



**COMPETITION COMMISSION OF INDIA**

**Case No. 75/2012**

**In Re:**

**Saifudheen E.**  
Proprietor, Popular Traders  
EP 7/780 J and K  
Edakkara Post  
Malappuram District  
Kerala – 679331

**Informant**

**And**

**Ramco Cements Limited**  
Auras Corporate Centre, 5<sup>th</sup> Floor  
98-A, Dr. Radhakrishnan Road  
Mylapore, Chennai District  
Tamil Nadu - 600 004

**Opposite Party No. 1**

**The Kerala Cement Dealers Association**  
Mission Quarters, M G M Complex  
Opposite Cooperative Bank  
Trissur District  
Kerala – 680001

**Opposite Party No. 2**

*With*

**Case No. 56/2013**

**In Re:**

**K. M. Chakrapani**  
Proprietor, Coir India (The Cement People)  
Vadakara  
Kozhikode District, Kerala- 673105

**Informant**



**And**

**Ramco Cements Limited**  
Auras Corporate Centre, 5<sup>th</sup> Floor  
98-A, Dr. Radhakrishnan Road  
Mylapore, Chennai District  
Tamil Nadu - 600 004

**Opposite Party No. 1**

*With*

**Case No. 106/2013**

**In Re:**

**Informant**

**Muraleedharan K**  
Proprietor, S V S Enterprises  
Kallummoodu, Muttathara,  
Vallakkadavu Post, Trivandrum District  
Kerala – 695008

**And**

**Ramco Cements Limited**  
Auras Corporate Centre, 5<sup>th</sup> Floor  
98-A, Dr. Radhakrishnan Road  
Mylapore, Chennai District  
Tamil Nadu - 600 004

**Opposite Party No. 1**

**The Kerala Cement Dealers Association**  
Mission Quarters, M G M Complex  
Opposite Cooperative Bank  
Trissur District  
Kerala – 680001

**Opposite Party No. 2**



## **CORAM**

**Mr. Devender Kumar Sikri**  
**Chairperson**

**Mr. Sudhir Mital**  
**Member**

**Mr. U. C. Nahta**  
**Member**

### **Appearances during the final hearing on 13<sup>th</sup> December, 2017:**

*For Mr. Saifudheen-E and Mr. Muraleedharan K* : Mr. Rakesh Kumar, Advocate

*For Mr. K. M. Chakrapani* : Mr. K. Lakshmi Narayan,  
Advocate

*For Ramco Cements Limited* : Mr. T. Srinivasa Murthy,  
Advocate along with Mr. Anand  
K, Advocate

*For KCDA* : Mr. Harris P. M., Advocate

*For Dalmia Cements (Bharat) Ltd.* : Ms. Kalayani Singh, Advocate and  
Mr. Mehul Parti, Advocate

## **ORDER**

### **A. Facts:**

1. Information in Case No. 75 of 2012 was filed by Mr. Saifudheen E., Proprietor of M/s. Popular Traders, under Section 19(1)(a) of the



Competition Act, 2002 ('Act') against Ramco Cements Limited ('Ramco') and the Kerala Cement Dealers' Association ('KCDA'), alleging contravention of the provisions of Sections 3 and 4 of the Act. The gist of the allegation was that KCDA was interrupting or blocking the supply of cement to Mr. Saifudheen by Ramco as he ignored the instructions of KCDA to sell cement at an unjust price.

2. Upon considering the above information, the Commission was convinced that there exists a *prima facie* case of contravention of Section 3(3) of the Act, as KCDA appeared to have given threats to its members to stop dealing with Ramco if it continued to supply cement to Mr. Saifudheen. Accordingly, the Commission passed an Order dated 06<sup>th</sup> May, 2013 under Section 26(1) of the Act, directing the Director General ('DG') to cause an investigation into the matter and submit a report.
3. Subsequently, the Commission received another information bearing Case No. 56 of 2013 from Mr. K. M. Chakrapani, Proprietor of M/s. Coir India (The Cement People) against Ramco. It was alleged that Ramco stopped supplies to M/s. Coir India as it was not a member of KCDA. Considering the similarity of allegations, the Commission, *vide* its Order dated 06<sup>th</sup> September, 2013, clubbing this matter with Case No. 75 of 2012, sent the matter for investigation to the DG.
4. Later, the Commission received yet another information in Case No. 106/2013 from Mr. Muraleedharan K., Proprietor of M/s S. V. S. Enterprises against Ramco and KCDA. It was alleged that KCDA forced Ramco to stop supplies to Mr. Muraleedharan, as he did not follow the instructions of KCDA to sell cement at an unjust price. Considering the substantial similarity of allegations, the Commission, *vide* its Order dated 05<sup>th</sup>



February, 2014, clubbed this matter also with Case No. 75 of 2012 and Case No. 56 of 2013 and referred the same for investigation.

