COMPETITION COMMISSION OF INDIA

Case No. 11 / 2009

Dated: 20.12.2011

INFORMANT : - Jindal Steel & Power Ltd.

OPPOSITE PARTIES :- Steel Authoirty of India Ltd.

Order under Section 27 of the Competition Act

As Per R. Prasad, Member (dissenting)

In this case, the majority the Commission has held that no case is made out and for this reason they have closed the case. I have a different view and therefore I am passing a separate order.

2. In this case Jindal Steel and Power Ltd. (JSPL) submitted information on 16.10.2009 against Steel Authority of India Ltd. (SAIL). The gist of the information is that SAIL entered into an exclusive supply agreement with Indian Railways (IR) for the supply of rails vide a Memorandum of Understanding (MoU) dated 01.02.2003 and therefore foreclosed the market for JSPL. It has been stated that by the virtue of the MoU, market access was denied to JSPL. It was stated that SAIL is a dominant player in the market and that by the denial of market access and foreclosure of competition in the markets and denial of market access SAIL has abused its dominant position under Section 4(1) of the Competition Act as well as Section 3(4) of the Act. It was also stated that by having an exclusive supply agreement, when there was practically only one buyer, the entire market has been denied to the informant JSPL. The informant provider JSPL further argued that as it had made substantial investment in setting up the rail plant and because of the MoU between SAIL and IR, it had no entry in the market for rail, it would have no option but to suffer a loss and close the mill. It was further stated that JSPL produced very long rails, a product better than produced by SAIL and that it would have sold the rails at a lower price to IR. This would have saved Rs.500 crores for the IR. It was stated

that if there was competition in the market, innovation would have increased. JSPL wanted that the Commission should –

(i) direct SAIL to end the exclusivity obligations with IR.

(ii) to impose fines on SAIL in accordance with Section 27 of the Act for entering into an anti-competitive agreement.

(iii) to introduce competitive bidding arrangement in the relevant market of the purchase of rails.

(iv) to pay costs to the information provider.

(v) pass any order the Commission deems fit.

3. After receiving the complaint the Commission had a meeting with the authorised representatives of JSPL and also fixed a conference with the representatives of SAIL. The details of writ filed before the Delhi High Court by JSPL against IR were submitted. As far as SAIL is concerned, it wanted an extension of time by six weeks for the conference with the Commission. As the Commission had given sufficient time to SAIL and as on the basis of the facts submitted by JSPL in the opinion of the Commission, prima facie a case existed of violation of Section 3(4) and 4(1) of the Act, the Commission passed an order under Section 26(1) of the Act on 08.12.2009 directing the Director General (DG) to investigate the case.

4. Aggrieved against the directions of the Commission, SAIL went in appeal to the Competition Appellate Tribunal (COMPAT). COMPAT stayed the proceedings before the DG and directed that the matter may be remitted to the Commission for fresh hearing after taking into consideration the material which was to be submitted by SAIL. On the directions of COMPAT for passing a fresh order under section 26(1), the Commission heard JSPL and SAIL and on 29.06.2011 formed an opinion that prima facie a case existed and therefore directed the D.G. to investigate the case. A copy of the directions of the Commission is enclosed as Annexure to this order.

5. Meanwhile, the Commission went in appeal to the Supreme Court against the orders of COMPAT. The Supreme Court admitted the appeal and vide its orders dated 09.09.2010 in Civil Appeal No. 7779 of 2010, held that appeal is a statutory

right and as no appeal is provided in Section 53A of the Act against directions issued under Section 26(1) of the Act, COMPAT erred in admitting the appeal and giving directions to the Commission. Many other directions were issued by the Supreme Court on the basis of the grounds of appeal. This landmark decision would go a long way in the development of jurisprudence on Competition Law.

6. The D.G. took up the investigation in accordance with the directions of the Commission. During the course of the investigation, the D.G. examined the officials of JSPL, SAIL and IR. Submissions and arguments were raised before the D.G. SAIL argued that the Commission and the D.G. lack jurisdiction and the legal authority to entertain the information. It was argued that when SAIL and IR entered into the MOU on 01.02.2003, there was no other producer of rails as per railways specifications other than SAIL in India. It was argued that SAIL is an entity which is substantially owned by the Govt. of India and IR is also a govt. entity. It was argued that MOU dated 01.02.2003 was within the government itself and therefore it cannot be taken as anticompetitive agreement. Further, it was stated that the behaviour of SAIL cannot be treated as abusive under the Competition Act. It was therefore argued that there has no contravention of Section 3 and Section 4 of the Competition Act. It was also stated that the manufacturing process for structures and long rail is similar and that they are produced in the same mill after some modifications. It was therefore argued that by entering into the MOU SAIL had not foreclosed the market and that JSPL could use the capacity of the plant / mill for the rails to produce structurals. SAIL argued that it was fulfilling social service obligations by producing rails for IR. On the other hand, JSPL argued that by entering into the MOU on 01.02.2003, SAIL has denied market access to JSPL and that there has been a reduction / elimination of competition in the relevant market. It was therefore argued that MoU's fall out is that SAIL had contravened the provisions of Section 3(4) and 4(1) of the Act.

