



# Constitutional court orders criminal probe into an alleged cement cartel

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### Introduction

In a surprising turn of events in July 2021, the bench of the Madras High Court directed the director general of the Tamil Nadu police to investigate complaints regarding the cartelisation of certain cement manufacturers that had allegedly created an artificial scarcity of cement for the purposes of wrongful gain by increasing cement prices (the Cement Order).<sup>(1)</sup>

The Court ordered the police investigation into the cartelisation (which is not part of the Competition Commission of India's (CCI's) enforcement regime) as a prima facie cognisable offence under the Indian Penal Code 1860 (IPC), which is the primary Indian legislation that deals with criminal offences. The investigation took place despite there being a statutory competition and antitrust regulator (the CCI), which is specifically empowered to impose civil liability on anti-competitive horizontal agreements – including cartels. As expected, the Cement Order has proved controversial in the field of national competition law and regulation.

This schism in jurisdiction raises many pertinent questions: does the Competition Act within its mandate allow cartels to be investigated and prosecuted under a criminal jurisdiction? Does the IPC have suitable provisions under which cartel cases can be adequately examined and criminally tried by the courts? What could be the implications of a concurrent police and CCI investigation?

### Facts

In March 2021, the Coimbatore Corporation Contractors Welfare Association and the Class I Contractor Welfare Association – Mangadu each filed separate criminal petitions before the Court pleading for directions to the respondents (ie, the Central Bureau of Investigation (CBI), a specialised federal police body that investigates criminal offences of important nature and the police) to investigate alleged cartelisation by steel manufacturers<sup>(2)</sup> (the Steel Order) and cement manufacturers (the Cement Order), respectively.

### *Steel cartel*

The complainants argued that:

- By forming a "syndicate" for profiteering that resulted in a 55% increase in steel prices, the nine steel manufacturers<sup>(3)</sup> had rendered the governmental and

private projects of the petitioner association's members unviable.<sup>(4)</sup>

- Most of the steel companies owned iron ores and despite no increase in labour and power charges, they had still increased the steel prices. The nine steel manufacturers were thus alleged to be involved in:

*criminal acts for illegal gain to fix the steel price in the market and these companies manipulate in such a way as to cheat not only the Government but also for illegal profit.*

- The special public prosecutor for the CBI argued that the steel companies had indulged in various anti-competitive activities and thereby collectively sought to control the supply of steel. To create artificial scarcity, the steel manufacturers resorted to restricting the supply of steel to builders and consumers, resulting in artificial increases in steel prices.

### ***Cement cartel***

The complainants argued that:

- 10 cement manufacturers<sup>(5)</sup> in Tamil Nadu had entered into an agreement and, without any reason, had increased the price of cement by 13.23% between July 2019 and early 2021.
- Because of the sudden increase in cement prices, the petitioner association's contractors had to incur significant losses, thereby reducing the livelihood of many employees engaged in construction work due to lack of quality work.
- By way of the agreement, the 10 cement manufacturers had "created an artificial scarcity in cement in order to gain wrongfully by increasing the prices of the cement".

### **Decision**

In April 2021, the Court directed the CBI to conduct inquiries into both sets of cartel allegations. However, no action was taken and the complainant (ie, Class I Contractor Welfare Association - Mangadu) approached the Court once again.

In response, the CBI submitted letters to the Court detailing what action it had taken on the Court's directions, which is what could have led to the concurrent jurisdiction in this case. In those letters, the CBI explained to the Court that, while it had forwarded the complaint against the steel manufacturers to the CCI, it had forwarded the cement cartel complaint to the police. It is noteworthy that both complaints dealt with similar facts and anti-competitive conduct (eg, cartelisation, artificial control of supply and production, and price-fixing) and both took proceedings against the CBI and the police (ie, not the CCI) as respondents.

Particularly in the Cement Order, the Court opined that when a "cognisable offence" had been identified, the respondents should have registered the case against the cement companies and proceeded with the investigation in accordance with law. Accordingly, the police were directed to take necessary and appropriate action on the complaint and proceed with the investigation. The Court did not invoke any specific contravention of the IPC or any other statute, but simply directed the police to register the case on establishment of a "cognisable offence".

### **Comment**

### ***Competition Act does not bar criminal jurisdiction of IPC***

Section 62 of the Competition Act expressly provides that the provisions of the Competition Act shall be "in addition to, and not in derogation of" the provisions of any other law in force. Section 61 merely excludes the jurisdiction of civil courts for matters forming the subject of determination of the CCI and the National Company Law Appellate Tribunal (NCLAT) under the Competition Act. Therefore, a subject that could be addressed additionally in another regime outside of the Competition Act can potentially be pursued in such an additional regime.

There is technically no bar or embargo that can be interpreted in the language of the Competition Act or any rule or regulation that expressly outlaws criminal jurisdiction in respect of cartel cases. It appears that an independent assessment of the same conduct could occur outside the Competition Act so long as the basic ingredients of violations under the additional statute are met.

### ***Cartels can, and have been, prosecuted under IPC***

It appears that the basis for ordering criminal investigations on cartels is the provision relating to "criminal conspiracy" under sections 120A and 120B of the IPC. Under these provisions, criminal liability may arise for a "person" if such a person commits, omits or abets another person to commit an offence. Criminal conspiracy is said to comprise:

- an object to be accomplished;
- a plan or scheme embodying means to accomplish that object;
- an agreement or understanding between two or more of the accused persons in which they definitively commit to cooperate in order to accomplish the object by the means embodied in the agreement, or by any effectual means; and
- the jurisdiction where the statute required an overt act.<sup>(6)</sup>

Further, in terms of the standard of proof in cases of criminal conspiracy, it is not necessary under section 120A to prove a charge with direct evidence, and circumstantial evidence is considered sufficient. Accordingly, it may be seen that the standard of proof for cartels under the IPC is similar to the standards under the Competition Act.