## **B. Findings of Investigation:**

5. After seeking due extension of time, the DG submitted a common Investigation Report on 30<sup>th</sup> March, 2015. A summary of the major findings of the DG is as under:

5.1. In Case No. 75/2012, neither the Informant *viz.* Mr. Saifudheen E. could provide any evidence nor is any evidence available otherwise to suggest that KCDA obstructed supply of cement by Ramco. The allegation that Ramco stopped supplies at the behest of KCDA could not be established. On being asked, Ramco stated that supplies were stopped to Mr. Saifudheen E. as he was asking for additional discount and delivery of cement at his branch in a different location. Although Mr. Saifudheen E. alleged price control by KCDA, the investigation observed great variation in prices of cement even on the same day by the same dealer.

5.2. In Case No. 56/2013, the investigation raised doubts regarding the claim of the Informant *viz.* Mr. K M Chakrapani that Ramco stopped supplies to it from May 2013, at the behest of KCDA. Mr. Chakrapani alluded that he refused to become a member of KCDA in 2009 and hence, KCDA urged Ramco to stop supplies to it. However, KCDA has neither been made a party to the information nor its name finds a mention in the legal notices sent by Mr. K M Chakrapani to Ramco. It is also illogical that KCDA would urge Ramco to stop supplies to Mr. K M Chakrapani after around 4 years



of his refusal to join KCDA. The investigation also observed that there are twenty seven other major dealers of Ramco in Kerala, who are not members of KCDA and do not face any problem in receiving supplies from Ramco.

5.3. In Case No. 106/2013, the investigation has revealed that the dealership of Mr. Muraleedharan was terminated because of his continuous misbehaviour with Ramco. Although he alleged that KCDA urged Ramco to terminate his dealership as he was raising contentious issues during the meetings of KCDA, no material was adduced by him to support such allegation. A review of the correspondence relating to the termination of dealership of Mr. Muraleedharan shows that the same was done due to low turnover of S V S Enterprises. Even in his response to Ramco after the termination of dealership, Mr. Muraleedharan did not blame or mention anything regarding KCDA. Thus, the investigation concluded that Ramco terminated the dealership of Mr. Muraleedharan in normal course and KCDA did not have any involvement in the same.

5.4. Further, it was noted that there are more than twenty five cement companies active in the State of Kerala and there is no bar on dealers for dealing in multiple brands. Further, there are a large number of cement dealers in Kerala and not all of them are members of KCDA. For instance, out of four hundred dealers in Thiruvananthapuram, only two hundred are members of KCDA. Against this backdrop, the investigation concluded that there is fierce competition between the cement manufacturers and cement dealers in the State of Kerala and such competition would not be curtailed by stopping supplies to one



or two cement dealers by any cement manufacturer. Additionally, Ramco commanded only around 20% market share during the relevant period and hence, no appreciable adverse effect on competition is probable by stopping supplies by it to one or two cement dealers.

### **C. Supplementary Investigation:**

6. Upon considering the Investigation Report, the Commission was of the view that the investigation conducted was not in line with the directions passed under Section 26(1) of the Act. The Commission, *vide* its Order dated 13<sup>th</sup> May, 2015, *inter alia*, observed the following deficiencies in the investigation:

- “i. It has not been brought out clearly whether distributors/dealers who were members of the Kerala Cement Dealers Association (KCDA) at the relevant time influenced the supply of quantity of the cement, pricing and continuation of membership as well as NOC requirement from the association.*
- ii. KCDA is an association, and being an association, meetings of its executive committee/governing body as well as members ought to have been held. No light has been thrown on details of meetings and minutes thereof. Facts have also not been brought out in report in the light of the statements given by the member/office bearer(s) of KCDA.*



