



सत्यमेव जयते



COMPETITION COMMISSION OF INDIA

Case No. 22 of 2021

In Re:

**Kalpit Sultania,
H. No. G-401,
Rashmi Apartment, Harsh Vihar,
Pitampura, Saraswati Vihar S.O,
North-West Delhi,
Delhi-110034**

Informant

And

**IREL (India) Ltd.,
Plot No. 1207, ECIL Building,
Veer Savarkar Marg,
Opp. Siddhivinayak Temple,
Prabhadevi,
Mumbai, Maharashtra-400028**

Opposite Party

CORAM:

**Mr. Ashok Kumar Gupta
Chairperson**

**Ms. Sangeeta Verma
Member**

**Mr. Bhagwant Singh Bishnoi
Member**

Direction for investigation under Section 26 (1) of the Competition Act, 2002

1. The present information has been filed by Mr. Kalpit Sultania ('**Informant**') under section 19(1)(a) of the Competition Act, 2002, ('**Act**') alleging contravention of the provisions of Section 4 of the Act by IREL (India) Ltd. ('**OP**'/ '**Opposite Party**').
2. As stated in the information, OP was incorporated on 18.08.1950, as a limited liability company and is currently a Government of India Undertaking, classified as a Miniratna-I company. The Informant has claimed that the OP is, *inter alia*, engaged in mining and production of minerals viz., Ilmenite, Rutile, Zircon, Girnet and Sillimanite. The present

information relates to the actions of OP *vis-a-vis* beach sand Sillimanite and does not concern OP's other activities.

3. The Informant states that Sillimanite is a natural sand-based product generated during the extraction of rare earth compounds from beach sand which are of two categories *viz.*, beach sand Sillimanite and underground mined Sillimanite and both of them are qualitatively different from each other. Beach Sand Sillimanite is used primarily by refractory manufacturers for lining furnaces and is also used in the ceramic industry. It is also stated that underground mined Sillimanite that is available in India is neither cost effective nor can it replace beach sand Sillimanite in its application as a raw material for refractory manufacturing because underground mined Sillimanite has excessive impurities that diminishes the quality of the refractory. Further, expenditure required to remove impurities from underground mined Sillimanite makes it unviable to use in the manufacturing of refractories in terms of cost effectiveness. Thus, the physical properties of both these materials are different and one cannot replace the other in the manufacturing of refractory. The Informant has averred that in the absence of beach sand Sillimanite, there is no other alternative but to import expensive Andalusite from South Africa which is the closest replacement for beach sand Sillimanite in terms of quality. Thus, it cannot be considered as an effective substitute of beach sand Sillimanite when locally beach sand Sillimanite is available in abundance. The Informant has further stated that the allegation in the present case relates to beach sand Sillimanite and not underground mined Sillimanite.
4. The Informant has submitted that in 2016, Sillimanite was included in the category of atomic minerals by virtue of Central Government Notification No. S. 0. 2356 (E) dated 11.07.2016. Subsequently, the Department of Atomic Energy *vide* Central Government Notification S.O. 2685 (E) dated 27.07.2019 prohibited the grant of operating rights in respect of atomic minerals in any offshore areas in the country to any person, except the Government or a Government Company or a Corporation owned or controlled by the Government. Furthermore, due to closure/suspension of beach sand mining operations for Sillimanite by private entities, OP is the only corporation engaged in the production of beach sand Sillimanite in India and also the sole manufacturer and supplier of Sillimanite in the Indian market, as on date.
5. The Informant has submitted the relevant product market to be "*beach sand Sillimanite*" and the relevant geographic market to be "*India*" as the OP supplies Sillimanite mined

by it throughout the country, the conditions are homogenous across the country and there exists no geographical advantages or disadvantages within the country. Thus, the relevant market as per the Informant is “*mining and supply of beach sand Sillimanite in India*”.