7. The D.G. found that the MoU dated 01.02.2003 had IR as the other party and therefore IR becomes a necessary party. The D.G. therefore obtained details from IR and examined on oath some officers of IR to ascertain the facts. On the basis of the facts gathered from JSPL, SAIL and IR, the D.G. then analysed the facts with reference to the Competition Act.

8. The D.G. then analysed the concept of relevant market, relevant product market and the relevant geographical market with reference to the facts of the case so as to ascertain whether there was an abuse of dominance. The D.G. has observed that IR buys only those rails which are approved by its Research Designs and Standards Organisation (RDSO). Incidentally RDSO is a division of IR. Further, IR has given the right of certification that the rails are compliant to RDSO standards to RITES. RITES is a corporate entity which is a subsidiary of IR. Incidentally the same procedure of certification is followed for the rails which are installed on the rail network for private sidings or internal rail network of an organisation. The standard setting for rails in India is done by RDSO. While determining the issue of relevant market in India, D.G. considered the views of SAIL and JSPL. SAIL stated that rails and heavy structurals are both manufactured in the Rail and Universal Beam Mill (RUBM) and that both SAIL and JSPL have this mill. SAIL therefore argued that the argument advanced by JSPL that because it cannot sell the rails, its mill would close down is without any basis. SAIL stated that the market for heavy structurals is very large and remunerative but SAIL has more or less exited from this market because it had to produce rails for IR. It was further argued that out of the market of 2.8 million tonnes for structurals in the financial year 2008-09, JSPL had a market share of 11.2%. SAIL therefore argued that the relevant product market should be the manufacture of rails and structurals, and not only rails. On the other hand JSPL has argued that its total investment in the rail plant was Rs.226 crores which is a sunk cost. It was the view of JSPL that the high sunk cost acts as a barrier to entry. It was also argued that the investment of Rs.226 crores includes the cost of equipments, plant and machinery only for the manufacture of rails in the RUBM which is also being used to produce structurals. According to JSPL the relevant product market would be the production of rails which are RDSO complaint. The D.G. considered the fact that rails and structurals are neither substitutable nor interchangeable and therefore as far as SAIL is concerned the relevant market would be the manufacture of long rails inIndia (India being the relevant geographic market). For IR, the relevant market would be the consumption of long rails in India. Thus in this case the D.G. has defined two markets, one for IR and the other for SAIL.

9. The D.G. then considered the provisions of section 4 and the factors mentioned in Section 19(4) of the Act. On the basis of the economic strength, size of the companies, the powers conferred on IR by statute, market share etc. the D.G.

opined that (i) SAIL is a dominant player in the relevant market of manufacture of rails in India and (ii) IR is a dominant player in the relevant market of procurement of rails in India.

