

**(2014) 05 DEL CK 0067**

**In the Delhi High Court**

**Case No : W.P. (C) 3008/2014 and CM Appls. 6274-6275/2014**

Shree Cement Limited and Another

APPELLANT

Vs

Competition Commission of India and Another

RESPONDENT

**Date of Decision : 27-05-2014**

**Acts Referred:**

Competition Act, 2002 — Section 18, 26(1), 3, 4, 53T  
Constitution of India, 1950 — Article 133, 133(1)(c), 226, 227, 32  
General Clauses Act, 1897 — Section 6  
Monopolies and Restrictive Trade Practices Act, 1969 — Section 12B

**Citation : (2014) 122 CLA 22 : (2014) 210 DLT 605 : (2014) 126 SCL 275**

**Hon'ble Judges : Manmohan, J**

**Bench : Single Bench**

**Advocate :** Parag P. Tripathi, Senior Advocate, Mr. Ramesh Singh, Mr. Kunal Bahri and Ms. Ishita Chakrabarti, Advocate for the Appellant; Vaibhav Gaggar, Ms. Reena Kumari and Mr. Abhimanyu Chopra, Advocates for CCI and Dr. Vijay Kumar Singh, Dy. Director, Law, Advocate for the Respondent

## **Judgement**

Manmohan, J.—By the present writ petition, petitioner challenges the interlocutory order dated 29/04/2014 passed by Competition Appellate Tribunal (hereinafter referred to as "COMPAT") insofar as it does not grant unconditional order of stay. It is pertinent to mention that by the impugned order petitioner has been asked to deposit only ten per cent of the penalty amount.

2. Mr. Dushyant Dave, learned senior counsel for the petitioner submits that Competition Commission of India (hereinafter referred to as "CCI") has no jurisdiction to levy penalty as the inquiry pertains to the period prior to 2009, that is, prior to coming into force of Sections 3 and 4 of the Competition Act, 2002 (hereinafter referred to as "Act, 2002").

3. He further submits that the order imposing penalty is in violation of principles of natural justice as even though the said order entirely relies upon the Director General's report and evidence in Case No. 29/2010 as well as the findings rendered by CCI in said case No. 29/2010, yet the report in case no. 29/2010

was not furnished to the petitioner while the ground for levy of penalty is that petitioner indulged in cartelization along with other cement manufacturing companies who were parties only to Case No. 29/2010 and not RTP 52/2006 which pertains only to the petitioner. In support of his submission, he relies upon a judgment of Supreme Court in M/s. R.B. Shreeram Durga Prasad and R.B. Shreeram Durga Prasad and Fatechand Nursing Das Vs. Settlement Commission (It and Wt) and Another, wherein it has been held as under:-

7. We are definitely of the opinion that on the relevant date when the order was passed, that is to say, 24-8-1977 the order was a nullity because it was in violation of principles of natural justice. See in this connection, the principles enunciated by this Court in *State of Orissa Vs. Dr. (Miss) Binapani Dei and Others*, as also the observations in *Administrative Law* by H.W.R. Wade, 5th Edn., pp. 310-311 that the act in violation of the principles of natural justice or a quasi-judicial act in violation of the principles of natural justice is void or of no value. In *Ridge v. Baldwin* [1964 AC 40 : (1963) 2 WLR 935 : (1963) 2 All ER 66 ] and *Anisminic Ltd. v. Foreign Compensation Commissioner* by House of Lords, 1969 (2) A.C. 147 at 197. the House of Lords in England has made it clear that breach of natural justice nullifies the order made in breach. If that is so then the order made in violation of the principles of natural justice was of no value. If that is so then the application made for the settlement u/s 245C was still pending before the Commission when the amendment made by Finance Act of 1979 came into effect and the said amendment being procedural, it would govern the pending proceedings and the Commission would have the power to overrule the objections of the Commissioner. Dr. V. Gauri Shankar, appearing for the revenue, did not seriously contest that position. He accepted the position that the law as it is, after the amendment authorises the Commission to consider and overrule the Commissioner's objection. He also very fairly, in our opinion and [Vide Corrigendum No. F.3/Ed. B.J./61 dated 21-8-1989] rightly accepted the position that the appellant was entitled to be heard on the Commissioner's objections. It appears to us, therefore, if that is the position then, in our opinion, the appellant was entitled to be heard on the objections of the Commissioner. As mentioned hereinbefore, the only short ground which was sought to be canvassed before us was whether after the amended Act the order had been rightly set aside and whether the appellant had a right to be heard on the objections of the Commissioner. Mr. Harish Salve, counsel for the appellant contends that it had a right to be heard. On the other hand Dr. V. Gauri Shankar, learned counsel for the respondents submitted that the order proceeded on the assumption that the objections had been heard. He did not, in fairness to him it must be conceded, contest that in a matter of this nature the appellant had a right to be heard. Reading the order, it appears to us, that though the appellant had made submissions on the Commissioner's objections but there was no clear opportunity given to the appellant to make submissions on the Commissioner's objections in the sense to demonstrate that the Commissioner was not justified in making the objections and secondly, the Commission should not accept or

