

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPETITION APPEAL (AT) NO.18/2019

&

IA No.2237/2023

(Arising out of order dated 15.01.2019 passed in Suo Motu Case No.03 of 2017 by Competition Commission of India, New Delhi)

In the matter of:

Godrej & Boyce Manufacturing Co Ltd,
Pirojshanagar, Vikhroli,
Mumbai 400079

Appellant

Vs.

1. Competition Commission of India,
9th Floor,
Office Block -1
Kidwai Nagar (East),
Opposite Ring Road,
New Delhi-110023
2. Panasonic Corporation,
1006, Oaza Kadoma,
Kadoma-shi, Osaka 5718501 Japan
3. Panasonic Energy India co Ltd
GIDC, Makarpura,
Vadodra 390010

Respondents

For Appellant: Mr. Rajsekhar Rao, Sr. Advocate, Ms Nisha Kaur Uberoi, Mr. gautam Chawla, Mr. Ankush Walia, Mr Rishabh Suneja, Mr. Madhav Kapoor, Mr. arsh Rampal, Advcoates,

For Respondent: Mr. ankur sood, Mr. Varun Agarwal, Advocates for CCI. Mr. Tarun Donadi, Mr. Jai Hindocha, Advocates for R2 and R3.

With

COMPETITION APPEAL (AT) NO.19/2019

&

IA No.2225, 2325 of 2023

(Arising out of order dated 15.01.2019 passed in Suo Motu Case No.03 of 2017 by Competition Commission of India, New Delhi)

In the matter of:

Rajiv Jhangiani,
(Executive Vice President and
Business Head)
Godrej & Boyce Manufacturing Co Ltd,
Pirojshanagar, Vikhroli,
Mumbai 400079
Mr. Sorab Parekh
(Associate Vice President
Godrej & Boyce Manufacturing Co Ltd (Prima)
Retired
R/o 32 Jamasji Apartments,
32, Sleater Road,
Mumbai 400007

Mr. Sunil Patil
Pirojshanagar, Vikhroli,
Mumbai 400079

Mr rakesh A
Pirojshanagar, Vikhroli,
Mumbai 400079

Appellants

Vs.

1. Competition Commission of India,
9th Floor,
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Opposite Ring Road,
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2. Panasonic Energy India Co Ltd
GIDC Makarpura
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4. Godrej & Boyce Manufacturing Co Ltd,
Pirojshanagar, Vikhroli,
Mumbai 400079
Panasonic Energy India co Ltd
GIDC, Makarpura,
Vadodra 390010

Respondents

For Appellant: Mr. Rajsekhar Rao, Sr. Advocate, Ms Nisha Kaur Uberoi, Mr. gautam Chawla, Mr. Ankush Walia, Mr Rishabh Suneja, Mr. Madhav Kapoor, Mr. arsh Rampal, Advcoates,

For Respondent: Mr. ankur sood, Mr. Varun Agarwal, Advocates for CCI. Mr. Tarun Donadi, Mr. Jai Hindocha, Advocates for R2 and R3.

JUDGEMENT

JUSTICE YOGESH KHANNA, MEMBER (JUDICIAL)

These two appeals are against the impugned judgement dated 15.01.2019 passed by the Ld. CCI.

2. The learned senior counsel for the appellant fairly conceded that the appellant is not interested to contest on merits, and is inclined to deposit the monetary penalty within three weeks provided the interest amount payable on monetary penalty is *waived*, lest the Ld. Tribunal may reduce the penalty. It is submitted since the instant Appeal is pending consideration since 2019, the interest is mounting, hence the appellant thought it appropriate it should pay the penalty and get a waiver of interest. Qua power to waive interest the appellant relies upon Regulation 5 of CCI (Manner of Recovery of Monetary Penalty) Regulations, 2011 as under:

“5. If the amount specified in any demand notice is not paid within the period specified by the Commission, the enterprise concerned shall be liable to pay simple interest at one and one half per cent, for every month or part of a month comprised in the period commencing from the day immediately after the expiry of the period mentioned in demand notice and ending with the day on which the penalty is paid:

*Provided that the Commission may **reduce** or **wave** the amount of interest payable by the enterprise concerned **if it is satisfied that default in the payment of such amount was due to circumstances beyond the control of the enterprise concerned:***

Provided further that where as a result of an order of the Competition Appellate Tribunal or the High Court or the Supreme Court of India, as the case may be the amount of penalty payable has been reduced, the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded in accordance with regulation 14.

