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W.P. No.17243/2019, Batch

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
14.06.2023	22.06.2023

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

W.P. NOS.17243, 11372 & 12221 OF 2019

AND

**W.M.P. NO.12507, 12508, 16785, 16786, 25896, 25908, 25902,
25912, 26554, 26555, 11687 & 11688 OF 2019**

Chettinad Cement Corporation
Pvt. Ltd., rep. by its
Company Secretary, Mr. S.Hariharan
'Rani Seethai Hall' Building IV Floor
603, Anna Salai, Chennai 600 006.
17243/19

.. Petitioner in WP

Dalmia Cements (Bharat) Ltd.
Rep. by its Asst. Executive Director – Legal
Mr. T.A.Srinivasen
Dalmiapuram, Lalgudi Taluk
Thiruchirappalli District 621 651.
12221/2019

.. Petitioner in WP

The India Cements Ltd.
Rep. by its Senior Manager Legal
Mr. Y.Adinarayana Rao
Coromandel Towers
No.93, Santhome High Road



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R.A. Puram, Chennai 600 028.
11372/2019

.. Petitioner in WP

- Vs -

1. Union of India
Rep. by its Secretary
Department of Consumer Affairs
Room No.49, Krishi Bhavan
New Delhi 110 011.

2. Director General of Bureau of
Indian Standards, rep. by its
Director General
Manak Bhavan
No.9, Bhadur Shah Zaffar Marg
New Delhi 110 002.

.. Respondents in all petitions

W.P. No.17243 of 2019 filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorarified mandamus calling for the records of the 2nd respondent comprised in the Minutes of Meeting of CED-2 dated 17.12.2018 insofar as it relates to gradation of the Indian Standard Specifications for PPC and PSC and quash the same as being arbitrary, illegal and contrary to the Bureau of Indian Standards Act, 2016 and consequently issue a mandamus forbearing the respondents from in any manner seeking to introduce the Indian Standards Specification PSC (IS 455)



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and PPC (IS 1489 Part 1) relating to gradation of cement of PPC and PSC in India.

W.P. Nos. 12221 and 11372 of 2019 filed under Article 226 of the Constitution of India praying this Court to issue a writ of mandamus forbearing the respondents from implementing or publishing the proposed amendments to the Indian Standards Specification PSC (IS 455) and PPC (IS 1489 Part 1) relating to manufacture of cement of PPC and PSC in India.

For Petitioners : Mr. P.S.Raman, SC, for Mr. K.Harishankar
in WP 11372 & 12221/19
Mr. S.Vasudevan in WP 17243/19

For Respondents : Mr. S.Diwakar, SPC for R-1
Mr. AR.L.Sundaresan, ASG, assisted by
Mr. Karthik Sundaram for R-2

COMMON ORDER

Assailing the impugned proceedings dated 17.12.2018 in and by which the cement gradation of PSC (IS 455) and PPC (IS 1489 Part 1) were approved based on the resolution dated 30.07.2009 made under the Bureau of Indian Standards Act, 1986 (for short 'Act, 1986'), since repealed, instead of the Bureau of Indian Standards Act, 2016 (for short 'Act, 2016') and the Rules made thereunder, the present petitions have been filed.



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2. It is the case of the petitioners that different varieties and grades of cement, viz., Ordinary Portland Cement (OSC – 33, 43, 53 Grades), Portland Pozzolana Cement (PPC) and Portland Slag Cement (PSC), Portland Blast Furnace Slag Cement (PBFSC) and many other varieties are produced in India. All the above varieties of cement are covered by the Indian Standard Specifications.

3. It is the further case of the petitioner that PPC, OSC and PBFSC are the most important cement produced in India, which account for around 99% of the total cement production of which OPC is the most common and widely used type of cement. In the present day scenario, PPC and PSC cement are commonly used in construction activities.

4. It is the further case of the petitioner that Bureau of Indian Standards govern the manner in which quality is ensured and to that end, the Act, 1986 was enacted, which provided for the specification for all varieties of cement, the details of which are as under :-



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Indian Standard Specifications	
Ordinary Portland Cement (OPC) – 33 Grade	IS : 269
Portland Cement – 43 Grade	IS : 8112
53 Grade	IS : 12269
Portland Pozzolana Cement (PPC)	IS : 1489
Portland Blast Furnace Slag Cement (PBFS)	IS : 455

5. It is the further case of the petitioner that standards for manufacture of OPC, PSC and PPC were introduced from 1976 and in addition to prescribing standards of manufacture, the Bureau was also empowered to provide specifications which is defined under Section 2 (s) of Act, 1986 including providing grades to the articles or process. In view of the above, the 2nd respondent resorted to classification of OPC into three grades, viz., Grade 33, Grade 43 and Grade 53. On and from the above gradation issued in the year 1976 with regard to OPC 33 Grade and 43 Grade and 1987 with regard to OPC 53 Grade, cement were being produced and insofar as PPC/PSC is concerned, no gradation was provided.