Another key aspect to consider is that of liability, particularly joint liability, given that cartels or criminal conspiracies require two or more persons. In this regard, Section 34 ("Acts done by several persons in furtherance of common intention") of the IPC sets out the rule of evidence and principle of joint liability. According to section 34, if a criminal act is done by several persons in order to further a "common intention", each person will be liable for the act as if they had performed it alone. This provision would allow the IPC, therefore, to effectively hold all such persons that are taking part in a cartel conduct as criminally and jointly liable under the IPC.

In fact, two recent orders of the Jharkhand High Court have considered the applicability of the provisions of the IPC on cartels relating to bid-rigging.<sup>(7)</sup> In these cases, certain "persons" involved in cartelising bidders and companies had criminal petitions filed against them and the Jharkhand High Court identified a violation under section 120B in conjunction with sections 420 ("Cheating and dishonestly inducing delivery of property"), 468 ("Forgery for purpose of cheating") and 471 ("Fraudulent/dishonest use of forged document/electronic record as genuine") of the IPC.

The Jharkhand High Court observed that there were allegations that prima facie showed an agreement to act in such a manner so that the bid could be awarded in favour of a co-member of the conspiracy, in addition to one bidder being sponsored by another. The allegations on record were considered sufficient to constitute a prima facie case of criminal conspiracy against the petitioner and the co-accused in which the petitioner was accused of active participation. However, it is relevant that in both of these cases, a prima facie case was made only against the key personnel or directors of the cartelising companies. So far, there has been no case of imposing criminal fines on enterprises (eg, body corporates), similar to civil penalties under the Competition Act.

***What could additional criminal liability entail?***

This is an unprecedented development for the Indian cartel regime. While criminal investigations, prosecutions and fines or imprisonment can be expected to create a relatively high level of deterrence for businesses and company officials and representatives, it is evident that certain competition-specific nuances of the Competition Act evade the century-old IPC.

For instance, sentences for entering into cartels issued by judicial magistrates who are ill-equipped to handle economic offences of this nature could lead to disproportionate penalties and negatively impact the entire business sector. Furthermore, unlike the Competition Act, which lays down criteria for identifying individuals for imposition of individual civil penalties, the IPC offers no guidance. If the courts were to be guided by a liberal interpretation of the IPC, employees who had any knowledge of the existence of cartels may face a much more severe penalty.

Finally, there is a high risk of litigation uncertainties if the police and the CCI simultaneously initiate a cartel investigation under the IPC and the Competition Act, respectively. There is also the possibility of multiple stays of proceedings and litigations emanating from these concurrent jurisdictions. At the same time, there are significant opportunities for cooperation and sharing of experience between the CCI and the police and criminal justice system, given that similar tools and parameters of assessment can be used under both statutes, and the standard of proof also appears to be circumstantial in both case. However, this departure from cartel jurisprudence could undoubtedly create greater difficulties for businesses. This kind of proceeding, which does not formulate clear procedures for the police and the criminal justice system under the IPC (regarding the Competition Act), is likely to cause significant uncertainty and a decrease in the confidence of businesses regarding India's regulatory competition environment.

Nevertheless, these are interesting and challenging times for national competition law. Both the courts and the government can be expected to address this split in competition law jurisdiction, which is statutorily civil in India, to either:

- treat this departure as a lacuna in the CCI's jurisdiction and procedure and, therefore, foolproof the CCI's jurisdictional exclusivity; or
- treat the split as an untapped opportunity to formulate a dual procedural system to pursue cartels, notorious for being the most pernicious offence under the Competition Act, concurrently under both criminal and competition frameworks.

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## Endnotes

(1) *Class I Contractor Welfare Association, Mangadu v The Central Bureau of Investigation & Anr*, CRL OP No. 8013 of 2021 dated 29 July 2021.

(2) *Coimbatore Corporation Contractors Welfare Association v The Central Bureau of Investigation & Anr*, CRL OP No. 6153 of 2021 dated 29 July 2021.

(3) Tata Steel Ltd, JSW Steel, Sail Steel, Vizag Steel, Tirumala TMT, Kamachi TMT, Agni Steel, Indrola Steel and Kiscol TMT.

(4) Allegedly, the steel companies had increased prices by 2,500 to 2,700 rupees (£25 to £27) per tonne of both flat and long products for December 2020, citing rising iron ore prices and strong demand for steel. As a result of the increase, it was highlighted that the price of hot rolled coil in Mumbai had hit a record high of 47,000 rupees (£470) per tonne, in line with the firm price trend in the international market.

(5) ACC Limited, Ambuja Cements Limited, Grasim Cement, Ultratech Cement Ltd., Jaiprakash Associates Ltd., The India Cements Ltd., J.K. Cement Ltd., Century Textiles and Industries Ltd., Binani Cement Ltd., and Lafarge India Pvt. Ltd.

(6) *Ram Narayan Popli v CBI*, appeal CRL no. 1097 of 1999.

(7) *Om Prakash Singh v Union of India*, Cr.M.P. no. 983 of 2012 and *Nageshwar Yadav v Union of India*, Cr.M.P. no. 980 of 2012.