3. It is argued if this Tribunal is not inclined to reduce the interest, then the appellant would press to reduce the penalty of **4%** on the turn over for each year as the penalty is on a higher side. It is argued the appellant was never a part of cartel with Respondents No.2 and 3.

4. The relevant dates as would be required to decide the controversy are as under:-

- i) On 15.01.2019 the impugned order was passed thereby imposing the penalty of Rs.85,01,364/- upon the appellant;*
- ii) On 26.03.2019 demand notice was sent for payment of penalty.*
- iii) On 25.03.2019 the present appeal was filed.*
- iv) On 05.04.2019 the stay order was passed directing the appellant to pay 10% of the amount of penalty.*
- v) On 12.04.2019, 10% of the penalty amount was deposited.*

5. It is the submission of the learned senior counsel for the appellant that major players of the alleged cartel were Respondents No.2 and 3 and not the appellant, as is even noted in the impugned order, that appellant had no bargaining power and was rather *running in losses and was selling batteries at a lower rate than Respondent No.2 and 3 yet was imposed with a penalty of **4%** on the turnover.* Reference was made to the following paras of the impugned order as under:-

2. In the LP Application, it was disclosed by the Applicants that there existed a **bi-lateral ancillary cartel** between OP-2 and Godrej & Boyce Manufacturing Co. Limited (hereinafter "OP-3") in the institutional sales of dry cell batteries (hereinafter, "DCB") from at least 2012 till November 2014. OP-2 was the supplier of batteries to OP-3, as part of its institutional sales. OP-2 had a primary cartel with Eveready Industries India Ltd. (hereinafter "Eveready") and Indo National Limited (hereinafter "Nippo") whereby the three of them co-ordinated the market prices of zinc-carbon DCB. Hence, OP-2, having fore-knowledge about the time of price increase to be effected by this primary cartel, used the same as leverage to negotiate and increase the basic price of the batteries being sold by it to OP-3. OP-2 would lead OP3 to believe that the Market Operating Price (hereinafter "MOP") and Maximum Retail Price (hereinafter "MRP") of all the major manufacturers of DCB would increase in the near future and OP-3 would be in a position to pass on the increase in the basic price of DCB to the consumers in the market because of such increased MOP/ MRP.

14. Clarifying such position, the Commission now proceeds to examine the matter on merits. From the report, it is noted **that OP-2 was the contract manufacturer of zinc carbon DCB for OP-3. A PSA dated 13.01.2012** was entered into between them whereby it was decided that OP-3 would procure DCB 'R-6 UM-3-UM 'AA' Size (Economy)' and 'R-6 UM-3-UM 'AA' Size (Premium)' from OP-2 to sell in the market. OP-2 and OP-3 also agreed on other specific details by way of Supplementary PSAs dated 13.01.2012 and 23.03.2013. Clause 8.2 of the PSA, which is reproduced below, has been found by the DG to be anti-competitive: "Either party herein agrees and undertakes that it will not take any steps which are detrimental to the other party's market interests.

27. Regarding OP-3's contention that the actual rates of DCB of OP-3 as shown in a table placed on record by OP-3 of the net landed prices of the top distributor of OP-3 in Madhya Pradesh, Maharashtra, Rajasthan and Kerala shows that OP-3 did not cartelise and its prices were lower, the Commission notes that in the absence of OP-2 and other DCB manufacturers' net landed prices for comparison with OP-3's such rates, no conclusion from such table placed on record can be drawn. Once explicit unambiguous e-mails between OP-2 and OP-3 discussing each other's MOPs and asking for corrective action to maintain price parity are read alongwith Clause 8.2 in the PSA, and in view of the fact that the existence of such cartel has been accepted by OP2, the contention of OP-3 that its rates shown in the table prove otherwise does not seem acceptable. The Commission finds merit in the submission put forth by the learned counsel for OP-2 that OP-1 and OP-2 had no motive to file a false LP Application before the Commission as filing of such an application causes reputational harm.