6. The quality of cement is ensured by the Cement (Quality Control) Order, 2003, which prohibits manufacture, sale, distribution, etc., of cement, which fails to conform to the specified standard and which do not bear the



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Standard Mark. It is the further averment of the petitioner that all the cement are manufactured and sold, including PPC and PSC as per the standards specified under the Act and the Rules of the Bureau of Indian Standards.

7. It is the further case of the petitioners that the 2nd respondent has now sought to further classify the two categories of cements, viz., PPC and PSC under different grades by its resolution, which is set out in the Minutes of the Meeting of the 2nd respondent's CED-2 dated 30.07.2009. The 2nd respondent constituted Cement and Concrete Sectional Committees CED-2 and CED-2:1 for the purpose of considering the gradation of PPC and PSC. It is the further averment of the petitioner that as per Rule 7 (7)(a) of Indian Standard Rules, 1987, all the interested parties have to be given an opportunity to put forward their views so as to obtain a consensus on the contents of the standard. However, there was no consensus in the Committee with regard to implementation of the Grades of PPC and PSC and without the said consensus, the respondents proceeded to fix the gradation in respect of PPC & PSC in the meeting of 30.7.2009 notwithstanding the



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objections of the manufacturers and experts from South, as contemplated by Rule 7 (7)(a) of 1987 Rules.

8. It is the further averment of the petitioners that aggrieved by the aforesaid resolution, petitions in W.P. No.19220/2000, etc., Batch was filed by the respective petitioners/cement manufacturers to quash the said minutes insofar as it relates to gradation of Indian Standards Specifications for PPC and PSC, along with an application for interim injunction restraining the respondents from implementing or publishing the proposed amendments and also for consequential stay of Para 4.1 of the Minutes of the Meeting, which was impugned in the writ petitions and this Court, by order dated 16.09.2009 and connected miscellaneous petitions, directed maintenance of status quo and in view of the aforesaid order and the pendency of the writ petition, the decision relating to the aforesaid subject matter was kept in abeyance by the Committee.

9. It is the further averment of the petitioners that pending the writ petitions, the Parliament passed Act, 2016 by repealing Act, 1986 and by



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virtue of Section 43 of Act, 2016, protection was granted to the acts done under Act, 1986, insofar as it is not inconsistent with Act, 2016. It is the further averment of the petitioners that by virtue of the powers u/s 38 of Act, 2016, Bureau of Indian Standards Rules, 2018 have also been framed, which has a clear prescription u/r 19 that the Committee shall be reconstituted once every three years and it shall be reviewed by the 1st respondent every five years.

10. It is the further averment of the petitioners that Section 10 and Rule 22 of Act, 2018 and Rules, 2018 provides for formulation of standards by a Sectional Committee, which would propose draft standard and circulate the same among the persons interested for critical review and suggestions for improvement u/r 22 of Rule, 2018. Proviso to Rule 22 provides for waiver of circulation if the matter is urgent or non-controversial.

11. It is the further averment of the petitioners that the consequential developments pending the writ petition, subsequent technical developments, the standards to be introduced were to be reassessed and the old standards



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proposed in the year 1995 necessitated reconsideration as the life of the Selection Committee u/r 19 was only for a period of three years.

12. It is the further averment of the petitioners that in view of the subsequent development in the repealment and enforcement of Act, 1986 and Act, 2016 and Rules, 2018, and also the deliberation of the Committee by taking into account all the anomalies pointed out by the petitioners with regard to the implementation of the old proposed gradation, the writ petitions, which were pending before the High Court, was dismissed as infructuous as nothing survived for consideration in view of the aforesaid subsequent development.

13. It is the further averment of the petitioners that consequent upon the dismissal of the writ petitions on 25.1.2018, the Committee, in the meeting, while taking up the issue relating to gradation in specification of cement, considering the order of the High Court in the above batch of writ petitions, without going through the consultative process, which was ingrained under Act, 2016, the respondents decided to publish and



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implement the gradation of cement as it existed prior to the filing of the writ petition, based on the resolution prior to the filing of the writ petition, on which status quo was ordered to be maintained.