- iii. *Statements given by cement dealers other than Ramco Cement have not been examined in the light of the allegations made by the informant.*
- iv. *Statements of Mr. S. Nainar, Ex-executive body member, is not relied upon in the investigation report. For instance question no. 15 (Annexure A43, Page 317 (pdf) read as Is there any practice of issuing NOC by the association without which companies do not entertain dealers? The answer given to this question states: No such system of NOC was there till 2012. However, since 2012 there has been a system of indirect NOC". It shows that issue of issuance of NOC by KCDA directly or indirectly has been checked only upto 2012 whereas it would have been appropriate if the same is checked/verified for the subsequent period as well.*
- v. *Receipts of fees/donations collected by the KCDA from its members are not part of the report. The rationale of donations received by KCDA has also not been examined in entirety.*
- vi. *It appears that the DG did not explore all the possibilities to examine all the relevant witnesses and has also not exercised his powers conferred under the Act to collect information and call the witnesses. DG has not specifically examined the office bearers of KCDA in the light of Section 48 of the Act.*
- vii. *All the statement given by the parties/witnesses have not been verified with supporting evidences. The question/issue raised/arisen during investigation should be examined to a logical conclusion."*



In view of these discrepancies, the DG was directed to examine all the relevant issues including the deficiencies pointed out.

7. After investigating the issues/deficiencies pointed out by the Commission, the DG submitted its Supplementary Investigation Report on 27<sup>th</sup> August, 2015. A summary of the findings/ observations of the DG is as under:

- 7.1. Appointment, cancellation and termination of dealers is done by cement manufacturers and KCDA has no role in the same. Cement supplies to dealers are based on market considerations and no coercion or directive from KCDA was found. Further, there are many dealers who are not members of KCDA but are doing business smoothly without any problem.
- 7.2. After a careful perusal of the minutes of the meetings, nothing could be found which could establish that KCDA was involved in stoppage or reduction of supply of cement to any member or non-member.
- 7.3. In order to address the issue of not examining dealers other than Ramco Cement, three more cement dealers were examined on oath. Based on a detailed examination of the statements of all such witnesses, it cannot be said that KCDA was behind the stoppage of supplies by Ramco.
- 7.4. None of the Informants could submit even a single piece of evidence on the basis of which role of KCDA could have been established in allotment of dealership.



सत्यमेव जयते



- 7.5. During the investigation, no cement dealer came forward to suggest that KCDA forced therein to make any contribution towards building fund. Further, Mr. Sirajudheen, the brother of Mr. Saifudheen, could not provide any material to support his contention that since they refused to honour the demand of KCDA to pay Rs. 1,00,000/- towards building fund, therefore, it urged Ramco to stop supplies to them.
- 7.6. Since investigation could not establish violation of any provision of the Act, identification of persons for the purpose of Section 48 of the Act has not been done.
- 7.7. With respect to verification of statements given by parties/ witnesses, it is important to note that no documentary evidence is available with the Informants or Opposite Parties. Therefore, statements of the relevant persons have been recorded on oath. Persons referred to in these statements have been called for and their statements were also recorded on oath. Opportunity for cross-examination was afforded to the concerned persons with a view to get a clear picture of the factual position. Thus, the findings of investigation have been arrived at only after a detailed examination of the statements in light of the allegations.

Overall, the supplementary investigation concluded that no new fact surfaced, which could impact or change the conclusion arrived in the main Investigation Report.



#### **D. Second Supplementary Investigation:**

8. The Commission, *vide* its Order dated 17<sup>th</sup> September, 2015, forwarded the main and Supplementary Investigation Report to the concerned parties for their suggestions and objections upon the same. Upon considering the submissions received, Commission heard the parties on 12<sup>th</sup> January, 2016. All the Informants sought further investigation stating that the investigation had failed purportedly to appreciate the evidence in a proper manner. They filed additional material such as letters sent to KCDA seeking assistance in getting dealership, correspondence of KCDA to Ramco on cement price, transcript of the deliberations held during the meeting of cement dealers where the representative of Dalmia Cements (Bharat) Limited (“**Dalmia**”) and Ramco spoke, *etc.*, to suggest interference of KCDA in supply of cement by Ramco, appointment of cement dealers and determination of sale price of dealers. To verify the new material and marshalling of relevant facts, the Commission directed the DG to cause further investigation in the matter and submit a report, by passing an order dated 23<sup>rd</sup> February, 2016, under Section 26(7) of the Act.
  