10. The D.G. then considered the abuse of dominance enumerated in the Act, which IR and SAIL have resorted to. In this connection, the D.G. examined the material which led to SAIL acquiring a position of dominance. The D.G. placed reliance on the MoU dated 01.02.2003. The D.G. also considered the RDSO specification which favoured RH Degassing technique. The D.G. has also recorded a finding that prior to April 2008, JSPL was not in a position to supply long rails following RH Degassing technique. The D.G. has therefore opined that the abuse of dominance by SAIL can be assessed only from April 2008. The D.G. held that the cause of abuse in the relevant market of procurement of long rails was the MoU and its effect is seen even in the market of manufacture of long rails. According to the D.G., the MoU is an agreement in perpetuity. The D.G. considered the terms of the MoU and came to the conclusion that as SAIL was committed to supply to IR, its ability to supply rails to other parties is curtailed and this gives rise to competition concerns. The D.G. then relied on the minutes of meeting of the Board of Directors of SAIL held on 28.05.2001 wherein there was a mention of JSPL's aim of setting a rail manufacturing unit at Raigarh. It was also mentioned in the minutes that due to competition which is going to come due to the entry of JSPL in the market for rails, SAIL should upgrade the facilities of the rail and structural plant. The D.G. further held that the MoU dated 01.02.2003 effects competition and does not ensure freedom of trade. In his view, the MoU was anti-consumer. In his view, the MoU was entered on 01.02.2003 to counter the threat of competition. In his view, the MoU limited the production of rails in India. The D.G. examined the MoU and found that according to the MoU, an annual review was to be carried only with reference to the prices of the rails but not the other terms and the termination of the MoU. The D.G. also held that by restricting the technical specifications, IR restricted technical and scientific development. The D.G. therefore held that IR & SAIL had abused their dominance and contravened Section 4(2)(b)(i() of the Act. As far as placing restriction of technical development is concerned, it has been held by the D.G. that IR had contravened Section 4(2)(b)(ii) of the Act. The D.G. further held that when JSPL decided to start production of rails, IR foreclosed the market by entering into the MoU and in this manner violated the provisions of Section 4(2)(c) of the Act. The

D.G. further held that by not allowing sales to other parties by SAIL, IR abused its dominant position in terms of Section 4(2)(a)(i) of the Act. It was also the view of the D.G. that by entering in the MoU with IR, SAIL had foreclosed the market for rails and therefore violated Section 4(2)(c) of the Act.

11. The D.G. then examined whether Section 3(4) of the Act would be applicable to the facts of the case especially with reference to exclusive supply obligations and refusal to deal. The D.G. then examined the provisions of Section 3(4) of the Act, the definitions of exclusive supply agreement and refusal to deal. He also examined the MoU wherein it has been mentioned that IR would source all its purchases from SAIL and that as IR was the only consumer of long rails, SAIL required the assurance of regular placement of orders. In the view of the D.G. the exclusivity clause in the MoU is a vertical restraint under Section 3(4)(b) of the Act. In his view the MoU cast can obligation on IR of refusal to deal with any other supplier. This in his view contravenes Section 3(4)(d) of the Act. The D.G. then examined the factors mentioned in Section 19(3) of the Act. In the DG's view the MoU led to foreclosure of competition, no benefit to the consumers and no technological development. In his view, there is a violation of Section 3(4) of Act read with Section 3(1) of the Act.

12. The Commission on receipt of DG's report forwarded a report to JSPL, IR and SAIL. These enterprises submitted written arguments and also came forward with oral arguments. But before considering these arguments it is necessary to examine the facts which have not been considered in a proper perspective by the D.G.

13. In the second half of 1990s the Ministry of Railways decided to replace its ageing rail infrastructure. This decision was taken on the basis of safety concerns which had arisen. A special railway safety fund budget of Rs. 17,000 crore became operational in the year 2001. As a consequence the demand for rails was expected to double to around 7 lakhs tonnes. At that time in India the Bhilai Steel Plant of SAIL had a capacity to produce rail to the tune of five lakh tonnes. IR floated a global tender in October 1997 for production and purchase of one lakh tonnes rail from a new source for a period of five years. But no serious bidder came forward though there were 16 bids. In April 1998 IR held a meeting with 25 firms but none of them were willing to supply rail as per the Indian Railways tender. The main objection of the firms was that the period of five years was too low and that a period of 15-20 years should be given. The other issue raised by the tenderers was that one lakh

tonnes per annum was too low and that should be increased to 2 lakh tonnes per annum. Indian Railways then decided this issue should be taken up at ministerial level between the Ministry of Steel and the Ministry of Railways. On the request of the Ministry of Railways, the Ministry of Steel asked SAIL to set up extra facilities for the production of more rails for the Indian Railways. SAIL has stated that since 1998 it had made an investment of Rs. 711 crores in setting up new facilities as well as for product quality upgrade and expanding existing capacity. It was stated by SAIL that investment made was relationship specific. The SAIL had also stated that it would incur losses of around Rs.30 crores per annum if it ceased the operation of long rails and produced only short rails which also mainly exported. It was also the view of SAIL that the investment could not be used for heavy structurals as such switching would make the entire investment redundant. SAIL submitted the details of investment made for the creation of additional capacity, new capacity and quality improvement as under –

