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W.A.Nos.2227 & 2218 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.09.2023

CORAM :

THE HON'BLE MR.SANJAY V.GANGAPURWALA, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE P.D.AUDIKESSAVALU

W.A.Nos.2227 & 2218 of 2023

Dalmia Cement (Bharat) Ltd.
Rep. by its Manager-Legal, Deepak R
Having registered Office at:
Dalmiapuram, Dalmiapuram Taluk
Tiruchirappalli District 621 651
Tamil Nadu
Having South Regional Office at:
No.26, Fagun Mansion
Ethiraj Salai, Egmore
Chennai 600 008.

Appellant in
W.A.No.2227 of 2023

The India Cements Limited
Represented by its Authorised Signatory
Coromandel Towers, No.93
Santhome High Road
Karpagam Avenue, RA Puram
Chennai – 600 028.

Appellant in
W.A.No.2218 of 2023

Vs.

1. Competition Commission of India
Through the Secretary
9th Floor, Office Block – 1
Kidwai Nagar (East)
New Delhi 110 023, India.



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2. Office of the Director General
Competition Commission of India
"B" Wing, HUDCO Vishala
14, Bhikaji Cama Place
New Delhi – 110 066.

3. Builders Association of India
D1/203, Aashirwad Complex
Rep. by its Authorised Signatory
Green Park Main
New Delhi 110 016.

Respondents in
W.A.No.22263 of 2023

..

1. Competition Commission of India
Rep. by its Secretary
9th Floor, Office Block – 1
Kidwai Nagar (East), Opposite Ring Road
New Delhi 110 023.

2. Builders Association of India
G-1/G-20, Commerce Centre
J.Dadajee Road, Tardeo
Mumbai – 400 034.

Respondents in
W.A.No.2218 of 2023

..

Prayer in W.A.No.2227 of 2023: Appeal filed under Clause 15 of the Letters Patent against the order dated 14.08.2023 in W.P.No.22263 of 2023;

Prayer in W.A.No.2218 of 2023: Appeal filed under Clause 15 of the Letters Patent against the order dated 14.08.2023 in W.P.No.22045 of 2023.

For the Appellant in : Mr.Sankaranarayanan
W.A.No.2227 of 2023 Senior Counsel
for Mr.K.Prahalad Bhat

For the Appellant in : Mr.P.S.Raman
W.A.No.2218 of 2023 Senior Counsel
for Mr.Abishek Jenasen



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For the Respondents : Ms.Madhavi Diwan
Senior Counsel
for Mr.R.Thirunavukarasu
for R1 in both W.As

Mr.V.Chandrasekaran,
Ms.D.Anu Monga and
Mr.Rahul Goel
for R3 in W.A.No.2227 of 2023
and for R2 in W.A.No.2218 of 2023

COMMON JUDGMENT

(Delivered by the Hon'ble Chief Justice)

The Competition Commission of India, under Section 26(1) of the Competition Act, 2002 (for brevity, hereinafter referred to as "the Act of 2002") ordered to issue *suo motu* proceedings to analyse the complaints received by it against various cement manufacturers. The complaints were on account of steep rise in price of cement. It directed the office of the Director General of the Competition Commission of India to investigate the complaints and further to determine whether the cement manufacturing Companies had committed any act in contravention to Section 3(3)(a & b) of the Act of 2002. It appears that the issue of cartelisation was also investigated. Pursuant thereto, the Director General of the Competition Commission of India conducted search and seizure and he initiated investigation.



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2. It appears that on 07.12.2021, the Builders' Association of India (in short, hereinafter referred to as "the BAI") filed an application before the Competition Commission of India for impleadment. It sought to be impleaded as an informant, claiming that it has sufficient interest in the outcome and is a necessary party in the *suo motu* proceedings initiated by the first respondent. The application was dismissed by the first respondent vide order dated 29.12.2021.

3. The BAI challenged the said order before the Delhi High Court by filing a writ petition. The Delhi High Court, under order dated 26.09.2022, granted liberty to the BAI to move the Competition Commission of India under Regulation 25 of the Competition Commission of India (General) Regulations, 2009 (fore brevity, hereinafter referred to as "the Regulations of 2009") and directed the Competition Commission of India to consider such representation, in accordance with law.

