

(2024) 04 NCLAT CK 0005

National Company Law Appellate Tribunal New Delhi

Case No: Competition Appeal (AT) No.19 Of 2020

Sundaram Brake Linings Ltd

APPELLANT

Vs

Chief Materials Manger

RESPONDENT

Date of Decision: April 2, 2024

Acts Referred:

- Competition Act, 2002 - Section 2(c), 3, 3(1), 3(3)(a), 3(3)(c), 3(3)(d), 53B

Hon'ble Judges: Yogesh Khanna, Member (J); Ajai Das Mehrotra, Member (T)

Bench: Division Bench

Advocate: Aditya Verma, Samar Singh, K. Rigved Prasad, Shama Nargis, Balaji Subramanian, Akash Kundu

Final Decision: Dismissed

Judgement

Yogesh Khanna, Member (Judicial)

1. This appeal is filed under Section 53B of the Competition Act, 2002 against an order dated 10.07.2020 in Reference Case No.03/2016. The impugned order is a common order with respect to Reference Cases No.5 of 2016, 1 of 2018, 4 of 2018 and 8 of 2018. The appellant No.1 was a party only in Reference case No.03/2016.

2. It is the submission of the learned counsel for the appellant vide an impugned order, the Commission had erroneously found Appellant No.1 guilty of contravention of the provisions of Section 3(3)(a), 3(3)(c) and 3(3)(d) read with Section 3(1) of the Competition Act.

3. It is argued no appeal against an impugned order has been filed by any of the other parties who have been found liable by the Commission. The present case merit an interference of this Tribunal because although the contravention of Section 3 of the Act was virtually admitted by the other parties, there was no such admission by Appellant

No.1. To the contrary, Appellant No.1 had disproved the allegations against it. In fact, members of the cartel have themselves gone on record to say appellant No.1 was not a part of the cartel. It is argued appellant No.1 was wrongly clubbed with members of the Cartel without any application of mind by the Commission; contrary to fundamental principles of competition law and the law of evidence. None of the submissions on behalf of appellant No.1 have been even adverted to or addressed in the impugned order.

4. The main contention of the learned counsel for the appellant is that the appellant had only given a bid for three tenders, annexed at Page 106 to 110 of the appeal paper book, which tenders were never discussed by this appellant with other members of the Cartel. Further, it is argued admissions made by one Mr. P. Basu, an employee of the appellant company, would not bind the appellant company as he gave statement before the authority without any authorisation. It is argued two other witnesses one namely Mr. L.R. Murali, Ex Marketing Head of Escorts and Mr. Navin Sangari, an Ex employee of Escorts had also exonerated the appellant for being a part of the Cartel.

5. It was argued not only the alleged confession given by its employee Mr P. Basu was without any authorisation of the Company but it was never supported by any document, hence was wrongly relied upon by the Commission to convict this appellant.

6. Heard.

7. A bare perusal of the statements made by the members of the Cartel, before the Director General are all relevant here. The confession of one Jagdish Gadikar of HCL was he had created an email account i.e. jagadsharma@rediffmail.com for the purpose of communication with the competitors namely Masu, Rane, ILPL, Escorts, Bony, Cemcon, Om Besco, Sundaram Brake, Allied, Nippon and Pioneer and since the aforesaid players had an arrangement to quote in different railway Tenders of CBB after discussing with each other and allocating the quantities of CBB, it was felt to avoid any complication from CCI or MRTP, official email ids of the companies should not be used. Thereafter, after discussions with the representatives of aforesaid companies including **Mr. Priyankar Bose of Sundaram Brake**, he created this email ID to exchange bid price; screen shots of financial bids being uploaded by the aforesaid companies on IREPS portal; the calculation of quantities shared/allocated for different Tenders of CBB as per the agreement amongst the aforesaid companies; scheduling of meetings amongst the aforesaid companies; discussing other business related issues/RDSO technical issues, discussion on common points to be raised with railway/RDSO; exchange of different formats and bid related documents etc.

8. Mr. P.K. Chaudhary of HCL, Managing Director also confessed in line of their employee Mr. Jagdish Gadikar (Supra).

9. Then one Mr. N.K. Bhattachary, Vice President (Marketing) of Masu had also confessed after decentralization of railway tenders in or around 2010, the bidders had continued in the same way and the Cartel arrangement was carried out as agreed upon previously, by deciding price bid in advance and by allocating quantities of forthcoming Tenders of different types of CBBs of Indian Railways. Shri Bhattacharya stated as and when any new manufacturer of CBB would enter into the CBB manufacturing business including Cemcon, Om Besco, Daulat Ram, SBL etc. they would become a part of the Cartel arrangement.

10. Further one Mr. S.R. Venkat Raj, General Manager of Rane had also confessed that Mr. Umesh Shah, an employee of his company after discussions with other bidders, including the appellant herein used to inform him about particular price to be quoted in such railway tenders.

