



COMPETITION COMMISSION OF INDIA

Case No. 12/2018

In Re:

**Dr. Sanjay Agarwal,
73 Kela Bagh Alakh Nath Road,
Bareilly 243001,
Uttar Pradesh**

Informant

And

**Public Works Department,
Government of Uttar Pradesh,
Nirman Bhawan, 96 MG Road, Opp. Raj Bhawan,
Lucknow 226001, Uttar Pradesh**

Opposite Party

CORAM

**Mr. Sudhir Mital
Chairperson**

**Mr. Augustine Peter
Member**

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

**Justice Mr. G.P. Mittal
Member**

Order under Section 26(2) of the Competition Act, 2002

1. Present information has been filed under Section 19(1)(a) of the Competition Act, 2002 (hereinafter the “Act”) by Dr. Sanjay Aggarwal (hereinafter, the “**Informant**”) against Public Works Department, Government of Uttar Pradesh (hereinafter, “**OP**”) alleging contravention of the provision of Section 4 of the Act.



2. The Informant is a practicing physician at Krishna Hospital, Bareilly which is owned by Trivati Corporation Pvt. Ltd., formally known as Krishna Mohan Hospitals & Allied Medical Research Centre Pvt. Ltd., Bareilly. The Informant is stated to be the Managing Director of the Company.
3. The Informant has stated that the OP is an enterprise of Government of Uttar Pradesh and is involved in building and civil construction activities. The Informant has submitted that more than thirty percent to forty percent of all public construction activities carried out in the State of Uttar Pradesh are done by the OP. The Informant has stated that all public enterprises of Uttar Pradesh Government involved in civil construction consume more than sixty percent of the total bricks produced in the State of Uttar Pradesh. Further, OP is the designated nodal agency for the State of Uttar Pradesh with respect to all civil construction agencies/ departments and their regulation and also the designated nodal agency for Fly ash product utilization. Thus, OP is alleged to be enjoying dominant position in the State of Uttar Pradesh.
4. The Informant has further submitted that the Ministry of Environment, Forests & Climate Change (MoEF&CC), *vide* various notifications issued from time to time (“**Fly ash Notifications**”) made it mandatory for the Government and Private Agencies to use Fly ash bricks & Fly ash based construction products within a radius of 300 KMs of lignite/coal based Thermal Power Generation Plants. This was done, *inter alia*, with a view to protect the environment, conserve top soil from excavation by the brick kilns, prevent dumping and disposal of Fly ash discharged from coal or lignite based thermal power plants on land. The Informant is primarily aggrieved by the non-implementation of Fly ash Notifications by the OP.
5. It has been stated that for violation of the mandate as contained in the above stated Fly ash Notifications, the jurisdiction of the National Green Tribunal, Principal Bench, New Delhi (“**NGT**”) was invoked in O.A. No.102/2014 titled *Sandplast (India) Ltd. and Others v. MoEF and Others*. In the said matter, the Hon’ble NGT passed the following order on 24th September, 2014 –



“*In the meanwhile, we direct all the State Government/Public Authorities and Corporations to ensure that the aforementioned two notifications should be adhered to strictly and every tender for construction works issued by any of the State Government/Public Authorities shall contain stipulations and specifications as contemplated under these two Notifications.*”

6. It has been further submitted that in the same case on 27th May, 2016 and 19th July, 2016, the State Government had admitted before the NGT that the PWD Department of UP is appointed as the nodal agency for Fly ash product utilisation and further assured that the OP will prepare norms for respective tender documents, schedules of specifications and construction applications, including appropriate standards and codes of practice and making provisions for use of Fly ash and Fly ash based bricks, blocks, tiles and aggregates in the schedule of approval for material and rates. However, the OP despite being a nodal agency of the State Government of UP and issuing circulars for the utilisation of Fly ash bricks in civil construction, is prescribing usage of only standard clay bricks in the civil construction activities for last several years and also in the current year.
7. It has been stated that in the State of Uttar Pradesh, OP is prescribing clay bricks in tender documents with specification of M-150 strength and thus, every Uttar Pradesh Government agency is bound to prescribe clay bricks in their respective construction activities, due to which, use of Fly ash bricks is absolutely restricted and denied.
8. On the basis of above mentioned facts, the Informant has alleged, *inter alia*, contravention of the provisions of Section 4 of the Act by the OP and has sought interim relief under Section 33 of the Act.
9. The Commission considered the matter on 29th May, 2018 and decided to seek additional information/clarification from the Informant along with the source of information, *inter alia*, regarding market share of the OP and other major players, both public and private, undertaking construction activities in the State of Uttar Pradesh. The informant submitted its response on 14th June, 2018.