4. The BAI, on 27.09.2022, filed an application for impleadment as a party in the said *suo motu* proceedings. On or about 05.07.2023,



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the first respondent allowed the application filed by the BAI. The same was assailed by the appellants before the learned Single Judge of this Court by filing writ petitions W.P.Nos.22263 & 22045 of 2023. The learned Single Judge of this Court, under the impugned order dated 14.08.2023, declined to exercise its jurisdiction under Article 226 of the Constitution of India both on the ground of forum conveniens, as well as comity of Courts. It was observed by the learned Single Judge that the Delhi High Court is positioned with all the jurisdiction to take cognizance of the dispute raised before it as regards the very same impugned order, now being challenged in these writ petitions. It is observed by the learned Single Judge that the Delhi High Court has heard the matters at length and reserved judgment, while this Court is yet to examine the case on merits. It appears that the order assailed by the present appellants before the learned Single Judge was assailed by another cement Company, viz., the Ultra Tech Cement Company before the Delhi High Court.

5. It is in the light of the above, the appellants have approached this Court by filing the present appeals under the provisions of the Letters Patent.



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6. We asked the learned Senior Counsel appearing for the respective appellants and the respondents whether they would argue the case on merits. All the learned counsel argued the matter on merits and they also submitted their written submissions on the point of jurisdiction and merits of the matter.

7.1. It is submitted by the learned Senior Counsel appearing for the respective appellants, on merits, that the Competition Commission of India has allowed the application filed by the BAI for impleadment without issuing notice to the appellants. The Commission has not adhered to the principles of natural justice. It is submitted that the argument before the Competition Commission of India is regarding the existence/non-existence of a cartel. The important feature of the Regulation 25(1) of the Regulations of 2009 is that the applicant must have interest in the outcome of the proceedings. The said aspect needs to be considered. It is not that any person can approach the Competition Commission. It is only that the applicant must be connected either with the term 'consumer' or 'enterprise'. The BAI is a Society, registered under the Societies Registration Act, 1860 with



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various builders and Members. These builders purchase cement from the Companies like the appellants. The BAI does not *per se* buy goods and use it for its own. The Members do not use the goods purchased by the BAI. Therefore, the BAI would not come within the definition of 'consumer'.

7.2. The BAI is not a wholesaler nor a retailer of cement and is not a consumer within the meaning of Section 2(f) of the Act of 2002, therefore, it cannot be a party within the meaning of Regulation 2(i) of the Regulations of 2009. In view of that, the order of the respondents suffers from error apparent on the face of the record. The BAI, at the most, can be a witness, however, not a necessary or appropriate party.

7.3. Under Regulation 25(4) of the Regulations of 2009, the impleaded party would be entitled to the copies of the documents previously filed in the matter by the other parties. The documents are sensitive, contain intricate details of the internal financial and marketing commercial management of the appellants. In response to the investigation report, the appellants have parted with vital



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information on the costing aspects of the production and marketing of goods. The BAI is a body representing the Members, negotiates with the cement manufacturers and obtains substantial benefits for its Members in the matters of pricing of cement. The internal workings, which if they find ways into the hands of the BAI, tends to tilt the negotiating table completely in favour of the BAI, gaining an advantage over all others.

7.4. The Competition Commission of India should maintain confidentiality of the identity of an informant on a request made to it in writing. At the time when the investigation was completed and the appellants deposed before the Investigating Authority, the BAI was not present. There was no need to specifically treat any document or deposition as confidential at that time, but there is a likelihood of the Competition Commission of India parting with these valuable, inalienable materials with the BAI. Therefore, the appellants are prejudiced by the impleadment of the BAI.

7.5. Two contradictory orders were passed. One order, rejecting the impleadment of the BAI, was passed on 29.12.2021 and still



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subsisting and has not been set aside and the second order is passed impleading the BAI as a party. It is further submitted that no reasons are given to justify the impleament of the BAI. Section 57 of the Act of 2002 provides that no information obtained by the Competition Commission of India shall, without the previous permission in writing of the enterprise, be disclosed than in compliance with or for the purposes of this Act. Regulation 34 of the Regulations of 2009 sets out the process for treating the information confidential. The claim of the Competition Commission of India that only non-confidential information will be provided to BAI is specious, as the appellants have no reason to mark any information as confidential and now, everything will be provided to the BAI.

8.1. Learned counsel for the respondents submits that the argument that the BAI's impleadment would give it access to the appellants' confidential, sensitive business data is an afterthought and without merit. Regulation 35(2) of the Regulations of 2009 clearly shows that the parties are given an opportunity to self-certify and segregate the documents furnished by them as "confidential" and "non-confidential". Therefore, the parties fully know at the very outset,



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the consequences of marking any document as “non-confidential”. In view of Regulation 37(2) of the Regulations of 2009, the BAI could have taken inspection of the documents as a Member of the public after showing sufficient cause. The Members of the BAI purchase cement from the appellants and are implemented as parties.

8.2. The appellants and their competitors from the cement industry have already inspected each other's documents on multiple occasions. No grievance has been raised by the appellants over the sharing of the documents with their own competitors from the cement industry.