11. Most importantly the confession of Mr. Priyankar Bose, Manager of the appellant company that they are a small fish in this anti-competitive arrangement between the big companies and never intended to violate any law. He confessed all the price bid discussions and allocation of quantities for CBB of Indian railway Tenders prior to 2014 has been done by the company management and not by him. He also said sometimes the Management did not consider emails of Sh Jagdish Gadikar, as forwarded by him, for taking the decision in relation to the price bids and accordingly many a times, independent decisions were taken by the company. He further stated after 2014 his company stopped participating in railways tenders of CBB. He further stated since he had no role to play, a lenient view be taken.

12. Similar was the confession of Mr. Balaji S, Vice President (Marketing) of appellant company who stated whenever he used to get email from Mr. Jagad Sharma alias Jagdish Gadikar of HCL about the rates to be quoted in the forthcoming tenders and allocation of quantities amongst the manufacturers of that time he used to pass on the message to his seniors on the basis of said emails. Sometimes, Sh Gadikar used to call meetings of different vendors to discuss the issue.

13. Following emails are also relevant to the issue. An email dated 12.09.2011 which is Exhibit 21 sent by Sh Jagdish Gadikar to Sh M.S. Raja Sekar of HCL wherein an excel sheet showing computation of share of tender quantities for K Type Bogie mounted CBB Tenders from 1.4.2009 to 18.8.2011 where BIC was Part I and Cemcon was Part II upto 03.08.2009 and thereafter, 01.04.2010 to 12.09.2011 where BIC was Part I and Cemcon was Part II upto 03.08.2009 and Part I thereafter between HCL, Rane, ILPL, Escorts, Bic Masu, SBL, Bony and Cemcon. The excel sheet also contain share of quantities for L Type CBB for Frt. for the tenders finalised between 01.04.2010 to 12.09.2011 among HCL, Rane, ILPL, Escorts, BIC/Masu, Cemcon, Bony, SBL and Om Besco/Greysham. The excel sheet also contained share of quantities for EMU CBB from

01.04.2010 to 12.09.2011 between HCL, Rane, ILPL, Escorts, Cemcon and BIC/Masu.

14. Another email dated 22.04.2013, Exhibit 28 also was sent by Mr. Jagdish Gadikar to all the opposite parties, including the appellant company wherein two attachments including (i) agenda for meeting with Greysham (Om Besco) in Delhi and (ii) Excel sheet showing share of tender quantities for K and L type CBB till 12.04.2013 has been annexed. The excel sheets details include share of business of L Freight Brake Blocks (for finalized tenders) from 23.09.2011 to 12.04.2013 along with calculated compensation

15. All these statements of different witnesses, including confessions of the Vice President, Marketing and the Manager of the appellant company would go on to show the appellant company was very much part of the cartel and now is trying to disown the statements of its employees which is nothing but a bid to avoid its involvement held per impugned order.

16. The argument of the learned counsel for the appellant that two of the witnesses/opposite parties viz. Mr. L.R. Murli and Mr. Navin Sagadari of Escorts had exonerated the appellant company would not be of much help since all other opposite parties had implicated the appellant company, including its own employees namely Mr. P. Basu and Mr. Balaji S. The impugned order takes notes of all these evidences and emails.

17. It was also an argument of the Learned counsel for the Appellant the appellant had never shared or exchanged information with any member of the Cartel and in fact the allegation is the appellant has only received some information from the Cartel and that a mere receipt of information without being acted upon, would not satisfy the requirement of Section 3(3) of the Act, so far as the appellant is concerned.

18. It was argued mere receipt of information cannot be a conclusive proof of the membership of the Cartel when the Appellant's tenders were not a part of Microsoft Excel Sheets and also the Appellant was not a part of Whatsapp Group of the Cartel.

19. We do not agree to this argument in view of strong evidence of cartelisation in the form of statements made by Cartel members which belies the argument that the appellant was merely a recipient of information.

20. In **State of Maharashtra V Kamal Ahmed Mohammed Vakil Ansar and others (2013) 12 SCC 17** it was held in a proceeding under the Competition Act, the strict rules of evidence are not applicable. Admittedly, all the statements are made by witnesses who were the authors/recipients of the emails and have confirmed their interaction with each other. Admittedly the appellant had never challenged the correctness of statements made by the other members and never sought a permission to cross examine them. All the evidence has been construed holistically by the Commission

before giving its justification. The oral statements and the email are completely consistent with each other. Moreso in view of the very definition of cartelisation in Section 2(c) of the Act, even an attempt to rig a bid is sufficient to attract the provision.

21. In alleged anti-competitive conduct in the Beer Market in India, suo Motu Case No.6 of 2017 and in Federation of Corrugated Box Manufacturers of India etc, Case No.24 of 2017, it has clearly been held in bid rigging cases mere exchange of information is sufficient to attract the provisions of the Act. The Appellant argued it had never sent any such email and only 'received' such emails and mere 'receipt' of the emails does not amount to 'exchange' of emails, is not acceptable. The appellant continuously 'received' emails for over five years without any protest and never requested the cartel to stop sending such emails to it.. This itself indicates a meeting of mind. More importantly, the evidence shows all the parties had access to the user name and password to the email id jgadikar@yahoo.com, hence it cannot be concluded the appellant was never a part of the Cartel.

22. In view of above, the appeal and all pending applications are dismissed.