accede to the objections in the facts and circumstances of the present case. We are of the opinion that in view of the facts and circumstances of the case and in the context in which these objections had been made, it is necessary as a concomitant of the fulfilment of natural justice that the appellant should be heard on the objections made by the Commissioner. It is true that for the relevant orders for the years for which the Commissioner had objected the concealment had been upheld in the appeal before the appropriate authorities. But it may be that in spite of this concealment it may be possible for the appellant to demonstrate or to submit that in disclosure of concealed income for a spread over period settlement of the entire period should be allowed and not bifurcated in the manner sought to be suggested for the Commissioner's objections. This objection the appellant should have opportunity to make. In exercise of our power of judicial review of the decision of the Settlement Commission we are concerned with the legality of procedure followed and not with validity of the order. See the observations of Lord Hailsham in *Chief Constable of the North Wales Police v. Evans* [(1982) 1 WLR 1155]. Judicial review is concerned not with the decision but with the decision making process.

4. He further relies on *Sangfroid Remedies Ltd. Vs. Union of India (UOI) and Others*, wherein it has been held as under:

6. In view of the objection/contention raised throughout by the appellant that no notice was served on them and opportunity given before passing the impugned assessment order by the 3rd respondent, which fact has not been disputed before us, we consider that insisting upon the payment of the duty determined, cannot be upheld....

5. On the other hand, Mr. Vaibhav Gaggar, learned counsel for respondent submits that the present writ petition is not maintainable as the petitioner has an alternative effective remedy by way of an appeal. Learned counsel for respondent refers to Section 53T of the Act, 2002 which provides an alternative efficacious remedy to the petitioner. It reads as under:-

53T. Appeal to "Supreme Court--The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them.

6. He states that in *G.K. Granites etc. and etc. Vs. Tata Hitachi Construction Machinery Company Limited and Others etc. and ect.*, a Coordinate Bench of this Court has held as under:-

6. A careful perusal of Section 53T of the Competition Act would show that an appeal to the Supreme Court is provided against "any order passed by the Appellate Tribunal" meaning thereby that the remedy is available against every order of the said Tribunal irrespective of whether the order is passed under the

provisions of the Competition Act or under the provisions of the MRTP Act, 1969. Had the legislative intent been to grant right of appeal only against the orders passed under the provisions of the Competition Act, Section 53T would have been framed in a different manner by providing for an appeal only against an order passed by the Appellate Tribunal under the provisions of the said Act. No such restriction, however, finds place in Section 53T of the Act.

7. I find some support for the view being taken by me from the decision of the Supreme Court in *Nathoo Lal Vs. Durga Prasad*, . In the aforesaid case, a decree came to be passed by the High Court of former Jaipur State on 3.3.1949, concerning a suit for possession of property. The defendant applied for review of the said judgment. In the meanwhile the Jaipur High Court became defunct and review was heard by the Rajasthan High Court as successor to the Jaipur High Court and was partially allowed on 5.4.1950. An appeal against the said judgment and decree came to be preferred by leave of the Rajasthan High Court under Article 133(1)(c) of the Constitution. When the appeal came up for hearing the learned counsel for the respondents raised a preliminary objection as to the maintainability of the appeal. He contended that according to the CPC of the Jaipur State, the decision of the Jaipur High Court had become final as no appeal lay from it and, therefore, the appeal before the Supreme Court was incompetent. The contention, however, was rejected by the Apex Court noticing that the order under appeal was passed by the Rajasthan High Court after coming into force the Constitution of India and, therefore, the provisions of Article 133 were attracted to it and it was appealable to the Apex Court subject to fulfilment of other requirements of the said Article. It was further held that the CPC of the Jaipur State could not determine the jurisdiction of the Apex Court and had no relevance to the maintainability of the appeal. Thus, despite the fact that no appeal against the order passed by the Jaipur High Court was available at the time it was before the said High Court was instituted, the Apex Court, considering that the order impugned before it had been passed after coming into force of the Constitution, upheld the right of appeal conferred under Article 133 of the Constitution.

