of CATI before the SCI which was listed for hearing on 30th November, 2016. By an order SCI has decided to hear the matters together in para 11 and 14 along with the appeal filed by ABI under section 53T.

Counsels from both the sides may frame the issues raised in the two SLPs aforesaid and issues on merit under the appeal preferred by ABI. Additional arguments arising out of the facts may also be raised.