8.3. The Commission was not required to provide the appellants an opportunity of hearing while impleading the BAI or allowing its applications for inspection. Reliance is placed on the judgment of the Apex Court in the case of *SAIL vs. The Competition Commission of India*¹. The impleadment entails no civil consequences, as such, the opportunity of hearing need not be provided. The parties, including the appellants, have been given the liberty to file their replies to the BAI's

¹ (2010) 10 SCC 244



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opinion. It is submitted that the BAI has already done inspection of the non-confidential records on 17.07.2023, pursuant to the order passed by the Commission on 05.07.2023.

9. We have considered the submissions canvassed by the learned counsel for the parties. The respective counsel have made their submissions on the either aspects of jurisdiction as well as the merits of the matter.

10. On 25.08.2023, we have heard the learned Senior Counsel for the appellants and learned counsel for the respondents on the issue of jurisdiction, as well as on merits *qua* the order impugned before the learned Single Judge and subsequently, written arguments were submitted by the parties on 05.09.2023. On 12.09.2023, learned counsel for the appellant in W.A.No.2227 of 2023 submitted that the copy of the written submissions filed by the BAI was not served. As such, the matter was adjourned to 15.09.2023 and on 15.09.2023, the matter was reserved for orders. As we have considered the submissions on merits, we would be dealing with the merits of the matter also.



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11. The proceedings under the Act of 2002 would be proceedings in rem. Under Regulation 37(2) of the Regulations, 2009, the Commission may, on an application of a person, who is not a party to the proceedings, on sufficient cause demonstrated, allow such person inspection of documents or records mentioned in Sub-Regulation (1) of Regulation 37 of the Regulations of 2009. Under Sub-Regulation (1) of Regulation 37 of the Regulations of 2009, a party to any proceeding of an ordinary meeting of the Commission may, on an application in writing in that behalf, be allowed to inspect or obtain copies of the documents or records submitted during proceedings, subject to the provisions of Section 57 of the Act of 2002 and Regulation 35 of the Regulations of 2009.

12. Regulation 35 of the Regulations of 2009 mandates the Commission to maintain confidentiality of the identity of the informant and under Sub-Regulation (2) of Regulation 35 of the Regulations of 2009, any party may submit a request in writing to the Commission or the Director General, as the case may be, that a document or documents, or a part or parts thereof, be treated confidential.



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Procedure is prescribed as to how the confidential documents are to be marked. Under Sub-Regulation (8) of Regulation 35 of the Regulations of 2009, at the request of the parties under Sub-Regulation (2), the Commission or the Director General, if satisfied, shall direct that the document or documents or a part or parts thereof shall be kept confidential for the time period to be specified. As such, the right available to the parties is also available to any person who is not a party to the proceedings to allow inspection of documents.

13. The apprehension of the appellants in implementing BAI is that, as the BAI was not a party, they may not have marked some of the documents as confidential documents and the impleadment of the BAI would have prejudiced them. In view of the fact that they may not have marked some relevant documents as confidential, the BAI will have access to it. In fact, the BAI can be categorized as a person, as per the definition of a 'person' under Section 2(l) of the Act of 2002.

14. The BAI was also allowed to inspect all documents as per the condition of the BAI on 05.07.2023. It was also provided with the non-confidential version of the Director General report under the



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order dated 06.10.2022.

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15. The appeals are filed by the present appellants on or about 16.08.2023 and 21.08.2023 respectively. Prior to the filing of the appeals, the BAI has already been provided with the inspection of the documents. In view of that, the entire premise of arguments of the appellants that by inclusion of BAI as a party, it would have access to the inspection of the documents, now would be futile.

16. No doubt, before passing the order of impleadment, the Competition Commission of India ought to have given notice to the present appellants. That is the minimum requirement of the principles of natural justice. However, as the matter has proceeded further and that the BAI had already been given the inspection of all the documents of the appellants, as contemplated under the Regulations of 2009, now nothing would survive for the appellants to agitate.

17. In the light of that, these appeals stand dismissed. As on merits, we have not entertained the appeals. We did not consider the aspect of jurisdiction, including that of forum conveniens and comity of



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Courts. There will be no order as to costs. Consequently,
C.M.P.Nos.19214, 19215, 19216 & 19299 of 2023 are closed.

(S.V.G., C.J.)

(P.D.A., J.)

29.09.2023

Index : Yes/No
Neutral Citation : Yes/No

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To:

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Through the Secretary
9th Floor, Office Block – 1
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THE HON'BLE CHIEF JUSTICE
AND
P.D.AUDIKESAVALU,J.

(drm)

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29.09.2023