YEAR OF SANCTION	QTR	SCHEME NAME	SANCTION AMOUNT	LAST YEAR OF DEPRECIATION
ADDITIONAL CAPACITY				
1999-00	3	Installation of Carbide saw	2,81.2	2017-18
2001-02	3	Roofing of open (GH) bay – Rail Structural Mill (RSM)	1,88.0	2019-20
2001-02	3	Procurement and Instalation of 1 no. Carbide Saw – RSM	1,66.0	2019-20
2001-02	3	Provision of Air Conditioning of Operator's Cabin of Crane no. 5, 6 & 7 - RSM	15.8	2019-20
2001-02	4	Post facto approval for "Provision of Inspection beds (2 nos.) along with association equipments in Open Bay".	1,65.32	2019-20
2001-02	4	Post Facto approval for "Provision of Transfer beds (1 no.) along with association equipment in Open Bay".	1,22.98	2019-20
2001-02	4	Covering of Roof (Col.39 to 79) in Open Bay of RSM.	1,97.25	2019-20
2001-02	4	Provision of Inspection Bed (1 no.) including covering of Roof (Col.119 to 135) in Open Bay of RSM.	1,90.68	2019-20
2001-02	4	Modification of Cooling Bed No. 5 & 6, including connected mechanisms and Roll Table with Receding Stopper at RSM.	2,14.73	2019-20

2002-03	1	Installation of Rail Welding Plant	5,00	2020-21
			25,41.99	
		NEW CAPACITY		
2001-02	2	Installation of facilities in RSM for finishing of Longer Rails	5,00	2019-20
2001-02	3	Diversion of Road no. 10 (Link Scheme no. 1)	1,05.09	2019-20
2002-03	1	Long Rail Facilities including Rail Welding Plant	3,20,00	2020-21
2007-08	3	Installation of End Forging Plant for Thick Web Rails.	45,54	2025-26
			3,71,59.9	
		QUALITY IMPROVEMENT		
1998-99	1	Installation of On line Ultrasonic Testing Machine at RSM.	13,60	2016-17
1998-99	1	Installation of RH Degassing facility at SMS-II	60.80	2016-17
1998-99	1	Installation of Ladle Furnace at SMS-II	22.96	2016-17
1998-99	2	Installation of Eddy Current testing machine at Rail Structural Mill	3,40	2016-17
2001-02	1	Installation & Commissioning of De-scaling unit before 950 mm Roughing stand	3.26	2019-20
2004-05	3	Installation of Hot Metal Desulphurization unit at SMS-II (Enabling Jobs)	1,00,00	2022-23
2005-06	4	Installation of Hot metal Desulphurization unit at SMS-II	86,23	2023-24
2006-07	3	Installation of On-Line Hot Rail Profile Measuring system	3,10.04	2024-25
2007-08	3	Installation of Electromagnetic stirrer (EMS) in Bloom caster at SMS-II	20,87	2025-26
		GRAND TOTAL	**3,14,22.04**	
			7,11,23.93	

A perusal of the above details would show that some of the investments were made prior to 2003 whereas most of the investments was made after that date. Thus, the investments were made for the benefit of IR.

14. The MoU between the Railways and Steel Authority was entered on 1st February, 2003. A copy of the memorandum is reproduced as under-

MEMORANDUM OF UNDERSTANDING
BETWEEN
MINISTRY OF RAILWAYS AND
STEEL AUTHORITY OF INDIA LIMITED

This understanding is reached on this 1st day of February, 2003 between Steel Authority of India Limited (SAIL), a Government of India Enterprise and having its registered office at Ispat Bhavan, Lodhi Road, New Delhi and Indian Railways, through Railway Board.

Whereas, to 'meet Railways' requirement for long rails, SAIL undertook a project to update its production line to produce long rails for supply to Indian Railways.

And whereas, since Railways at present is the only user of such long rails, and SAIL requires the assurance of regular placement of orders and Railways require timely supply of required material (long rails), the parties have expressed their understanding as under:-

i) *Railways have projected a demand of long rails/long rail panels in 52kg/60kg to the extent of about 50% of its total annual requirement of rails, which SAIL has agreed to meet by manufacturing 65/78m long rails and welding them to long rail panels (240 to 260m long)*

ii) *Railways commit to buy from SAIL its total requirement of long rails/long rail panels, as also the balance of its normal requirements in other lengths like 13m, 26m, etc. subject to annual review within the overall policies of Govt. of India.*

iii) *SAIL/BSP will meet the Railways' requirement as per mutually agreed delivery schedule. In the event of non-compliance of the committed delivery schedule by SAIL, Railways reserve the right to take such recourse as it may deem fit as per agreed conditions.*

iv) *The joint pricing committee of Indian Railways and SAIL shall recommend the price of long rails as is being done at present. The decision of Chairman, Railway Board in regard to price will be final and binding on both the parties.*

v) *Railways shall make all efforts to arrange for regular and unhindered transportation of the long rails/long welded panels from BSP to enable SAIL to meet its supply commitments.*

Both Railways and SAIL have agreed to reach to this understanding for the mutual benefit of both the organizations.