In the case before this Court also the impugned orders came to be passed by the Competition Appellate Tribunal much after the MRTP Act had been repealed and the Competition Act had been notified. Therefore, despite the fact that the original application was filed under the provisions of Section 12B of the MRTP Act and in view of the provisions contained in Section 66 of the Competition Act as also Section 6 of the General Clauses Act, the said petitions had to be decided in terms of the provisions of the MRTP Act, an appeal against the order passed by the Competition Appellate Tribunal, after coming into force of the Competition Act would be maintainable.

8. The appeal u/s 53T of the Competition Act is provided against any decision or order of the Competition Appellate Tribunal irrespective of whether such decision or order be interlocutory, intermediate or final though the orders impugned in

their petitions are final orders. Therefore, the appropriate remedy for the petitioners would be to file an appeal in terms of the aforesaid provisions of the Competition Act. It is settled legal proposition that the High Court in exercise of its extraordinary jurisdiction under Article 226/227 of the Constitution will not be justified in intervening in the matter, when an equally efficacious alternative remedy is available to the petitioners before the Court. The remedy of appeal is, in fact, more efficacious than the remedy by way of a writ petition under Articles 226/227 of the Constitution and there is no reason why the petitioners should not avail the said remedy.

7. He further states that CCI has jurisdiction by virtue of Section 66(6) of the Act, 2002 to decide the issues raised in the present petition and consequently, there has been no jurisdictional error. Section 66(6) of the Act, 2002 reads as under:-

66(6). All investigations or proceedings other than those relating to unfair trade practices, pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the Competition Commission of India, and the Competition Commission of India may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.

8. In support of his submission, he relies upon a judgment of this Court in *Interglobe Aviation Limited Vs. The Secretary, Competition Commission of India and Others*, wherein it has been held as under:-

12. Under the MRTP Act, the MRTP Commission combined in itself both the inquisitorial as well as adversarial/adjudicatory functions. In its inquisitorial role, the MRTP Commission was empowered to refer matters of investigation to the DG(I & R) which was, in a sense, its extended arm. At this stage it was meant to be a fact or information gathering exercise. If on the basis of such information gathered and placed before it by the DG(I & R), the MRTP Commission came to a prima facie view that there was restrictive trade practice or unfair trade practice, as the case may be, then it can proceed further in the matter. It was at that stage, after forming the prima facie view, that the matter can proceed to get crystallized into a case" it is possible that on the report of the DG(I & R), the MRTP Commission forms an opinion that there is no need to proceed further. In that event there will be no "case".

13. In the considered view of this Court, as far as the present Petitioners are concerned, the investigations against them by the DG(I & R) remained incomplete and the matter did not crystallize into a "case" before the MRTP Commission, which could be stated to be pending as on the date of the CAA. Consequently there is no merit in the contention that as far as the Petitioners are concerned, it was incumbent on the DG(I & R) of the CCI to transfer the cases straight to the CAT and not to the CCI.

14. A comparison of Section 66(3) CA with Section 66(6) CA shows the contrast

between the kinds of matters before the MRTTP Commission and the DG(I & R). While Section 66(3) CA talks of "cases" pending before the MRTTP Commission, Section 66(6) CA talks of "all investigations or proceedings" pending before the DG(I & R). The expression "all investigations or proceedings" is meant to encompass even investigations and proceedings before the DG(I & R) which remained incomplete as of the date of the CAA 1999.

9. He also urges that as the two reports pertaining to Case No. 29/2010 and RTPE 52/2006 are practically identical, no prejudice has been caused to the petitioner for not supplying the report sought for.

10. Learned counsel for the respondent relies upon a judgment of the Supreme Court in Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., wherein it has been that natural justice cannot be an empty formality and prejudice must be shown.