10. To analyse the case under Section 4 of the Act, the first requirement is to delineate the relevant market as per Section 2 (r) of the Act. The next step is to assess the dominance of the OP in the defined relevant market as per the factors enumerated under Section 19 (4) of the Act. Once the dominance of the OPs is established, the final step is to analyse the allegations pertaining to abuse of dominance.
11. The Informant has not specifically delineated the relevant market in the information in which the OP is alleged to be dominant and is abusing such position to deny market access to bricks manufactured from Fly ash. The Commission notes that the allegations in the instant matter relate to non-compliance of Fly ash Notifications which has effect on procurement of Fly ash based bricks for construction activities by OP.
12. The Commission observes that both fly ash as well as clay bricks can be used in construction activities interchangeably and the price of the two types of bricks are placed very close to each other. Similar view was taken by the Commission in its earlier decision dated 16th August, 2017 in *In Re: Flyash Based Bricks Manufacturers & Promoters Association* (hereinafter, **Case No. 22 of 2017**). Since no new facts have been brought out by the Informant on this aspect, the Commission reiterates its earlier view that the two types of bricks are substitutable with each other. Therefore, the relevant product market in the instant matter would be '*market for procurement of bricks for construction activities*'.
13. In relation to the relevant geographic market, the Informant has submitted that the area of operation of the OP is primarily in the State of Uttar Pradesh. The Commission notes that brick is a product having high volume and low value, consequently the proportion of transportation cost in the total cost of bricks is high, making bricks unlikely to be sold in distant markets. Therefore, users would prefer to procure bricks only from kilns spread across the geographical area of a particular State for their requirements. Thus, the relevant geographic market in this case would



be the '*State of Uttar Pradesh*'. The relevant geographical market was similarly defined by the Commission in the aforesaid case.

14. Accordingly, the Commission is of the *prima facie* view that the relevant market in the present case is the '*market for procurement of bricks for construction activities in the State of Uttar Pradesh*'.
15. With regard to the assessment of dominance of OP in the aforesaid relevant market, it is observed that the Informant has not provided any information regarding procurement of bricks in the State of Uttar Pradesh. The Informant has asserted OP's dominance in the relevant market relying on the data related to the share of OP in civil construction activity undertaken by public sector enterprises in the State of Uttar Pradesh. In this context, it is noted that in the previous case also the Commission had expressed the view that, for the purpose of assessing dominance in such a matter, the construction activities undertaken by the private sector needs to be included. Accordingly, additional information was sought from the Informant regarding market share of OP and other major players in the State of Uttar Pradesh.
16. From the additional information submitted by the Informant, the Commission observes that the Informant has stated that the OP undertakes major civil construction activities in the State of Uttar Pradesh which are carried out through its different wings, which includes State Sampatti Directorate, Road, Communication, Special Area Programs, and Building wing. Further, the OP is said to be having a market share of forty seven percent (approx.) in major civil construction activities done by all State Public Departments in the State of Uttar Pradesh. This market share has been calculated by the Informant on the basis of estimated budgetary allocation in the last three financial years by the Uttar Pradesh Government in major construction activities in the State of Uttar Pradesh. It is also stated that the average contribution of Government of India Public Enterprises is about five percent. Further, the Informant has estimated that the average contribution of the major private players in major civil construction activities is about ten percent. The remaining thirty eight



percent (approx.) of civil construction activity is said to be carried out in retail by individuals or small enterprises in the unorganised sector.

17. The Commission is, however, unable to rely on the data provided by the Informant as the source of data for arriving at the share of private and individual enterprises is not mentioned. In the absence of authentic figures for these categories, total market size of construction activities in the State of Uttar Pradesh cannot be determined. Hence, the Informant fails to substantiate its claim that OP has forty seven percent market share in construction activities.
18. Moreover, the data related to the share of construction activities referred by the Informant relates to only civil construction activities and does not include other construction activities undertaken by private players in the organised and unorganised sector in the State of Uttar Pradesh. The Commission is of the view that the overall consumer base for procurement of bricks is very wide and procurement of bricks undertaken by OP would be relatively marginal. Based on the foregoing, the Commission is of the view that OP does not enjoy a dominant position in the relevant market as a procurer. Accordingly, OP does not possess the ability, as a buyer, to influence the relevant market for procurement of bricks for construction activities in the State of Uttar Pradesh.
19. As mentioned earlier, similar allegations were made in *Case No. 22 of 2017* against Departments of Government of Uttar Pradesh and Government of India and enterprises owned by them (OPs). The Commission, *vide* its order dated 16th August, 2017, held that the OPs are not individually dominant in the relevant market of procurement of bricks for construction activities in the State of Uttar Pradesh. Hence, the matter was closed under the provisions of Section 26(2) of the Act.
20. The Commission finds it appropriate to reiterate its views stated in the above mentioned case and in the absence of a dominant position being enjoyed by the OP in the relevant market, the alleged abuse need not be examined.



21. Even otherwise, looking at the nature of allegations as enumerated above *i.e.* non-compliance of Fly-ash Notifications issued by MoEF&CC and the order of NGT, the Commission is of the considered view that the remedy for alleged non-implementation of Fly-ash Notifications and non-compliance of order of NGT does not lie with the Commission as it does not raise any competition issue.
22. In the light of the above analysis, the Commission finds that no case of contravention of the provisions of Section 4 of the Act is made out against the OP in the instant matter. Accordingly, the matter is closed under the provisions of Section 26(2) of the Act.
23. The Secretary is directed to inform the Informant, accordingly.

Sd/-
(Sudhir Mital)
Chairperson

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

Sd/-
(Justice G. P. Mittal)
Member

New Delhi

Dated: 30/08/2018