15. During the course of investigation it was gathered that RDSO permitted JSPL to supply rails private sidings in the year 2008. The price at which rails were supplied by SAIL to IR were lower than the prices at which rails were supplied by SAIL to non-Railways customers. In 1999 JSPL indicated that it wanted to set up rail mill. This mill was a second hand mill purchased from South Africa. But in 2001 Indian Railways informed JSPL that SAIL had agreed to meet the entire requirements of rails of Indian Railways. It was thus clear that in the year 2003 the only supplier of rails in India was SAIL. IR had also shown a preference for procuring its requirements of rails from domestic sources. In the background of these facts this case has got to be decided.

16. On behalf of SAIL it was argued that SAIL does not enjoy any dominance in the relevant market of rails. It was stated that JSPL had abused the process of law by going for two remedies – (i) by filing a writ against Indian Railways and (ii) by approaching the Commission under the Competition Act. It was stated JSPL wanted competitive bidding by desiring an access to the market of long rails. JSPL also wanted the MoU to be setaside. It was stated that the same cause of action could not be advocated in two forums. It was stated that under the Civil Procedure Code Order 2, rule 2 the issue cannot be split up and JSPL could not go to two forums. Another argument advanced was that JSPL wanted 35% market share and that the purpose for which the information was filed was abusive. It was further argued that SAIL and IR are both owned by a common owner i.e. the Govt. of India. They are the practical purposes the same entity and if one examines the definition of group in Section 5 of the Act they have to be classified as one entity. It was argued that as IR was Govt. of India, agreement between an owner and subsidiary is not covered under the Competition Act. It was also argued that a consumer can make his own choice of purchase. It was stated that if one examines the MoU dated 01.02.2003, it would be evident that as far as pricing of goods is concerned the Chairman Railway Board was to have the final say. In such a case, SAIL cannot be a dominant player

especially when the Govt. of India had the unilateral dictating power. It was further argued that the RDSO, a division of IR sets up the standards for railway equipment and that standard setting is necessary for the purpose of safety, which is of paramount importance. It was also stated that the security of supply was necessary for IR and for this purpose large investments were required. Attention was then drawn to Article 19(6) of the Constitution of India wherein a primacy has been given to the public sector for public good and in such cases, it was argued that Competition Act would not apply. It was also stated that the market of rails is large and that there are no barriers to entry. It was stated that JSPL has been able to enter the market. Subsequently the sovereignty issue was raised and reliance was placed on Section 11 of the Railways Act. It was argued that railway was government of India and therefore it was sovereign and its activities cannot fall under the Competition Act. It was further argued that the rights of SAIL are protected under the MRTP Act. In this connection, attention was drawn to Notification dated 1991 which exempts a PSU from the rigours of the MRTP Act. It was argued that it was a right accrued and was therefore protected under Section 66(1A)(b) of the Competition Act. To sum up it was argued that SAIL was not a dominant player and its conduct was not abusive. It was further stated that if the MoU was setaside, the prices would rise and IR would suffer. It was stated that Sections 3 and 4 of the Competition Act would not apply to SAIL and that the case should be closed.

17. On behalf of IR, the MoU of 01.02.2003 was again mentioned and it was argued that the action of JSPL was mischievous as it was indulging in forum shopping by abusing the process of law. The issue of sovereignty was again raised and attention of the Commission was invited to Act, 19(6)(2) of the Constitution of India. It was stated that IR was not an enterprise under Section 2(h) of the Competition Act. It was also stated that the Competition Act was not applicable in view of the Railway Act. It was pointed out that in view of Section 11 of the Railways Act, Competition Law would not apply to railways. It was argued that under the Railways Act, the function of railways consist of (i) acquisition of land (ii) procurement and (iii) maintenance of the railways network. It was argued that the MoU between SAIL and IR is a part of the policy decision of the Govt. of India which does not fall within the scope of the Competition Act. It was further argued that the D.G. did not give a hearing to IR and therefore there was a denial of natural justice and this makes the report vitiated. It was stated that as the Delhi High Court was

seized with the issue, the Commission should not have taken up the case. It was argued that the MoU was within the group and is therefore not a competition issue and further that IR could not be regarded as a consumer within the meaning of Section 2(f) of the Act. It was also stated that the MoU was an arrangement and not an agreement and further the rights acquired under the MRTP Act were protected under Section 66(1A) of the Competition Act. It was therefore argued that the case of IR does not fall foul of Section 3 and 4 of the Competition Act and should be closed accordingly.