9. After seeking due extension of time, the DG filed its second Supplementary Investigation Report on 29<sup>th</sup> June, 2017. This time, DG found contravention of Section 3 of the Act by Ramco, KCDA and Dalmia Cements (Bharat) Limited (“**Dalmia**”) on the basis of their conduct during a meeting held on 23<sup>rd</sup> October, 2013 at Horizon Hotel, Thiruvananthapuram. This meeting was organised by the said cement manufacturers with the assistance of the Thiruvananthapuram unit of KCDA *i.e.* Thiruvananthapuram Cement Dealers Association (“**TCDA**”). In the meeting, officers/ office bearers, as the case may be, of the said parties were found to exhort cement dealers not to sell cement below the invoice price. Such conduct was found to be in



contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act. However, DG did not find any merit in any of the other material submitted by the Informants and noted by the Commission in its Order dated 23<sup>rd</sup> February, 2016. Based on a detailed examination of the material adduced by the Informants as well as the information provided by third party dealers, second Supplementary Investigation Report concluded that KCDA has no role in award of cement dealership.

10. After considering the second Supplementary Investigation Report, the Commission forwarded the same to the parties for filing their suggestions/objections thereto. A copy of the said report was also forwarded to Dalmia as its conduct was also found to be in contravention of the provisions of the Act by the DG. Copies of report were also forwarded to the officials/representatives of Dalmia, Ramco, KCDA and TCDA, who were identified as persons liable under Section 48 of the Act, viz. Mr. Francis M.R., President, KCDA; M. V. Sakeer Hussain, General Secretary, KCDA; Mr. Jayan S. Oorambu, President, TCDA; Mr. K. J. Sebastian, General Secretary, TCDA; Mr. Ghyanendra Nath Bajpai, Chairman, Dalmia; Mr. Gautam Dalmia, Managing Director, Dalmia; Mr. Puneet Yadu Dalmia, Managing Director, Dalmia; Mr. Abraham Kurian, Regional Sales Manager, Dalmia; and Mr. Venkatraman K. S., Assistant General Manager, Ramco. The Commission decided to hear all these parties on 10<sup>th</sup> October, 2017, which was later adjourned to 13<sup>th</sup> December, 2017, at the request of the parties.
11. The Informants in all the three cases, filed their written submissions on 28<sup>th</sup> September, 2017. Ramco filed its written objections to the Supplementary Investigation Report on 29<sup>th</sup> September, 2017; KCDA filed its objections on 27<sup>th</sup> September, 2017; Dalmia, on the other hand, moved an application dated 04<sup>th</sup> December, 2017 seeking recall of the Commission's Orders dated



23<sup>rd</sup> February, 2016 and 24<sup>th</sup> August, 2017 pursuant to which it has been made a party in the case.

12. The suggestions and objections of the parties on the findings of the Second Supplementary Investigation Report shall be referred to in detail and dealt with while analysing the matters on merits.

### **E. Analysis of the Commission**

13. It is observed that the instant cases primarily focus on two allegations; first, the role of KCDA in obstructing supply of cement to dealers, thereby limiting/controlling the supply of cement in the State of Kerala and secondly, fixation of sale prices of cement dealers. On the first issue, the investigation followed by two supplementary investigations have consistently concluded that there is no material to suggest that KCDA has any role in award or termination of dealership. Similarly, there is no material to establish that KCDA urged the cement manufacturers to stop supplies to the Informants or other cement dealers. On the contrary, investigation has found that there are several cement dealers in Kerala, who are not members of KCDA but are still doing their business without any hassle. It has also been found that Ramco terminated the dealership of Informants in the normal course of business because of continuous misbehaviour or low turnover or seeking additional discounts. Having due regard to the findings, Commission is of the view that the material available on record is not sufficient to conclusively establish any role played by KCDA in termination of cement dealership, insisting its consent/NOC as a mandatory requirement for award of cement dealership or stoppage of supplies to the dealers. Accordingly, no contravention of the provisions of Section 3(3)(b) of the Act is made out against KCDA on the said aspects.