6. The Informant has further submitted that OP being the sole entity entitled to undertake mining and production of Sillimanite, conducts its activities through its Orissa, Kerala and Tamil Nadu units and has acquired a dominant position in the relevant market, *i.e. the mining and supply of beach sand Sillimanite in India*. It is alleged by the Informant that the OP enjoys a position of strength in the market which enables it to operate independently of any competitive forces and the consumers are left with no choice, but to transact with OP.
7. As per the Informant, OP has abused its dominant position in the relevant market by:
 - (i) indulging in prohibitive increase in the Sillimanite prices which increased from Rs. 9000/- Per Metric Ton in 2016-17 to Rs. 14000/- Per Metric Ton in 2020-2021,
 - (ii) following discriminatory pricing against the interests of the Micro, Small & Medium Enterprises (MSMEs) in the domestic market, while favouring multi-nationals and/or foreign parties. It is stated that rates for domestic MSMEs was Rs. 14000/- Per Metric Ton which was higher than the rate being offered to foreign companies/ multi-nationals) being Rs 11,000/- Per Metric Ton; and
 - (iii) fixing the supply of Sillimanite as per its whims and fancies and forcing its customer to accept arbitrary quantity.
8. In view of the foregoing, it has been alleged that the OP is in contravention of provisions of Section 4 (2)(a)(i) and Section 4(2)(b)(i) of the Act.
9. The Commission considered the information in its ordinary meeting held on 01.09.2021 and directed OP to file its para wise reply/ response(s) along with documents, if any, to the Information, latest by 04.10.2021 with an advance copy to the Informant. The Informant was also directed to file his comments to the reply/ response of OP, if any, latest by 22.10.2021. In compliance of the direction of the Commission, both OP and Informant filed their respective submission on 16.11.2021, and 06.12.2021, after obtaining due extensions of time from the Commission.

10. The OP in its reply has placed reliance on an earlier decision dated 25.07.2019, of the Commission in Case No. 19 of 2019 (*Beach Mineral Producers Association & Another Vs Directorate General of Foreign Trade (DGFT) & Others*), wherein, the Commission held that execution and implementation of *DGFT's* statutory duty and implementation thereof by IREL (India) Ltd. were not amenable for examination within the framework of Section 4 of the Act. OP further submitted that it is exempted from the purview of Section 4 of the Act as it not an "enterprise" under Section 2(h) of the Act, as it excludes certain activities from the definition of "enterprise" which are related to sovereign function of the State *i.e.* atomic energy, currency, defence and space.
11. As per OP, by virtue of Section 2(h), the activity undertaken by it is important from the purview of national security as beach sand minerals have potential applications in different stages of Indian Nuclear Power Programme. The OP has stated that to protect potential loss or pilferage of atomic minerals during extraction, handling, transportation which will affect national security, a policy decision was taken and was conveyed *vide* notification GSR No: 667(E), dated 11.07.2016 amended *vide* GSR No. 134 (E), dated 20.02.2019 by Ministry of Mines, Government of India. Adding to the existing notification, Department of Atomic Energy, Government of India *vide* notification S.O. 2685 (E) dated 20.07.2019, prohibited mining of any atomic mineral in any offshore areas of the country, except by the Government or a Government Company. Thus, as per the OP, said activities of OP are included under activity relatable to sovereign functions of the Government carried on by the departments of the Central Government and it does not fall under the purview of Section 4 of the Act, which makes the present information not maintainable.
12. The Informant, in its response, emphasised that the information does not relate to any 'sovereign activity' carried on by the OP as sale of Sillimanite is purely for commercial activity and has no link to atomic energy, making the exemption of 'sovereign functions' u/s 2(h) of the Act inapplicable. Informant has averred that Sillimanite extracted/mined by OP is sold independent of other minerals and is a completely separate product from other beach sand minerals. Thus, the overlap sought to be portrayed by OP is fallacious and unfounded. Moreover, Informant clarified that he is not connected to this field and Information has not been filed with any intention of re-introducing private players in extraction of beach sand minerals.