18. The representatives of JSPL argued that the reliance of SAIL and IR on Article 19(6)(2) of the Constitution has to be seen with reference to Article 19(1)(g) of the Constitution. Under the provisions of the Constitution, a monopoly could be created but under the Constitution no protection is given to the behaviour or abusive conduct of the monopoly. If a monopoly affects the freedom of trade by its behaviour it infringes the rights conferred by the Constitution. Regarding the protection claimed under Section 66(1A) of the Competition Act, it was argued that in view of Section 37 of the MRTP Act, the PSU and govt. departments were required to file for exemption which was not done. Further, in view of Section 33(3) of the MRTP Act, power to investigate remained with the MRTP Commission. It was therefore stated that in such a situation no benefit accrues to IR and SAIL. Regarding forum shopping, it was argued that if two remedies were available under different laws a person was entitled to claim relief under both the laws. As far as market share was concerned, it was stated that JSPL did not want a market share of 35%. It was argued that with 35% market share JSPL would breakeven. It was also stated that SAIL was not able to cater to the entire demand of IR and that because of the MoU, IR could not buy from any other source. As a result, there was a shortage of 20% in the market for rails. Reliance was placed on the findings of the D.G. It was argued that IR and SAIL are enterprises within the meaning of Section 2(h) of the Competition Act. It was stated that it is a case of public procurement by IR form one seller, SAIL. It was stated that the relevant product market was RDSO compliant rails and the relevant geographic market was India. It was argued that there was a denial of market access and the case is covered by the provisions of Section 4(2)(b)(ii) of the Act. It was argued that SAIL entered into the MoU with IR as and when it learnt that JSPL was setting up a rail plant. It was stated that it was clearly evident from a copy of the minutes of the Board meeting of SAIL. It was therefore stated that the prayers made

with the information should be accepted and an order to this effect should be passed.

19. Many of the issues raised in the arguments were also raised at the time of passing the order dated 29.06.2010 under Section 26(1) of the Act. One of the issues decided in the order dated 29.06.2010 is in respect of the claim of IR that it was discharging a sovereign duty. In that order the Commission held that the running of railway system was a commercial venture and was not a sovereign function. The second issue of forum shopping was also considered by the Commission and the Commission was of the view that by filing a writ and filing complaint with the Commission are two types of relief and that JSPL had not indulged in forum shopping. In view of the decision of the Commission, this view has to be accepted as the correct view. The third issue raised was that the Commission was not entitled to review a policy decision of the government. It was the view of the Commission that a commercial decision of Indian Railways cannot be regarded as a policy decision of the State. In view of the Commission if the MoU was to be considered as a Government policy then all acts of public procurement which are a function of the State would amount to be a policy decision of the government and this would be fundamentally incorrect. It was the view of the Commission that the Indian Railways while running the railway system was not acting like a State but like any other commercial entity. It was also the view of the Commission that the decision to procure rails from one particular vendor is a commercial activity and cannot be regarded as an activity relating to the administration of the State. Therefore this argument of Indian Railways was not accepted by the Commission. Another issue which needs to be discussed is a concept of any activity mentioned in section 2(h) of the Competition Act. In the explanation 2 of the said subsection activity has been defined to include profession or occupation. As activity has been defined in an inclusive manner very wide meaning has to be given to the word activity. Therefore the concept that any activity would also include any direction or policy statement has to be considered the correct view under the Competition Act. The fourth issue raised at the time of proceeding under section 26(1) of the Act is that the agreement between Indian Railways and Steel Authority is an agreement between two limbs of the same entity and therefore the MoU cannot be brought under the Competition Act. The Commission did not accept this argument and in the view of the Commission both Indian Railways and Steel Authority were different