31. In view of the above evidences i.e. **Clause 8.2 of the PSA and the e-mail communications between OP-2 and OP-3 evidencing existence of a price monitoring system and maintenance of price parity in the market, the Commission holds that there is**

contravention of the provisions of Section 3 (3) (a) read with Section 3 (1) by OP-2 and OP-.

32. OP-3 has raised another contention before the Commission that since it was never involved in the manufacture of zinc-chloride DCB but could only participate in the market by procuring supplies from OP-2 and selling, it was impossible for OP-3 to inflict any supply constraints or cause any AAEC in the market. In this regard, the Commission notes that in cases of violation of Section 3 (3) of the Act, there is a presumption of AAEC being caused. Also, the DG by analysing factors stated under Section 19 (3) of the Act, has clearly established AAEC been caused by such cartelisation of OP-2 and OP-3. Such anti-competitive arrangement between OP-2 and OP-3 led to an increase in the prices of zinc carbon DCB to a very high level causing loss to consumers, foreclosed competition in the market as consumer choice was compromised and did not result in accrual of any benefits to the consumers or promotion of any technical, scientific or economic development. Therefore, such contention raised by OP-3 is not acceptable.

33. Another contention raised by OP-3 is that it consistently suffered losses in the Economy DCB market during the period of investigation which can be seen from its financial statements. However, the Commission notes from the DG Report that Godrej is a multi-product company. It has 14 business units, one of which is Godrej Prima. Godrej Prima has 4 business units – Godrej AV Solutions, Godrej Vending Machines, Godrej Vending Services and Godrej Batteries (OP-3). OP-3 itself is in the business of sale of multiple products i.e. consumer batteries and allied products such as chargers, torches (flashlights) and portable power banks. In view of the Commission, **even if OP-3 did consistently sustain losses in the Economy DCB market, it could have offset the same against the high profits earned by it in any other product segment.** Further, though usually the motive behind cartelisation is earning of supra normal or high profits; however, in view of the clear evidences on record of cartelisation in the present case, mere absence of profits by one entity can be of no consequence.

34. Therefore, the Commission holds that there is contravention of the provisions of Section 3 (3) (a) read with Section 3 (1) by OP-2 and OP-3 and a cartel between them existed from 13.01.2012, when the PSA was entered into till November 2014, when OP-3 stopped procuring supplies from OP-2.

42. In view of the above calculations in Table 4, it can be seen that in case of OP-2, as per the proviso to Section 27 (b), penalty of upto three times of its profit for each year of the continuance of the cartel may be imposed as the said figure is higher while in case of OP-3, penalty of upto ten percent of its turnover for each year of the continuance of the cartel may be imposed as the said figure is higher.

44. On the other hand, with regard to OP-3, keeping in mind that OP-2, being the manufacturer of dry-cell batteries and supplier of OP-3, was in the position to influence and dictate the terms of the anti-competitive PSA to OP-3 and OP-3, being a very small player having

insignificant market share in the market for dry-cell batteries was not in a bargaining/ negotiating position visa-vis OP-2, and the fact that after cessation of cartel with OP-2, OP-3 had complained to the DGAD about the possibility of a cartel in DCB market vide letter dated 25.11.2015, the Commission decides to impose upon OP-3, penalty @ 4% of the turnover for each year of the continuance of the cartel which amounts to ₹85,01,364/-.

6. Heard.

7. Before proceeding further we may refer to the evidence recorded in the present case wherein the General Manager(s) of Respondent No.2 and 3 had deposed as under:-

Q5. Since when has PECIN been supplying zinc carbon dry cell batteries to Godrej & Boyce Manufacturing Company Ltd. (Godrej)? What are the broad terms and conditions of such arrangement?