14. The Informants in all the three cases have raised concerns regarding the way evidence provided by them has been evaluated by the DG. The Informant in Case No. 56/2013 also sought to furnish correspondence dated 8<sup>th</sup> May, 2014 and an undated letter of KCDA. Largely, all these correspondence and contentions of the Informants allude to KCDA's role in obstructing cement supplies to the Informants or other dealers. However, the Commission does not see any merit in them in view of the findings of the detailed investigation as well as two supplementary investigations.
15. On the second issue of price fixation, the second supplementary investigation has concluded a cartel amongst Ramco, Dalmia and KCDA, based on the statements of their officers/ representatives to cement dealers to avoid sales below their invoice price. Such statements were made during the meeting held on 23<sup>rd</sup> October, 2013 at Horizon Hotel, Thiruvananthapuram. It has been suggested that it takes the form of a cartel when the officials of different cement companies and cement dealers association of the state/ district, from a common platform, exhort all cement dealers to sell at their respective invoice prices or above and not to compete with each other lest they face withdrawal of the discount offered by Ramco and Dalmia. Such statements delivered by different officials of cement companies and KCDA have been found to fully disclose the strategy of each company to others of not reducing the price below invoice price. This, according to the DG, amounts to a meeting of minds and an agreement amongst Ramco, Dalmia and KCDA, with the objective of directly/indirectly determining the sales price of cement in the State of Kerala and bring it up to the level of invoice price.



16. In view of the above finding, it has also been concluded that Ramco and Dalmia were seen to be coercing the dealers not to pass on discount to the customers and not to compete with each other. This has been regarded to have an appreciable adverse effect on competition as it limits the benefits that otherwise would have accrued to the consumers. As such the conduct of officials/ representatives of Ramco, Dalmia as well as KCDA has been found to be in contravention of Section 3(3)(a) read with Section 3(1) of the Act.

17. The Commission has perused the Investigation Reports filed by the DG, suggestions/ objections of the parties thereto and the other material available on record including the oral arguments made by the parties. On consideration of the aforesaid, following issue arise for determination in the present matter:

- *Whether the conduct of KCDA, Ramco and Dalmia, during the meeting held on 23<sup>rd</sup> October, 2013 at Horizon Hotel, Thiruvananthapuram, is in contravention of Section 3(3) read with 3(1) of the Act?*

***Ramco's Response:***

18. Ramco vehemently objected to the conclusion of the DG that there was a cartel amongst Ramco, Dalmia and KCDA, with the objective of determining sales price of cement. Such a finding has been contended to be ill-conceived, based on surmises/conjectures and unsupported by any cogent evidence. The summary of objections of Ramco is as under:



- 18.1 Ramco manufactures cement and sells it to whole-salers and non-trade consumers. KCDA, on the other hand, is neither engaged in the manufacture nor sale of cement. It is an association of retailers/dealers of cement. At best, members of KCDA may be characterised as enterprises or persons at different stages or levels of production chain in different markets. Hence, any issue between Ramco and its dealers, if at all, would be governed by provisions of Section 3(4) of the Act. Thus, there is a fundamental jurisdictional error in finding a contravention of Section 3(3) of the Act by cement dealers and KCDA, which applies only to arrangements between persons or enterprises engaged in identical or similar trade of goods or provision of services.
- 18.2 The DG has relied upon an incomplete transcript of the meeting held on 22<sup>nd</sup> October, 2013, as provided by the Informant, to reach the conclusion that Ramco, Dalmia and KCDA cartelised to determine the cement prices. In its defence, Ramco had made written submissions to the DG providing complete details. However, DG has relied upon selective parts from the speech of Mr. Venkatraman, Assistant General Manager of Ramco, to arrive at an unsustainable conclusion of cartel.
- 18.3 Invoice price is arrived at on the basis of a long and well established price determination system and the same has nothing to do with dealers of the cement manufacturer or association of cement dealers. Ramco has around 8500 dealers of different categories across the State of Kerala. Most of these dealers are multi-brand dealers. Given the presence and competition between a number of cement brands and thousands of dealers across Kerala, it is simply



impossible for two out of many cement manufacturers to cartelise with the dealers' association to fix the selling prices and that too, with an exhortation to not sell below the invoice price.

- 18.4 Ramco used to compensate the dealers by way of giving credit note to absorb the losses incurred on account of price fluctuations in the market. However, by the time impugned meeting was held, Ramco had already stopped issuing credit notes as it could not continue to bear the losses of dealers arising out of sales below the invoice price. This coincided with the change in the system of taxation wherein the Kerala government, by law, started adding post invoice discount given by cement companies to their dealers, to the turnover of dealers. Thus, the practice of issuing credit notes led to dealers being forced to pay the value added tax (VAT) on an amount on which the Ramco had already paid VAT. To overcome these difficulties, Ramco was suggesting its dealers to desist sales below the invoice price and offer appropriate price after taking into account their costs and margins.
- 18.5 The DG failed to appreciate what the invoice price really is. The invoice price is a price at which a dealer obtains cement. Any sale price of a dealer which is below the invoice price, absent any discount offered to him by the manufacturer, is bound to be a loss making sale. An exhortation to avoid loss making sales cannot be characterized as a price fixation conspiracy.
- 18.6 The DG has provided absolutely no basis for the assumption that dealers compete with each other by passing on the discount given to them by Ramco. It is submitted that exhorting dealers not to sell below the invoice price cannot be construed as a message to avoid



competition amongst dealers and it is open for them to decide at what price they have to sell cement. The only message given was that Ramco would not compensate the loss of a dealer arising out of sales below invoice price.