13. With respect to Case No. 19 of 2019 (*Beach Mineral Producers Association & Another Vs Directorate General of Foreign Trade (DGFT) & Others*), Informant stated that said case dealt with a challenge to the activities undertaken by the OP in compliance to an export policy formulated by Directorate General of Foreign Trade (DGFT), whereas, the present case deals with abusive business decisions/practices of OP and does not provide any blanket immunity to the OP. The Informant also contended that neither OP has addressed the allegation of abuse of its dominant position nor submitted anywhere particularly that Sillimanite has any nuclear/atomic use or is supplied by the OP to the Government for any atomic use.
14. The Commission considered the Information, material available on record and the replies/ responses filed by both the parties in the case and notes that the Informant is primarily aggrieved of the alleged abuse of its dominant position by the OP in the mining and supply of beach sand minerals viz, Sillimanite, in India, by allegedly imposing unfair and discriminatory conditions on its customers.
15. With respect to the submission of OP relating to earlier decision dated 25.07.2019, in Case No. 19 of 2019 (*Beach Mineral Producers Association & Another Vs. Directorate General of Foreign Trade (DGFT) & Others*), the Commission observes that the present case is different from the aforesaid case as it pertained to allegations against a policy formulated by DGFT which brought exports of beach sand minerals under State Trading Enterprise (STE) regime and alleged onerous terms of Standard Operating Procedure (SOP) for exporters. The Commission in the said decision took a view that DGFT changed its export policy in pursuance of its statutory duties and the implementation of said policy by OP herein (IREL (India) Ltd.) was not amenable for examination within the framework of Section 4 of the Act.
16. Before examining the issues brought forth in the information, the Commission deems it appropriate to deal with the preliminary objection raised by the OP that it is not an 'enterprise' within the meaning of the term as defined under Section 2(h) of the Act and, as such, the OP cannot be proceeded against under the Act.
17. Section 2(h) of the Act defines 'enterprise' as including *inter alia* any person or Department of the Government, which is engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind. The definition is very wide in its amplitude and

covers all activities of specified nature of any kind. The thrust of the definition of the term 'enterprise' is on the economic nature of the activities discharged by the entity concerned.

18. In this regard, the Commission refers to its earlier order 03.05.2011 in Case No. 64 of 2010 (*Arshiya Rail Infrastructure Limited Vs Ministry of Railways and Container Corporation of India Limited*), wherein the Commission had held that Indian Railway was covered within the definition of section 2(h) of the Act. This decision of the Commission was assailed by Union of India by way of Writ Petition before Hon'ble Delhi High Court and the Hon'ble High Court *vide* its judgment dated 23.02.2012 in WP (C) 993/2012 upheld the decision of the Commission holding that Indian Railways was an enterprise. The relevant portion of the decision dated 23.02.2012 of the Delhi High Court is reproduced below:

“The Commission has taken note of Section 54 of the Act, which provides that the Central Government may, by notification, exempt from the application of the Act, or any provision thereof, and for such period as it may specify in such notification, inter alia, "any enterprise which performs a sovereign function on behalf of the Central Government or a State Government" (See Section 54(c)). Pertinently, no notification has been issued by the Central Government in relation to the services rendered by the Indian Railways. Even in relation to an enterprise which is engaged in activity, including an activity relatable to the sovereign function of the Government, the Central Government may grant exemption only in respect of activity relatable to sovereign functions. Therefore, an enterprise may perform some sovereign functions, while other functions performed by it, and the activities undertaken by it, may not refer to sovereign functions. The exemption under Section 54 could be granted in relation to the activities relatable to sovereign functions of the Government, and not in relation to all the activities of such an enterprise. Pertinently, there is no notification issued under Section 54 either under Clause (c), or under the proviso. This clearly shows that the Central Government does not consider any of the activities of the petitioner as relatable to sovereign functions.”

19. In the present case, Sillimanite is sold by OP to its customers for a consideration. The OP has not given any credible argument to show that it is not an enterprise, when there is evidence on record which *prima facie* indicates that the product in question *i.e.*,

Sillimanite is being extracted and sold, both in the country and abroad. Also, the Commission notes from the submission of Informant as well as from the website of OP that Sillimanite is used in production of refractories that is used in metal and alloy making industry as well as in ceramic and foundry industry¹. In view of the statutory framework defining ‘enterprise’ as detailed above and keeping in view the nature of functions performed by OPs, as adumbrated supra, OP *prima facie* is found to be an ‘enterprise’ under Section 2(h) of the Act.