Ans. *PECIN had an agreement with Godrej in 2012, and supplies were made under the agreement till FY 2014.*

*The broad terms of the agreement were - initially the basic price was valid for 3-6 months, with a clause that it would be changed with 1 month's notice on either side on mutual consent. We were labelling the MRPs on the batteries supplied to Godrej based on their artwork provided by them. MRP fixing was their prerogative. After receiving the artwork, the final development takes around 2 months' time (may come down to even 45 days). Initially, it was mentioned on the batteries that they were manufactured by PECIN; but after receiving feedback from the market that **Godrej was undercutting our prices in some markets** claiming that their product is identical to PECIN's product, we had an agreement with Godrej that their batteries would only indicate that they are being marketed by Godrej without mentioning the manufacturer.*

Q8. You are being shown a copy of the Product Supply Agreement (PSA) dated 13/01/2012 entered into between Godrej & Boyce Manufacturing Company Ltd. and PECIN which has been furnished by PECIN along with its reply dated 15/06/2017 to this office. Para 8.2 of the PSA reads as under:

"Either party herein agrees and undertakes that it will not take any steps which are detrimental to the other party's market interests."

Pl. elaborate.

Ans. *The prime intention of Panasonic in inserting this clause was that in case Godrej starts undercutting and taking away our market, as a manufacturer we wanted to have some control. In case they disturbed our market after buying from us, we had the option to stop*

supplies to them after giving them one month's notice. This clause was inserted by us to safeguard PECIN's market interests.

Q12. You are being shown a copy of the email exchanges of 6th February, 2013 between yourself and Mr. Rakesh Krishnan A with Cc marked to 'sppatil@godrej.com' (Mr. Sunil Patil of Godrej) and Mr. Bipon Sehgal of PECIN (provided by PECIN) with trail emails. In the emails there are concerns regarding low price of batteries being offered by Godrej in Rajasthan, Madhya Pradesh and Maharashtra etc. Please offer your comments as to from whom did you get the OMR of Godrej and what was the intention behind such email communication?

Ans. Mr. Khurana received some communication from either Nippo or Eveready that **Godrej is selling at a price which is very low in all markets**. This mail was shared with me and asked me to take up the issue with Godrej. Myself communicated the matter as sent to me with Mr. Rakesh of Godrej on 6th February, 2013 about the contents of the mail received from other battery company. The intention was mainly to report to them the concern of the battery industry as well as Panasonic management about Godrej selling at low prices and not allowing the industry to increase the MOPs in the market. Hence, it was expected that they should also increase their prices, and I informed them on the direction of Mr. Khurana to improvise the rates.

Thereafter, Mr. Rakesh of Godrej responded on 6th February, 2013 that they had already increased their distributor price w.e.f. 1st February, 2013 and the rates will definitely move up. This communication received from Mr. Rakesh was forwarded to Mr. S.K. Khurana by myself.

8. We have also perused the Investigation Report of the Commission which *inter alia* notes:-

6.19.3 The market structure of dry cell segment is heavily concentrated and in the hands of **three major manufacturers**, ie. Eveready, Nippo and PECIN Besides these, there are **small players like Godrej and Geep** present in the market. The cartelization in the dry cell market resulted in creation of barriers for new entrants. The anti-competitive agreement with regard to the prices of batteries, between the OPs which was on the similar lines of Eveready and Nippo, foreclosed competition in the market as it did not provide the consumers with choices in terms of lower prices. Further, the anti-competitive agreement between the OPs has not resulted in any accrual of benefits to consumers. The cartel in the dry cell battery market has not brought any improvement in production or distribution of dry cell batteries, nor has it resulted in promotion of technical, scientific or economic development by means of production or distribution of dry cell batteries in the market. In other words, no

positive outcome in terms of collective benefits to the community as a whole, could be demonstrated in the present case.

9. Admittedly a co-accused Geep was also convicted by the Ld. Commission. However, but in appeal *viz.* Ms Pushpa M Vs CCI, Competition Appeal (AT) No.**87 of 2018** decided on 31.03.2023 in similar circumstances it was held:-

19. In the present case, the PSA entered into between Geep Industries and PECIN, while being about the manufacture and supply of dry cell batteries by PECIN to Geep Industries, it is Clause 4.3 that has been found to be offensive by the CCI, clause 4.3 of PSA is as follows:

“4.3- Since price to GBIPL is very special price and that PECIN too is in the business of selling dry cell batteries of the same category in the same market, it is advised and agreed that GBIPL will not take steps which are detrimental to PECIN’s market interest particularly with respect to the market prices which shall be reviewed and maintained at agreed levels from time to time.”