14. It is the further averment of the petitioners that the stand of the respondent to publish and implement the earlier stand is arbitrary and unreasonable as the grievances voiced against the said resolution for publication and implementation of gradation had not been considered and further the change of circumstances between 2009 and the date of the dismissal of the writ petition as infructuous had not been taken into account by the respondents and the mandatory consultative process had not been taken up, thereby, frustrating the provisions of Act, 2016, which is a clear violation of principles of natural justice. The meeting on 17.12.2018 of the Committee, while considering the introduction of gradation of PPC and PSC, while noted the order of the High Court dismissing the writ petition and vacating the stay, observed that the earlier decision of the Committee in 1995 had undergone complete procedure, proceeded to issue the amendment finalised in 1995 by waiving further consultative process by adopting the



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urgency clause. Wide circulation as contemplated under Rule 22 of Rules, 2018 had not been resorted to and the objections of the manufacturers were not considered. The Act, 2016 having come into effect from 12.10.2017, it is incumbent upon the Committee to follow the procedure prescribed under Act, 2016 and Rules, 2018 and resorting to the earlier resolution which was on the basis of Act, 1986, the amendment cannot be allowed to be implemented, which is wholly arbitrary, perverse and irregular. Therefore, the present petitions have come to be filed before this Court.

15. Learned senior counsel appearing for the petitioners submitted that once Act, 1986 has been repealed and in place came Act, 2016, any resolution taken under Act, 1986 would lose its value and it cannot form the basis of any resolution that is to be passed after the introduction of Act, 2016. It is the further submission of the learned senior counsel that once Act, 2016 has been introduced, it is incumbent on the part of the respondents to adhere to the provisions of Act, 2016. It is the submission of the learned senior counsel that even under Act, 1986, the standards have to be reviewed every five years and that being the case, the standard arrived at in the year 2009,



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necessarily requires a review after five years. Therefore, it is incumbent on the part of the respondents to review the standards, which was decided in the year 2009.

16. It is the further submission of the learned senior counsel that once Act, 2016 and Rules, 2018 came into force, necessarily the Committee of the 2nd respondent is required to adhere to Rule 22 of Rules, 2018 to consider the proposal for gradation and it was necessary for the Committee to invite objections u/r 22 (4) and hiding under the urgency clause, the Committee cannot impose upon the petitioners a decision, which was taken in the year 2009 on the basis of Act, 1986, which Act has no applicability when the issue is considered in the year 2018 as Act, 2016 has come into force by then and the Committee is governed by Act, 2016.

17. It is the further submission of the learned senior counsel that for invoking the urgency clause even, it is necessary that an emergent situation should be the basis and merely at the whims of the respondents, the urgency clause cannot be invoked. In the case on hand, the respondents having



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abided by the order of status quo since 2009 to 2018, there was no urgency in implementing the new gradation, which is on the basis of the consultative process, which had taken place in the year 2009, on which an order of status quo was in operation. The writ petition was dismissed only on the ground of subsequent development of repealment of Act, 1986 and coming into force of Act, 2016 with different set of parameters for bringing in any new grading system. The fresh consultative process having not been undertaken as per the provisions of Act, 2016, the resolution, which was passed on the basis of Act, 1986, cannot be pressed into service by the Committee citing that consultative process had already been completed, which, factually, was on the basis of Act, 1986.

18. It is the further submission of the learned senior counsel that the 2nd respondent failed to consider the objections of the petitioners that the gradations would unfairly affect the petitioners and unreasonably benefit the Cement Manufacturers from North India as the requisite raw materials, viz., a higher grade of limestone is available only in North India and, therefore, imposing such gradation on the other sections of the Indian Continent would



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not only be unreasonable, but would pave the way for escalation in cost of cement, which would be in detriment to the end user.

19. It is the further submission of the learned senior counsel that the present writ petitions are not barred by *res judicata* as the earlier writ petitions were not dismissed on merits, but were dismissed as infructuous on the basis of the developments, which took place subsequent to the filing of the writ petition and before passing of final orders in the writ petitions. The order of status quo having been in operation, the said order would protect the interests of the petitioners.