enterprises and therefore were covered under the Competition Act. Further as both the entities were different enterprises even if they had common parentage, it did not mean that they could not enter into a MoU. Therefore the argument that two limbs of the same entity cannot enter into an agreement is not correct. These issues were also raised before the Commission at the time of the hearing after the receipt of the DG report. In view of the findings recorded by the Commission under Section 26(1) of the Act, these issues have to be decided against IR and SAIL. Regarding the argument that SAIL and Indian Railways would have the protection of the MRTP Act is not correct. In fact the Counsel for JSPL has explained this aspect in her argument. As both Indian Railways and SAIL had not submitted the Form under Section 37 of the MRTP Act, the two entities were not entitled to any protection under the MRTP Act and therefore under Section 66 of the Competition Act. Regarding the reliance placed on article 19(6)(2) of the Constitution of India, the arguments of the Counsel of JSPL are correct. Under the Constitution of India, the government can create a public sector which would have monopoly in the market. But the Constitution does not give to the said monopolist any power for abusing its dominance in the market and for following anti-competitive practices. It was also stated that Indian Railways was not given a hearing by the DG therefore all the proceedings are vitiated. This is not correct because the report of the DG shows that the officials of Indian Railways were examined by the DG at the time of investigation.

20. In the background of these facts, the case to be decided. The D.G. had defined two relevant marks – (i) for the railways and (ii) for SAIL. According to him the relevant market for SAIL would be the production of long rails which are RDSO compliant and for IR the relevant would be market of consumption of long rails in India. Further in his view SAIL is the dominant player in the relevant market of the manufacture of rails in India and IR is the dominant player in the relevant market of procurement of rails in India. There is no dispute in respect of these findings of the D.G. on this account. In fact in India, IR has a monopoly over railway services in India and is a monopolist. As far as SAIL is concerned, it is the largest producer of Steel in India and as far as rails are concerned it was the only producer of rails till JSPL entered the market. In fact the sales of rails by SAIL and JSPL from the financial year 2004-05 to 2008-09 is given as under:-

Table – Sale of Rails

Financial Year	IR's purchases of rails kiloton	SAIL's sales to non-IR customers – kiloton	JSPL's sales of rails – kilotons	Total sales of rails – kiloton	Proportion of total rails purchased by IR	Proportion of toral rails purchased by firms other than IR
04-05	739	152	4	894	83%	17%
05-06	636	217	11	864	74%	26%
06-07	694	188	5	888	78%	22%
07-08	687	202	20	909	76%	24%
08-09	767	197	35	999	77%	23%

But the sales cannot be equated with production of rails. But in any case 96% of the rails produced and sold in India is by SAIL whereas only 4% is produced by JSPL. In fact the monopoly of SAIL in the market was so high that in some contracts taken by JSPL, the rails were supplied by SAIL. There is no doubt that the facilities of rail production may have been set up with the idea of catering to IR's needs and therefore a social objective. In the 1990s there was no MoU between IR and SAIL as IR was the only buyer and SAIL was the only supplier. There is a strong possibility that SAIL wanted the MoU when in 2001 it perceived that JSPL was setting up a facility to manufacture rails. The minutes of the Board of Directors of SAIL points to this possibility but there is no conclusive proof. But in any case any enterprise which has made huge investments in order to protect its interest would resort to such tactics. Thus the MoU was beneficial to SAIL but whether it was beneficial to IR is not evident. What is evident is that by the MoU IR thought that it would get assured supply of rails. But on the other hand any prudent buyer would go for a competitive bidding process because it could have to led to procurement at lower prices. Further if alternative suppliers were available in the market who are competing with each other then the availability and assurance of supply would be greater.

21. The question is as to whether the MoU between IR and SAIL restricted any other supplier from entering the market. This is precisely the argument of JSPL. But when JSPL submitted a complaint to the Commission it was mainly a case of abuse of dominance by SAIL. On the other hand the D.G. has stated that both IR and SAIL are dominant in their different relevant markets. In this connection after analysis the D.G. held that both I.R. and SAIL are abusing their dominant position. In his view IR had abused its dominant position with reference to Sections 4(2)(b)(i), 4(2)(b)(ii),

4(2)(c), 4(2)(a)(i) of the Competition Act. As far as SAIL is concerned, the D.G. concluded that it had contravened Sections 4(2)(b)(i) and 4(2)(c) of the Act. In the opinion of the D.G. both SAIL and IR had contravened Section 3(4) of the Act by refusal to deal and having an exclusive supply arrangement.

22. Section 4 of the Competition Act reads as under-

(1) No enterprise or group shall abuse its dominant position.