11. In rejoinder, Mr. Dave and Mr. Tripathi, senior Advocates as well as Mr. Ramesh Singh submit that the present writ petition is maintainable as the order of CCI and COMPAT is without jurisdiction and contrary to the principles of natural justice. In support of their submission, they rely upon the following judgments:-

A. In The State of Uttar Pradesh Vs. Mohammad Nooh, , the Supreme Court has held as under:

On the authorities referred to above it appears to us that there may conceivably be cases-and the instant case is in point-where the error, irregularity or illegality touching jurisdiction or procedure committed by an inferior court or tribunal of first instance is so patent and loudly obtrusive that it leaves on its decision an indelible stamp of infirmity or vice which cannot be obliterated or cured on appeal or revision. If an inferior court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court's sense of fair play the superior court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the court or tribunal of first instance, even if an appeal to another inferior court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what ex facie was a nullity for reasons aforementioned.

B. In Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another, , the Supreme Court has held as under:-

15. The second part need not detain us. We have already held that demand of a tax, not backed by a valid law, is a threat to property and thus gives rise to a right to move this Court under Article 32..... A threat to property unbacked by a valid law or a want of jurisdiction or a breach of the principles of natural justice must be clearly made out, to entitle one to the assistance of this Court. If

that is successfully done then the provisions for other remedies do not stand in the way. We accordingly allowed the petitioner to raise the point of jurisdiction before us.

12. They further submit that this Court has the power to grant unconditional stay. In support of their submission, they place reliance upon a judgment of the Supreme Court in Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, wherein it has been held as under:-

5.....

All this is not to say that interim orders may never be made against public authorities. There are, of course, cases which demand that interim orders should be made in the interests of justice. Where gross violations of the law and injustices are perpetrated or are about to be perpetrated, it is the bounden duty of the court to intervene and give appropriate interim relief. In cases where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, a court may well be justified in granting interim relief against public authority.

13. Upon a perusal of the papers, this Court finds that COMPAT in the impugned order has prima facie rejected both the aforesaid submissions advanced by learned counsel for petitioners.

14. Further, COMPAT in the impugned order has held that CCI on 24th June, 2010 had directed Director General to conduct an inquiry into the matter. According to COMPAT, it did not restrict the inquiry to a period prior to 20th May, 2009. Also, COMPAT has prima facie held that the period was extended right up till 2011 and consequently, there was no jurisdictional error committed by CCI. The relevant portion of the impugned order is reproduced hereinbelow:-

6. The learned counsel canvassed before us that it was an old case of MRTP Commission, which came to be transferred u/s 66(6) of the Competition Act before the CCI. He, therefore, urged that the inquiry before the CCI pertained not to the period after 20th of May, 2009, when section 3 and 4 came on the anvil, but to the period prior to it and as such the inquiry suffered jurisdictional error. However, during the debate, the learned counsel contended that it could not be said that the CCI did not have the jurisdiction, particularly in view of the clear language of section 66(6). Therefore, there would be no jurisdictional question to be decided. The learned counsel, however, contended that the CCI on the basis of that inquiry could not have found the Appellant guilty of the breach of section 3 because the earlier inquiry pertained to the period prior to 20th May, 2009, when sections 3 and 4 came on the anvil. The contention is clearly incorrect, for the simple reason, that in its meeting on 24.06.2010, the CCI had directed the DG to do a thorough inquiry into the matter, which was not restricted only to the period prior to 20th of May, 2009. The concerned period, in fact was extended right upto 2011. It has been clarified by the CCI in its impugned order that the concerned period of breach was not prior to 20th of

May, 2009, but it pertained to that date upto the year 2010-2011. It can also be seen that u/s 26(1), the CCI considered the question of the inquiry and directed a total inquiry. When we see the order dated 24.06.2010, it is clear from the order that the CCI had ordered a thorough inquiry and complete investigation and the investigation was not to be restricted to the pre May 2009 period. It must be seen here that the CCI has suo-moto powers to order an investigation and indeed, one of its duty is to see that competition law is not breached, which is clear from the language of section 18 of the Competition Act. Under the circumstances, it has to be held that the inquiry ordered by the CCI was not pertaining to the pre Act period, but it pertained to the period when the Act and more particularly sections 3 and 4 were invoked. In that view, we do not find any jurisdictional error by the CCI in ordering the inquiry.