Overall, it has been argued that it is not a case of price fixation or price determination and a selective reference to the impugned conduct, *de hors* the context, would result in gross and grave error and consequently, injustice.

***KCDA's Response:***

19. KCDA too objected to the conclusion of cartel on the basis of meeting at Horizon Hotel, Trivandrum. The concerned office bearers of KCDA viz. Mr. M. R. Francis, President and Mr. M.V. Sakkeer Hussain, Secretary; and of TCDA viz. Mr. Jayan Oorambu, President and Mr. Sebastian, Secretary, have also made substantially similar objections to the contravention findings of the DG. The summary of their objections is as under:

19.1 The DG has arrived at a finding of cartel based on a single meeting held on 23<sup>rd</sup> October, 2013 at Horizon Hotel, Trivandrum. This meeting was never held under the auspices of KCDA, nor under its overt or covert support or guidance, nor has it even been alleged as such. The said meeting was organised by certain cement companies with the assistance of TCDA. Mr. Francis and Mr. Sakkeer Hussain were not present at the said meeting. Further, KCDA does not have supervisory control over its district units so as to make it liable for a meeting called for by TCDA and cement manufacturers.



- 19.2 In Kerala, people are well aware of the prices across the State and elsewhere and hence, imposition of controlled regime of prices is impossible. Moreover, there is always a maximum retail price above which the dealer cannot sell.
- 19.3 The detailed investigation by DG concluded that Ramco and Dalmia were trying to control the cement prices in the State of Kerala. However, it is relevant to point that there are many cement companies doing business in the State of Kerala and most of the cement dealers handle multiple brands. Thus, it would be impossible for just two brands to control cement prices.
- 19.4 The DG itself has found that dealers in the State of Kerala are not selling at prices recommended by the manufacturers and are not influenced by the directive to sell cement at the invoice price. It has been categorically recorded in the second Supplementary Investigation Report that it cannot be concluded that the dealers were a part of a cartel or were following the *diktat* of fixing the price. Despite these findings, KCDA and TCDA have been found to be responsible for fixing prices along with Ramco and Dalmia. It is submitted that being associations, KCDA and TCDA do not have any existence without their dealers. If dealers are not a part of the cartel, then their associations are also not. Since dealers were not selling at the recommended price, competition amongst them remains un-curtailed and customers have not lost out on any benefits. Thus, there cannot be any infringement of Section 3(3)(a) read with Section 3(1) of the Act. Lastly, office bearers of the associations cannot be held personally liable as they are not



decision makers nor do they exercise absolute control over their respective associations.

20. Since the allegations in the cases relate to Section 3(3) of the Act, it is relevant to look into the said provision, which reads as under:

*“Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which –*

- (a) directly or indirectly determines purchase or sale prices;*
- (b) limits or controls production, supply, markets, technical development investment or provision of services;*
- (c) .....*
- (d) .....*

*shall be presumed to have an appreciable adverse effect on competition.*

21. For appreciating the applicability of the above provision, it is useful to consider various elements of Section 3 of the Act in detail. Section 3(1) of the Act prohibits and Section 3(2) makes void all agreements by any association of enterprises or persons in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services which cause or are likely to cause appreciable adverse effect on competition within India. Therefore, if any agreement causes or is likely to cause appreciable adverse effect on competition, then it will fall foul of Section 3 of the Act.
22. Section 3(3) of the Act applies to an agreement entered into between enterprises or associations of enterprises or persons or association of persons or between any person and enterprise, engaged in identical or similar trade of goods or provision of services. This provision also applies with equal force to



any practice carried on or decision taken by any association of enterprises or association of persons including cartels, engaged in identical or similar trade of goods and provision of services, which has the purpose of directly or indirectly fixing prices, limiting output or sharing markets or customers. Once existence of the prohibited agreement, practice or decision enumerated under Section 3(3) is established, then a rebuttable presumption is raised that such a conduct has an appreciable adverse effect on competition and is therefore, anti-competitive. In such a situation, burden of proof shifts on the Opposite Party to show that the impugned conduct does not cause any appreciable adverse effect on competition.