20. The Clause 4.3 of the PSA as reproduced above, is in the form of an advice which is agreed TO by Geep Industries to not take steps detrimental to PECIN’s market interest particularly with respect to market prices. Further, by the application of said clause 4.3, Geep Industries also agreed to comply with the level of prices as agreed after periodic review of market conditions by PECIN. Thus, Geep Industries is very clearly in a ‘bilateral ancillary cartel’ with the Panasonic, while Panasonic is found to be member of ‘primary cartel’ in the dry cell batteries market. Thus, even though Geep is an extremely small player in the dry cell batteries market which may not be capable of influencing the market in any appreciable manner, the fact that it agrees through the PSA to follow market prices as set by Panasonic makes it clear that such behavior is anti-competitive, and Geep Industries being in contravention of Section 3 (1), (2) and (3) is clearly established, as has been adjudicated by the CCI in the impugned order.

23. We now consider the quantum of penalty which the Appellant has argued to be very high and disproportionate to its offensive behavior, and sought reduction in the penalty amount. We note that the impugned order, in paragraph 37, records that Geep Industries is a ‘very small player’ having insignificant market share in the market for dry cell batteries and was not in a bargaining/ negotiating position with PECIN. Thus, the Impugned Order recognizes that while Geep Industries is an offender of Section 3 of the Act, it was neither in a bargaining position vis-à-vis PECIN nor having a significant market share to be able to influence prices in the said market. Therefore, it was not in a position to disagree with clause 4.3 of the PSA in view of Panasonic’s interest in influencing the prices in the dry cell batteries market as a big market shareholder. We are of the

opinion that the offensive behavior of Geep Industries should be seen in this context and background, and it would be a mitigating factor.

26. Thus, it is true that the imposition of penalty and the quantum thereof in all the cases cited above, was dependent on the facts and circumstances of each of the cited cases and the quantum of penalty was reduced in some cases. In the facts and circumstances of the present cases, we are, persuaded to hold the view that in the present case Geep Industries which holds a miniscule share of the total market, which is less than 1%, was not in a position to influence competition in the market by resorting to price fixation by participating in the 'bilateral ancillary cartel' and, therefore, this would be a mitigating factor while imposing penalty on Geep Industries.

33. We also take note of the fact that Geep Industries has turned in losses for the years 2010-11, 2011-12 & 2012-13 and given small profits in later years, and therefore it has barely managed to hold on to its meagre market share to survive in the said market. Thus, Geep Industries is only a minor player in the dry cell batteries market which, in order to run its business, was buying unbranded batteries from PECIN. PECIN, being the complainant of the Lesser Penalty Application, has received benefit and no penalty has been imposed on it by the CCI, though it is a significant player in the market. It was, through the clause 4.3 of the PSA, attempting to save its interest in the said market and also imposing an anticompetitive condition in the PSA, but Geep was not in a position to resist or contest the clause 4.3, in view of its business interest in continuing to sell dry cell batteries even if with an insignificant and miniscule market presence.

34. In view of the extenuating conditions as discussed in preceding paragraphs, we are of the view that while the quantum of penalty should be such that it acts as a deterrent and regulate anticompetitive behavior. We consider Geep Industries business dynamics and situation in the market to be such that it was neither in a negotiating strength vis-à-vis PECIN nor having a market share that could actually influence the price in the said market. In view of such a situation, and fully conscious of the fact that Geep Industries has turned losses in the first three years under review by CCI of its anti-competitive behavior, we are of the view that Geep deserves a further reduction in the imposed penalty, and we are of the opinion that penalty @1% of the turnover for each year of continuance of the cartel would be appropriate penalty in keeping with the extent and seriousness proportionality of the anti-competitive behavior of Geep Industries.