20. Having found the OP to be an ‘enterprise’, the Commission now proceeds to assess its impugned conduct within the parameters of Section 4 of the Act which prohibits abuse of dominant position by undertakings in the relevant market. In this regard, first the relevant market needs to be delineated and thereafter the dominance of the enterprise or group concerned has to be ascertained therein before proceeding to examine the alleged abusive conduct.
21. The Commission notes that the Informant has delineated the relevant market as “*mining and supply of beach sand Sillimanite in India*”, which delineation has not been denied by the OP. Further, the Commission *prima facie* accepts the contention of Informant that underground mined Sillimanite or Andalusite cannot be a viable alternative for beach sand Sillimanite. Thus, the Commission *prima facie* agrees with the averment of the Informant that the relevant product market is *mining and supply of beach sand Sillimanite*. Further, as OP is the only player supplying Sillimanite within India and also to its customers situated outside India, the relevant geographic market may thus be taken as whole of India. Accordingly, *prima facie*, the relevant market in the instant case appears to be ‘*mining and supply of beach sand Sillimanite in India*’.
22. On the issue of dominance of OP in the relevant market, it can be seen that the OP has acquired a dominant position by virtue of being a corporation which has exclusive right to undertake mining and supply of beach sand minerals in India. The said position has not been disputed by the OP in its reply in any manner.
23. With regard to the allegations of abuse of dominance, the Commission notes from the submission of Informant that following restrictions on private players from mining and supply, OP increased the price of Sillimanite substantially from Rs. 9000/- Per Metric Ton in 2016-17 to Rs. 14000/- Per Metric Ton in 2020-21, resulting in substantial

¹<https://www.irel.co.in/Sillimanite>, accessed on 20.12.2021.

increase in OP's revenue during the same period. Also, the Commission notes from the Information that OP allegedly supplied Sillimanite to foreign entity *viz.* Krosaki Refractories limited at a rate of Rs. 11,000/- Per Metric Ton while the same was sold to domestic MSMEs at the rate of Rs. 14,000/- Per Metric Ton. These facts have also not been denied by OP in its response.

24. Further, the Commission notes the allegations of Informant that OP has allegedly not responded to the Expression of Interest (EoI) issued by domestic MSME consumers and has supplied lower amounts of Sillimanite to domestic MSMEs, whereas OP is stated to have supplied adequate quantity to foreign companies/ MNCs, which was significantly higher than what was being supplied to domestic MSME consumers resulting in restricted supply of Sillimanite to domestic MSME. OP has not refuted its alleged conduct in its response, other than merely stating that it is not an enterprise. The OP has chosen to not reply on the allegations pertaining to contravention of Section 4 of the Act and has neither accepted nor denied those allegations. Thus, the aspect of excessive pricing and discriminatory pricing by the OP, *qua* the customers/ MSMEs remains unaddressed by the OP.
25. Thus, based on facts and circumstances of the present case, it is *prima facie* noted that OP is the only entity engaged in the mining and supply of beach sand mineral in India, which allows it to operate independently of the market forces. The Commission has also perused the allegation in the information pertaining to unfair and discriminatory pricing, for which no response has been forthcoming from the OP. The Commission at this stage, thus, has to infer that *prima facie* there is substance in such allegations which points towards violation of Section 4 (2) of the Act.
26. In view of the foregoing, the Commission directs the Director General (DG) to cause an investigation to be made into the matter under the provisions of Section 26(1) of the Act. The Commission also directs the DG to complete the investigation and submit the investigation report within a period of 60 days from the receipt of this order.
27. It is also made clear that nothing stated in this order shall tantamount to a final expression of opinion on the merits of the case, and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein.

28. The Secretary is directed to send a copy of this order along with the information and the documents filed therewith to the Office of the DG forthwith.

Sd/-

(Ashok Kumar Gupta)
Chairperson

Sd/-

(Sangeeta Verma)
Member

Sd/-

(Bhagwant Singh Bishnoi)
Member

New Delhi
Dated: 03.01.2022