20. It is the further submission of the learned senior counsel that Rules, 2018 clearly prescribe for a consultative process to be followed and the consultation is not a mere formality, but it is an effective mechanism in and by which the interests of all the stakeholders are safeguarded. Such being the case, in the absence of a consultation between the various stakeholders, only advertng to the consultation had with the convenor, who is also a member of the Committee of the 2nd respondent, finalising the gradation to be



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implemented on the basis of the resolution taken under Act, 1986, would be wholly impermissible and against the provisions of Act, 2016. In this regard, learned senior counsel placed reliance upon the decision of the Supreme Court in ***Cellular Operators Association of India & Ors. – Vs - Telecom Regulatory Authority of India & Ors. (2016 (7) SCC 703)***.

21. In fine, it is the submission of the learned senior counsel that the resolution taken on the basis of Act, 1986 would not stand attracted as Act, 1986 already having stood repealed and replaced by Act, 2016, the procedure prescribed under Act, 2016 necessarily have to be followed and, therefore, the consultative process envisaged under Act, 2016 would have to be fulfilled and in the present case, the effective consultation having not been held as per the provisions of Act, 2016, the impugned order deserves to be set aside and the writ petitions have to be allowed.

22. Per contra, learned Addl. Solicitor General, leading the arguments on behalf of the 2nd respondent submitted that Act, 1987 stood repealed and in its place Act, 2016 has come into force, which fact is not disputed. It is the



WEB COPY further submission of the learned Addl. Solicitor General that the resolution of the Committee dated 30.07.2009 was put in issue before this Court in W.P. No.19220/2009, etc., Batch and this Court had granted an order of status quo, which writ petitions were later dismissed on 25.01.2018, meaning thereby, that the resolution, which was taken in the meeting 30.07.2009 was left undisturbed by this Court and, therefore, there was no embargo for the 2nd respondent to implement the resolution of the Committee dated 30.07.2009.

23. It is the further submission of the learned Addl. Solicitor General that while Rules, 1987 required a consensus, Rules, 2018 required only a consultative process. Pursuant to the dismissal of the writ petitions challenging the resolution dated 30.07.2009, the resolution dated 30.07.2009 was sought to be implemented as the petitioners are only one part of the stakeholders and Rules, 2018 only mandates a process of consultation with various stakeholders, with whom consultation was already held and, therefore, there was no impediment for the Committee to recommend the resolution of 30.07.2009 for being implemented.



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24. It is the further submission of the learned Addl. Solicitor General that effective process of consultation was carried out by the 2nd respondent pursuant to the dismissal of the writ petitions, which is evidenced from the deliberations of the meeting of the Committee dated 30.07.2009, when all the stakeholders had participated and consultation was held with them. Therefore, the stand of the petitioners that process of consultation has not been followed is wholly erroneous and is only an attempt to wriggle out from the implementation of the gradation.

25. It is the further submission of the learned Addl. Solicitor General that Section 43 (2) of Act, 2016 saves any proceedings taken under Act, 1986 and, therefore, all deliberation and consultation undertaken by the 2nd respondent with respect to the gradation of cement shall be valid under the provisions of Act, 2016. Due consultations having been held with all the stakeholders, the resolution being intact and not touched upon by this Court, the act of effective consultation would stand squarely complied with for the



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purposes of Rule 15 of Rules, 2018 and, therefore, the act of the 2nd respondent does not suffer the vice of any illegality or perversity.

26. It is the further submission of the learned Addl. Solicitor General that consultation had been going on continuously in the interregnum and the petitioners alone are not inclined to accepted the standards prescribed as it would affect their business interests and such objection cannot be the basis for the Committee to take a decision on gradation, as it would be against the interest of the industry and also the intent of Act, 2016.

27. It is the further submission of the learned Addl. Solicitor General that Rule 22 (4) clothes the Committee to waive the wide circulation if urgency in the implementation is encountered. In the present case, the resolution being of the year 2009, implementation of better gradation was found to be a matter of utmost concern for the various stakeholders, the resolution of the Committee dated 30.07.2009 was sought to be implemented by invoking the urgency provision provided for under Rule 22 (4), as all the provisions of consultative process stood complied with. Therefore, the mere



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fact that the petitioners would stand affected with the introduction of the present gradation, cannot be a ground for this Court to interfere with the said resolution. Further, it is the submission of the learned Addl. Solicitor General that gradation of PPC and PSC is a policy decision, which involves technical expertise, which was taken in larger public interest. The individual business interests of the petitioners cannot override such larger public interest and, therefore, the policy decision taken by the respondents cannot be called into question by the petitioners on the ground that the business interest of the manufacturers of cement would be hurt.