35. The penalties imposed on the respective directors, officers and employees as included in Table-6 in para 43 of the impugned order are commensurate with their offensive behavior as they were the persons responsible for entering into PSA and being knowledgeable persons were supposed to have knowledge and understanding of law in relation to behaviour of corporate entities in a market. Therefore, we are of the opinion that the penalties imposed on Ms. Pushpa M, Mr. Joeb Thanawala, and Mr. Jainuddin Thanawala by the Impugned Order need no modification.

10. After having gone through the record; the impugned order and the impugned judgement in an appeal of co-accused Geep, we now proceed to analyse the facts further. The appellant like its co-accused, Geep, was clearly in a *bi-lateral ancillary cartel* with Panasonic Energy India Co Ltd and was an institutional buyer of dry cell batteries from Panasonic. In Geep's case Clause 4.3 of the Product Supply Agreement dated 01.10.2010 noted *Geep would not take steps detrimental to Panasonic's market interest and likewise Clause 8.2 of the Product supply agreement dated 13.01.2012 executed between Godrej and Panasonic noted either party will not take any steps detrimental to other party's market interests.*

11. Admittedly Godrej was a small player in the field of dry cell market and had an insignificant market share like Geep. Godrej, admittedly, was not in a bargaining/negotiating position as compared to Panasonic. Further, Godrej suffered losses in the market for dry cell batteries and though Geep had also suffered losses for the years 2010-13 but made small profits in later years. Both the present appellant and M/s Geep were found in contravention of the Act by the Ld. CCI on the basis of the Product Supply Agreement(s) and e-mail correspondences between them and Panasonic. The appellant's Product Supply Agreement was, however, discontinued in November, 2014 though it exited the dry cell battery market in July, 2019 in India. The impugned order notes that Godrej had also filed a complaint dated 25.11.2015 before the Director General of Anti-Dumping and Allied Duties on the possibility of cartelisation in the dry cell batteries' market.

12. In *Excel Crop Care Ltd V CCI & Anr (2017) 8 SCC 47*, the Hon'ble Supreme Court of India held that the penalty imposed by the CCI must **(a)** *relate to the relevant turnover of the relevant business in the relevant market alone, and (b) determination of percentage of penalty should be based on aggravating and mitigating factors.* Thus the observation in impugned order where it notes that the losses suffered by the appellant on account of sale of dry cell batteries may have been compensated by the profits made by the appellant in another produces, is wrong, *per* Excel Crop's case. There would be no relevance of considering the overall turn over of Godrej from any businesses other than the dry cell battery business. The impugned order also notes **(a)** the appellant offered lower rates as compared to Panasonic and rest of industry **(b)** some gifting schemes for its dry cell battery were also offered by the appellant.

13. Hen

ce from the facts above one thing is clear the dry cell battery market is an oligopoly with three predominant players i.e. Eveready Industries India Ltd, Indo National Ltd and Panasonic which form a *primary cartel members*, controlling the market with combined market share of 88% as against miniscule 2% market share of appellant.

14. Admittedly, the turnover of the appellant *qua* dry cell battery was lesser than M/s Geep and rather it suffered losses in this business, though Geep was in profits in later years. Both the appellant company and M/s Geep were in similar position and asking M/s Geep to pay 1% of the turn over as a penalty and the present appellant to pay 4% to our mind did not synchronize.

Nevertheless, we are aware of the fact despite charging 4% as penalty, the amount of levy in terms of rupee(s) is far less than 1% penalty amount paid by M/s Geep but we cannot ignore Geep was in profits in later years. Thus in view of the above we hereby decrease the penalty imposed upon the appellant to 2% of the *turn-over*, while maintaining the penalty imposed upon its officials. However, we are not inclined to waive interest as pendency in appeal and continuation of stay would not be a ground for waiver. The penalty reduced is considering the peculiar facts of this case and be not treated as a precedent.

15. In view of the above the appeals stand disposed off in terms of the above. All pending applications are disposed off.

(Justice Yogesh Khanna)
Member (Judicial)

(Mr. Ajai Das Mehrotra)
Member (Technical)

Dated:05-04-2024
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