23. In the instant cases, issue before the Commission is whether the statements of Mr. K. S. Venkatraman of Ramco, Mr. Abraham Kurian of Dalmia and Mr. K. J. Sebastian, General Secretary of Thiruvananthapuram unit of KCDA, during the impugned meeting, amount to a contravention of Section 3(3) of the Act, because they exhorted cement dealers not to sell cement below their invoice price. There is no dispute that the officials/ representatives of KCDA, Dalmia and Ramco addressed the cement dealers and asked them not to sell below the invoice price. Each of these parties have offered their own justification for such an appeal to the cement dealers. Ramco claims that it used to compensate dealers for loss incurred by them because of making sales below the invoice price, by issuing price difference credit note. However, of late, the taxation authorities started treating such post sales discounting as part of the turnover of dealers and imposed VAT on the same. This led to the payment of VAT on the same amount twice: first, by Ramco and, later, by its dealer. Therefore, Mr. K. S. Venkatraman of Ramco asked dealers not to make sales below their invoice price. Before the investigation officer, Mr. Abraham Kurian, representative of Dalmia stated that its dealers and KCDA went for a strike in 2012 demanding the loss suffered by them because of making sales below invoice price. To avoid such an instance again, Mr. Kurian is stated to have



asked its dealers not to offer discounts to customers when Dalmia does not offer similar discounts to them. The General Secretary of TCDA, on the other hand, stated that in the interest of small dealers, he made an appeal not to sell below the invoice price.

24. It is observed that one of the essential prerequisites of Section 3(3) of the Act is: (i) an agreement between persons; or (ii) a decision or practice of an association of persons, engaged in identical or similar trade of goods or provision of services. In the instant cases, *first*, the facts and material on record are not sufficient to establish any consensus or understanding between KCDA and Ramco or other cement manufacturer, for any of the objects covered under Section 3(3) of the Act. *Second*, if one looks at the statement of the General Secretary of TCDA urging dealers not to sell cement below invoice price, during the impugned meeting, it is difficult to assume the same as a decision or practice of KCDA, as has been portrayed by the investigation. The Commission is of the view that such one-off instance is not sufficient to conclusively establish a decision or practice by KCDA to restrain competition amongst dealers. This is more so when the survey conducted by DG reveals that the price of Ramco cement during October to December, 2013 was different across the State of Kerala. Details of this are reproduced below:

<b>Price of Ramco Cement in various districts of Kerala (Oct. 2013 to Dec. 2013)</b>					
<b>S.No.</b>	<b>Name of Dealers</b>	<b>Address</b>	<b>Date/Period of Sale</b>	<b>Price (In Rs.)</b>	<b>Quantity (in bags)</b>
1.	M/s. Sree Sai Agencies	K. Venegopalan Nair, Seerja Bhavan, Thazham PO, Malayapuzha, Dist. Pathanamthitta-689566 Kerala	05.11.2013 12.11.2013 12.12.2013	<b>360.00</b> <b>358.00</b> <b>352.00</b>	40 25 35
2.	Pampoor Enterprise	Chitra Nair Venmony PO, Mavelikara Dist., Kerala - 689809	31.10.2013 31.10.2013 15.11.2013	<b>370.00</b> <b>364.50</b> <b>360.00</b>	100 100 100