28. Learned Addl. Solicitor General also submitted that the plea of requirement of higher quality and quantity of limestone for the purpose of manufacturing PPC and PSC 43 and 53 grades, which, according to the petitioners are available only in Northern India, is factually incorrect and higher quality and quantity of limestone is available in abundance in Southern India as well and, therefore, the concern of the petitioners with regard to availability of the requisite quality and quantity of limestone is wholly



baseless. Accordingly, learned Addl. Solicitor General prayed for dismissal of the present petitions.

29. In support of the aforesaid submissions, learned Addl. Solicitor General placed reliance on the following decisions :-

- i) *Yash Polymers – Vs – Union of India (2011 SCC OnLine Guj 2539);*
- ii) *Ugar Sugar Works Ltd. – Vs – Delhi Administration (2001 (3) SCC 635); and*
- iii) *Sarguja Transport Service – Vs – STAT (1987 (1) SCC 5)*

30. This Court gave its anxious consideration to the submissions advanced by the learned counsel on either side and perused the materials available on record.

31. The admitted facts are that the resolution, which has been put in issue, which has been approved by the Committee, was passed as early as on 30.7.2009. At the relevant point of time, Act, 1986 was in force. Against the said resolution, the petitioners and others had come by way of W.P.



No.19220/2009, etc. Batch and this Court had granted an order of status quo in the miscellaneous petitions, thereby, the said resolution was kept in abeyance.

32. Pending the aforesaid batch of writ petitions, Act, 1986 was repealed and Act, 2016 came into force on 12.10.2018 and Rules, 2018 were framed. In view of the subsequent development with regard to the repealment of Act, 1986 and enactment of Act, 2016, the pending writ petitions were dismissed as infructuous. It is thus evident that the finality of the writ petitions in the earlier round of litigation is not based on an order on merits, but was due to the subsequent development, thereby, the bar of *res judicata*, put forth on behalf of the respondents does not survive. So long as the writ petitions were not finally concluded on merits and the result of it being on an entirely different footing, in which the petitioners had no say, tightening the noose on the petitioners neck with *res judicata* is wholly impermissible. When this Court, on the earlier occasion, had dismissed the petitions as infructuous, it only means that at that point of time, the said matter could not be appreciated on the basis of the Act, which was in vogue



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then, as the order of status quo, in operation, had set at naught the act of the respondents and, therefore, the bar of *res judicata* would not operate against the petitioners. Therefore, the said contention is closed at the inception itself as liable to be rejected.

33. The main point that evolves for consideration is on the issue of applicability of the Act, 2016 vis-a-vis the resolution dated 30.7.2009 and whether the said resolution could be put into implementation by the respondents, which was resolved on the basis of Act, 1986.

34. As already stated supra, Act, 1986 was repealed and Act, 2016 came into force on 12.10.2017. The resolution, which is impugned in the present writ petition had come to be passed when Act, 1986 was in force, more particularly on 30.7.2009. Against the resolution, W.P. No.19220/2009, etc., were filed in which an order of status quo was passed. However, pending the writ petitions, Act, 1986 was repealed and Act, 2016 came into force.



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35. However, Section 43 (2) of Act, 2016 saved the acts, which had been done under Act, 1986, so long as such acts were not inconsistent with Act, 2016. Only in this backdrop, the whole case surfaces. The petitioners submit that process of consultation had not taken place as per Act, 2016, while it is countered by the respondents submitting that the consensus was required only under Rules, 1987 and under Rules, 2018, it is only consultation, which had already taken place with the petitioners way back when resolution dated 30.7.2009 was passed and, therefore, there is fulfilment of the procedure prescribed under Rules, 2018.

36. There is no dispute about the fact that Rules, 1987, used the expression "*a consensus has been obtained*" under Rule 7, while under Rule 15 of Rules, 2018, the expression used is "*by a process of consultation with stakeholders*". There is no quarrel with the fact that the petitioners are also stakeholders and the respondents cannot dispute the same. However, even from a cursory perusal of the submissions of the respondents reveal that fresh consultative process had not taken place with the stakeholders, viz., the petitioners.