7. The learned counsel then went on to suggest that there was a separate report produced by the DG in respect of Case No. 29 of 2010 and the DG still produced a different report in RTPE 52 of 2006. The learned counsel was at pains to point out that in the order in that case the CCI extensively relied on the report of DG produced in Case No. 29 of 2010. He further urged that inspite of relying on report of DG in Case No. 29 of 2010, that report was not supplied to the Appellant while deciding RTPE 52 of 2006. The learned counsel went one step ahead and contended that inspite of the fact that report was demanded by the Appellant by a separate application, that application was specifically rejected by the CCI on the ground that the Appellant was not a party to Case No. 29 of 2010. From this, the learned counsel urged that the basic principle of natural justice was trampled, firstly, by rejecting the demand of the report in Case No. 29 of 2010 and then relying on that report extensively while deciding RTPE 52 of 2006. As against this, the counsel appearing for the CCI pointed out that the report in Case No. 29 of 2010 was almost identical to the report in RTPE 52 of 2006. He also showed his willingness to supply the copy of the report at this stage. The learned counsel on behalf of CCI strenuously urged that there was absolutely no prejudice caused to the Appellant, as the examination of the two reports would show that they were practically identical. He also urged that it was incorrect to say that the CCI relied on the report in Case No. 29 of 2010, though the CCI might have referred to that report at some places. He pointed out that there was absolutely no prejudice caused, whatsoever, to the Appellant due to the alleged non supply of the report and as such there was no question of setting aside the order of CCI in this Appeal.

11. The Appellant has a prima-facie case because of which we have ordered the final arguments in this case. However, when we examine the matter on merits, we do not find anything different than the other cement manufacturers, who have been dealt in Case No. 29 of 2010. We shall certainly examine the question of non-supply of DG's report in Case No. 29 of 2010 to the Appellant at the final hearing, however, at this stage, we are of the firm opinion that it will not be proper to allow the Appeal by setting aside the judgment on account of the alleged denial of natural justice to the Appellant. When we see the matter on

merits, the case of the Appellant is almost identical with the other cement manufacturers, who have already been dealt with by us, where we had ordered the stay of penalty on condition that the Appellants deposits 10% of the penalty ordered by the CCI. We will chose to pass the same order in this Appeal too in terms of the order passed in Appeal Nos. 105 of 2012, 110 of 2012, 108 of 2012,.....

(emphasis supplied)

15. In the opinion of this Court, the issue of maintainability of the writ petition is no longer res integra. In Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , the Supreme Court has held, "But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the Writ petition has been filed for the enforcement of any of the Fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged....." Consequently, a writ petition challenging an order of COMPAT is maintainable on limited grounds.

16. However, this Court is of the opinion that the petitioner's argument of lack of jurisdiction is misplaced as neither CCI nor COMPAT lack inherent jurisdiction to decide the petitioner's first submission as to whether Act, 2002 applies to the proceedings or not. This Court is of the view that issues of applicability of Act, 2002 or Monopolies and Restrictive Trade Practices Act, 1969 and levy of penalty are not equivalent to lack of inherent jurisdiction to decide the case. Consequently, in the opinion of this Court, it is only the CCI and COMPAT which have the jurisdiction to decide the issue of applicability of Act, 2002 as well as the issue of levy of penalty thereunder.

17. This Court would not like to express its view on the interpretation of Section 66 of the Act, 2002 as the matter is still sub judice before the COMPAT.

18. As far as the issue of principles of natural justice is concerned, this Court is of the opinion that both COMPAT and CCI have adhered to it and parties have been given not only liberal, but a full hearing even at the interlocutory stage. The issue as to whether two reports prepared by the Director General, namely, Case No. 29/2010 and RTPE 52/2006 are practically identical, would be examined by the COMPAT at the final hearing stage.

19. This Court is also in agreement with the prima facie conclusions arrived at by COMPAT in its impugned order.

20. Moreover, this Court is of the view that COMPAT has also passed similar orders requiring other cement manufacturers to pre-deposit ten per cent of the penalty imposed on them by CCI. In the light of said orders, this Court is of the view that the impugned order is fair and reasonable and requires no interference at this interlocutory stage in writ proceedings.

21. Consequently, present writ petition and applications are dismissed.