सत्यमेव जयते



			25.11.2013	<b>360.00</b>	100
			13.12.2013	<b>350.00</b>	100
			26.12.2013	<b>350.00</b>	100
3.	Thuruthipallil Agencies	Mrs. Gracy Chacko Thuruthipallil House, Onnukal PO. Pathanamthitta Dist. Kerala - 689647	08.11.2013 26.11.2013 21.12.2013	<b>364.64</b> <b>345.79</b> <b>343.50</b>	50 14 93
4.	Puthuran Traders	P.M. Babu Bldg. No. IV/424, Peurva PO, Kottayam, Kerala - 686610	24.12.2013 29.12.2013	<b>332.05</b> <b>336.63</b>	100 60
5.	Mundoorakkan H/W & Electricals	Vidyadharan, T.N. No. IV/413,414,415M Kanjiram Pottaserry P.O. Palghat-678598, Kerala	18.11.2013 25.12.2013 30.12.2013	<b>360.00</b> <b>360.00</b> <b>360.00</b>	18 10 150
6.	M/s. Nambusseril Agencies	Kanjiram, Pottaserry P.O. Palghat-678598, Kerala	29.10.2013 06.11.2013 25.12.2013	<b>353.00</b> <b>337.78</b> <b>337.77</b>	50 100 48
7.	Nammanariyil Metals	N. M. Poullose, Manamangalam PO, VIII/422A, Murukumpara Cherunkuzhy Road, Dist. Trichur-680014, Kerala	23.10.2013 05.12.2013	<b>337.56</b> <b>329.97</b>	50 40
8.	Wayanad Tile Depot	N. M. Saleem Main Road, Kalapetta Wyanad Dist. Kalpetta, Kerala	01.11.2013 27.11.2013 12.12.2013 18.12.2013	<b>360.05</b> <b>354.95</b> <b>360.67</b> <b>360.67</b>	200 120 110 170
9.	M/s. P.M. Traders	Parambil House, T.C. Road, Tiruangadi, Malapuram, Kerala - 676306,	30.12.2013	<b>344.98</b>	25
10.	Kappoorath Traders	Pathumma Kutty N H. Kayumpuram, Kadampuzha Road, Dist. Malapuram, Kerala - 6786557	24.10.2013 02.11.2013 10.11.2013 22.11.2013 22.11.2013	<b>365.25</b> <b>357.14</b> <b>360.66</b> <b>360.64</b> <b>360.65</b>	65 70 30 65 20
11.	Y. Hussain	Cement Dealer Thodiyoor North, Ward No .VIII	11.11.2013	<b>343.50</b>	50



		Karunagapally, Kollam-690523, Thodiyoor North, Kerala - 690523			
12.	Melethil Agencies -	Mathe Abraham, Melethil House, Aranmula PO, Distt. Pathanamthitta, Kerala - 689533	13.12.2013 27.12.2013	<b>350.00</b> <b>345.00</b>	20 30

25. As regards statements of the officials of Ramco and Dalmia, it is observed that they both urged their dealers not to sell cement below the invoice price and if any dealer does so, company would not bear the loss suffered by them. The facts on record do not suggest any collusion between Ramco and Dalmia to determine the price at which they sell cement to their respective dealers. The impugned conduct in itself does not appear to be an attempt to fix the price at which the dealers have to sell to their consumers. It is open for the dealers to compete by adopting any price between the respective invoice price and maximum retail price. The Commission notes that the speech of Mr. Venkataraman of Ramco and Mr. Abraham Kurian of Dalmia, during the impugned meeting, is more of a message to convey that the dealers would not be compensated for losses arising out of sales below their invoice price. It is observed that cement manufacturers have to work closely with their dealers to avoid undesirable externalities arising out of independent business decisions by the latter. In the present cases, it has been argued that dealers' sales below their invoice price and the post-sale discounting by the cement manufacturers had led to payment of VAT twice on the same amount. Thus, there can be a commercial rationale for a manufacturer asking its dealers to price the product in a particular way. However, from competition law perspective what is of concern is two competitors jointly withdrawing post sales discounts, prevailing hitherto, in the same fora. Having said that, Commission is of the view that one-off instance of only two, among many competitors, withdrawing post sale discounts alone is not sufficient to establish an anti-competitive agreement



between Ramco and Dalmia and all the more so because of the rationale offered by them.

26. The Commission is of the view that detailed investigation followed by two further investigations could not discover material that could persuasively establish indulgence into any anti-competitive conduct covered under the provisions of the Act. Nevertheless, it is observed that common appeal of KCDA, Dalmia and Ramco is condemnable as the same is contrary to the spirit of competition.
27. Since no contravention is established based on the material available on record, Commission does not consider it necessary to take up the application of Dalmia seeking recall of the Orders whereby it has been made a party to the present proceedings.
28. In conclusion, the Commission is of the view that no case of contravention of Section 3(3) read with Section 3(1) of the Act is made out in the present case. Accordingly, the matter is closed.
29. The Secretary is directed to inform the parties accordingly.

**Sd/-**  
**(Devender Kumar Sikri)**  
**Chairperson**

**Sd/-**  
**(Sudhir Mital)**  
**Member**

**Sd/-**  
**(U. C. Nahta)**  
**Member**

**New Delhi**  
**Date: 24/05/2018**