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37. The case of the respondents is that when the resolution came to be passed on 30.7.2009, the stakeholders were consulted and based on the consensus the resolution came to be passed. It is to be pointed out that when the resolution dated 30.7.2009 was passed, Act, 1986 was in force so also Rules, 1987. There is no quarrel with the fact that a consultative process had taken place before the resolution dated 30.7.2009, but the consensus prescribed for under Rule 7 of Rules, 1987 cannot be said to have been obtained on the contents of the standards, as the petitioners, who were also stakeholders then, had agitated the said resolution before this Court by filing W.P. No.19220/2009, etc., batch, in which an order of status quo was passed. Therefore, it can safely be concluded that there was no consensus by the petitioners, who were also stakeholders then when the resolution, which was the subject matter of the earlier writ petition, came to be passed.

38. It is even the admission of the respondents that what is the prescribed procedure under Rule 15 of Rules, 2018 is *"a process of consultation with stakeholders"*. The submission as also the counter of the



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respondents reflect that no process of consultation was initiated with the stakeholders, viz., the petitioners. The respondents merely place their reliance on the alleged consensus in terms with Rules, 1987, which consensus was the subject matter of writ petitions before this Court, which writ petitions were dismissed as infructuous only on the ground of subsequent development with regard to the repealment of the Act and the Rules. Therefore, there was no subjective satisfaction with regard to the consensus prescribed under Rule 7 of Rules, 1987 by this Court so as to prevail upon this Court that no consultation is required of the petitioners after the enactment of Act, 2016.

39. Once Act, 1986 had been repealed and Act, 2016 came into force, the procedures prescribed under Act, 2016 are required to be followed by the respondents. The respondents cannot hide under the garb of Section 43 (2) to contend that the saving provision saves the resolution dated 30.7.2009, on account of the fact that the earlier round of writ petitions were dismissed by this Court. At the risk of repetition it is to be stated that the earlier round of writ petitions were not dismissed on merits, but were dismissed as



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infructuous only on account of the subsequent development with regard to the repealment of Act, 1986.

40. It is to be pointed out that an order of status quo was operating all along till the repealment of Act, 1986. Once the Act, 1986 stood repealed, the resolution dated 30.7.2009 would not stand saved for the simple reason that under Act, 2016, a different procedure has been prescribed, while the resolution was passed under different prescription on the basis of Act, 1986. Therefore, to that extent there is inconsistency with regard to the resolution not having adhered to the prescription under Act, 2016 and Rules, 2018 and, therefore, Section 43 (2) will not save the resolution dated 30.07.2009.

41. Further, it is to be pointed out that once the resolution dated 30.07.2009 is not saved by the repealment of Act, 1986 and Rules, 1987, necessarily, it is incumbent on the part of the respondents to follow the procedure prescribed under Rule 15 of Rules, 2018. Once the procedure prescribed under Rule 15 comes into play, necessarily, it has to be adhered to and only such of those standards, which have been established under Act,



1986 would stand saved. In the case on hand, only a resolution dated 30.07.2009 was passed and no Standard was established by Act, 1986, which is even evident from the fact that the resolution dated 30.7.2009 is sought to be enforced for bringing into establishment the new gradation. Such being the case, there being no establishment of the gradation under Act, 1986, the enforcement of resolution dated 30.07.2009 cannot be pressed into service and establishment of new gradation could be sought to be made.

42. One other fact that stares writ large on the case of the respondents is the fact that even according to the respondents, the consultation was an ongoing process, which had been going on for well over a decade. In such a backdrop of the pointed case of the respondents, the consensus, which has been pressed into service, alleged to have been obtained in the passing of the resolution of 30.7.2009 would stand blown to smithereens, as the ongoing consultation would not save the resolution u/s 43 (2). The saving provision under Section 43 (2) r/w Rule 15 of Rules, 2018 is only for such of the Standards, which had been established and it is not for those Standards, which is sought to be established. Any Standard sought to be established



would only be under Act, 2016 and Rules, 2018 and some resolution, which had been passed under Act, 1986 and Rules, 1987 would not stand saved u/s 43 (2).

43. Further, what is to be pointed out is that even according to the respondents the consultation had been ongoing. Therefore, the consensus alleged to have been obtained for the resolution dated 30.7.2009 would not survive, more so, when the said resolution was the subject matter of W.P. No.19220/2009, etc. This Court not having saved the said resolution in its order, but merely dismissing the writ petition as infructuous, based on the subsequent developments would only go to show that the earlier resolution cannot survive and the respondents have to resort to the procedure contemplated under Rule 15 of Rules, 2018.

44. It is also to be pointed out that even the issue of consensus under Rule 7 of Rules, 1987 also cannot be taken aid of by the respondents for the simple reason that the petitioners have not given their consensus to the contents of the standard as could be evident from the filing of the writ



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petition, as the Standard prescribed for establishment was not consented to by the petitioners. In the absence of consensus by the petitioners, the said resolution cannot be the basis for establishment of a Standard, more so, when the Rule and the Act under which the resolution had come to be passed had been repealed. Therefore, immediately after the repeal of the Act and the Rules, necessarily the respondents have to advert to the procedure prescribed under Act, 2016 and Rules, 2018 and of necessity, the respondents should have started the consultative process envisaged under Rule 15 of Rules, 2018 to consult all the stakeholders, including the petitioners, before implementing any Standard.

45. In this regard, useful reference can be had to the decision of the Apex Court in *Cellular Operators case (supra)* and the relevant portion of the order dealing with the meaning of “*consultation*” is quoted hereunder :-

“80. Section 11(4) of the Act requires that the Authority shall ensure transparency while exercising its powers and discharging its functions. “Transparency” has not been defined anywhere in the Act. However, we find, in a later Parliamentary Enactment, namely, the Airports Economic Regulatory Authority of India Act, 2008, that Section 13 deals with the



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functions of the Airports Economic Regulatory Authority, (which is an Authority which has legislative and administrative functions). “Transparency” is defined, by sub-section (4), as follows:-

“The Airports Economic Regulatory Authority Of India Act, 2008

13. Functions of Authority.

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions, inter alia,—

(a) by holding due consultations with all stake-holders with the airport;

(b) by allowing all stake-holders to make their submissions to the authority; and

(c) by making all decisions of the authority fully documented and explained.”

81. This definition of “transparency” provides a good working test of ‘transparency’ referred to in Section 11(4) of the TRAI Act.

82. In fact, a judgment of the Court of Appeal in England, being Regina v. North and East Devon Health Authority, Ex parte Coughlan, [2001] QB 213, puts the meaning of “consultation” rather well as follows:-

“It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper,



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consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken."

No doubt in the facts of the present case, the Authority did hold due consultations with all stakeholders and did allow all stakeholders to make their submissions to the Authority. However, we find no discussion or reasoning dealing with the arguments put forward by the service providers, that call drops take place for a variety of reasons, some of which are beyond the control of the service provider and are because of the consumer himself. Consequently, we find that the conclusion that service providers are alone to blame and are consequently deficient in service when it comes to call drops is not a conclusion which a reasonable person can reasonably arrive at.

92. We find that, subject to certain well defined exceptions, it would be a healthy functioning of our democracy if all subordinate legislation were to be "transparent" in the manner pointed out above. Since it is beyond the scope of this judgment to deal with subordinate legislation generally, and in particular with statutes which provide for rule making and regulation making without any added requirement of transparency, we would exhort Parliament to take up this issue



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and frame a legislation along the lines of the U.S. Administrative Procedure Act (with certain well defined exceptions) by which all subordinate legislation is subject to a transparent process by which due consultations with all stakeholders are held, and the rule or regulation making power is exercised after due consideration of all stakeholders' submissions, together with an explanatory memorandum which broadly takes into account what they have said and the reasons for agreeing or disagreeing with them. Not only would such legislation reduce arbitrariness in subordinate legislation making, but it would also conduce to openness in governance. It would also ensure the redressal, partial or otherwise, of grievances of the concerned stakeholders prior to the making of subordinate legislation. This would obviate, in many cases, the need for persons to approach courts to strike down subordinate legislation on the ground of such legislation being manifestly arbitrary or unreasonable."

46. The necessity for examining all the documents fell for consideration of the Apex Court in the case of **Barium Chemicals Ltd. - Vs - A.J. Rana (1972 (1) SCC 240)**, and in that context the Hon'ble Apex Court held as under :-

"14. The words "considers it necessary" postulate that the authority concerned has thought over the matter



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deliberately and with care and it has been found necessary as a result of such thinking to pass the order. The dictionary meaning of the word “consider” is “to view attentively, to survey, examine, inspect (arch), to look attentively, to contemplate mentally, to think over, meditate on, give heed to, take note of, to think deliberately, bethink oneself, to reflect” (vide Shorter Oxford Dictionary). According to Words and Phrases — Permanent Edition Vol. 8-A “to consider” means to think with care. It is also mentioned that to “consider” is to fix the mind upon with a view to careful examination; to ponder; study; meditate upon, think or reflect with care. It is therefore, manifest that careful thinking or due application of the mind regarding the necessity to obtain and examine the documents in question is sine qua non for the making of the order. If the impugned order were to show that there has been no careful thinking or proper application of the mind as to the necessity of obtaining and examining the documents specified in the order, the essential requisite to the making of the order would be held to be non-existent.

15. A necessary corollary of what has been observed above is that mind has to be applied with regard to the necessity to obtain and examine all the documents mentioned in the order. An application of the mind with regard to the necessity to obtain and examine only a few of the many documents mentioned in the order, while there



has been no such application of mind in respect of the remaining documents, would not be sufficient compliance with the requirements of the statute. If, however, there has been consideration of the matter regarding the necessity to obtain and examine all the documents and an order is passed thereafter, the Court would stay its hand in the matter and would not substitute its own opinion for that of the authority concerned regarding the necessity to obtain the documents in question.”

(Emphasis supplied)

47. The ratio thereto with regard to the necessity to examine all the documents with equal force apply to the “*process of consultation*” envisaged under Rule 15 of Rules, 2018 as without complying with the said process, the consultation cannot be held to be complete.

48. Therefore, the materials on record and the various provisions of law dissected above coupled with the decision of the Apex Court in *Cellular Operators case* clearly and unerringly point out that the act of accepting the resolution dated 30.07.2009 by the respondents is in stark violation of Rule 15 of Rules, 2018, as the procedure contemplated with regard to “*process of*



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consultation” has not been followed and, therefore, the impugned order passed by the respondent does not have the approval of law and resultantly, the said resolution cannot be pressed into service as it suffers the vice of perversity, arbitrariness, irregularity and illegality and necessarily the said resolution deserves to be set aside.

49. One other aspect that also makes the proceedings of the respondents illegal is the waiver of wide circulation provided for under proviso to Rule 22 (4). There can be no second opinion that the respondents are vested with power to invoke proviso to Rule 22 (4) in an emergent situation. However, in the case on hand, invocation of emergency clause is wholly improper as no urgency is made out.

50. It is not the case of the respondents that the particular gradation is of so emergent need that invocation of the emergency clause is necessary. The gradation was initially deliberated in the year 2009 resulting in the resolution dated 30.7.2009 and which was put on hold by the orders of this Court. The respondents have not taken any steps to get the said order of



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status quo vacated from 2009 till 2016, when the Act, 1986 was repealed and Act, 2016 came into force. Only on the earlier writ petitions becoming infructuous, the respondents have revived the process and by adopting the earlier resolution, without resorting to the consultation provided for under Rule 15 of Rules, 2018, in a haste and urgency, the respondents have issued the impugned proceedings. This clearly shows that it is not an urgent situation for invoking the emergency clause; rather the urgency of the respondents to give life to the said resolution is evident from the manner in which the impugned proceedings have come to be passed. Therefore, in the aforesaid backdrop, this Court is of the considered view that the invocation of emergency clause is wholly unwarranted and is nothing but a misuse of proviso to Rule 22 (4) and definitely such invocation deserves to be axed.

51. In view of the discussion made above, the materials and the manner in which the act has been perpetrated by the respondents coupled with the ratio laid down in *Cellular Operators case*, which clearly shows violation of principles of natural justice in Rule 15 not having been followed, the decisions relied on by the learned Addl. Solicitor General would in no way



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advance the case of the respondents and resultantly, the impugned proceedings of the respondents deserve to be set aside.

52. In the result, the writ petitions are allowed and the impugned proceedings in and by which the respondents are seeking to introduce the Indian Standards Specification PSC (IS 455) and PPC (IS 1489 Part 1) relating to gradation of cement of PPC and PSC is set aside and the matter is remanded to the respondents with a direction to proceed with the consultative process as provided for under Rule 15 of Rules, 2018 for the purpose of introducing any new Standards of cement and complete the same within a period of twelve weeks from the date of receipt of a copy of this order. The petitioners are directed to co-operate in the consultative process initiated by the respondents under Rule 15 of Rules, 2018. Consequently, connected miscellaneous petitions are closed. There shall be no order as to costs.

22.06.2023

Index : Yes / No

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To

1. The Secretary
Department of Consumer Affairs
Government of India
Room No.49, Krishi Bhavan
New Delhi 110 011.

2. The Director General
Bureau of Indian Standards
Manak Bhavan
No.9, Bhadur Shah Zaffar Marg
New Delhi 110 002.



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M.DHANDAPANI, J.

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**PRE-DELIVERY ORDER IN
W.P. NOS. 17243, 11372 &
12221 OF 2019**

Pronounced on



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22.06.2023