(2) There shall be an abuse of dominant position [under sub-section (1), if an enterprise or a group].—

(a) directly or indirectly, imposes unfair or discriminatory –

(i) condition in purchase or sale of goods or service; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

Explanation:- For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(b) limits or restricts –

(i) production of goods or provision of services or market therefore; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access [in any manner]; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;

(e) *uses its dominant position in one relevant market to enter into, or protect, other relevant market.*

Explanation:- For the purposes of this section, the expression –

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to –

(i) Operate independently of competitive forces prevailing in the relevant market; or

(ii) Affect its competitors or consumers or the relevant market in its favour.

A perusal of the facts in this case discussed above shows that in this case there was no buyer i.e. IR and one seller i.e. SAIL. Till 2008, there was no other seller. JSPL was eligible to enter the market only when it was in a position to supply RDSO compliant rails. The D.G. has also taken the view that by enforcing the fact that all suppliers should comply with RDSO standards IR had abused its dominant position. RDSO sets standards with reference to all procurement for railways especially safety. This cannot be regarded as an abusive conduct. Further, if there is one buyer and one seller how the behaviour could be unfair or discriminatory. It could be unfair or discriminatory if there was more than one buyer. Discriminatory or unfair are terms which could be considered when there are more than one buyer or seller. As this is not the case here, the provisions of Section 4(2)(a)(i) are not applicable to IR in this case.

23. The D.G. has held that Section 4(2)(b)(i) is applicable to both IR and SAIL for establishing abuse. Section 4(2)(b)(i) talks of limiting and restricting production of goods or provision of services or market thereof. In this case, the relevant market for IR is the procurement of RDSO long rails. The only consumer of long rails in India is IR and no material has been gathered by the D.G. or supplied by the informant that IR has tried to restrict or limit directly or indirectly the production of goods or the market of those goods. Therefore the findings of the D.G. on the contravention of Section 4(2)(b)(i) are incorrect. As far as SAIL is concerned the relevant market, as determined by the D.G., is the market of production of RDSO long rails. SAIL was the only supplier of rails to IR for the last many years. Whatever was required by IR was supplied by SAIL and there was no reason for SAIL to limit or restrict production of RDSO compliant long rails and in consequence reduce it revenues. JSPL on the

other hand has alleged that SAIL has not been in a position to supply all the requirements of IR. No material has been supplied by JSPL in support of this contention. Therefore no contravention of section 4(2)(b)(i) either by IR or SAIL has been established by the D.G.

24. The D.G. has stated that IR had contravened Section 4(2)(b)(ii) of the Competition Act. This section talks of limiting or restricting technical or scientific development relating to goods or services to the prejudice of the consumers. One of the issues raised is that the products of JSPL are better than that of SAIL. It was argued that the long rails of SAIL are made by butt welding whereas the rails of JSPL are one piece and as butt welding does not give strength, the rails of JSPL are better. But no technical material was brought to show that the products of JSPL were better than that of SAIL. In fact the rail mill of JSPL is a second hand depreciated plant purchased in 2001 from some enterprise in South Aftrica. The efficiency of an old plant would be much lower than a new plant put in operation by SAIL. Also as already discussed above, standard setting by RDSO cannot be stated to be restricting or limiting technical or scientific development. But restricting or limiting such development has to be seen with reference to the harm to the consumers. The consumer in this case is not railways but the person who avail the services of railways. As the D.G. and JSPL have not shown how technical development is to the detriment of the consumers, the findings of the D.G. on this issue is not correct.

25. The D.G. has also held that both IR and SAIL have contravened the provisions of Section 4(2)(c) of the Act. Section 4(2)(c) talks of practice or practices resulting in denial of market access. The section is very clear. Denial of market access is not within the scope of this section. Under this section, the dominant player should indulge in practice or practice which results in the denial of market access. Therefore before invoking this section practice has to be established. Under Section 2(m) of the Act practice includes any practice relating to the carrying on a trade. The definition is inclusive and therefore a wide meaning has to be given to the word practice. Practice means an activity which is repeated over a period of time so as to be defined as a practice. In this particular case, the MoU dated 01.02.2003 cannot be treated as practice and therefore if the MoU results in a denial of market access then Section 4(2)(c) under the head abuse of dominant position

cannot be invoked. Therefore the findings of the D.G. even on this issue is erroneous.

26. Thus, in this case both the entities i.e. IR and SAIL are dominant but there is no material to hold that the two enterprises have abused their dominance. But both JSPL and the D.G. had sensed that there are competition concerns in this case. I do not agree with the analysis of the D.G. regarding abuse of dominance . But as there exist competition concerns, it is necessary to highlight the competition concerns and analyse them.

27. The crux of the problem in this case is the MoU dated 01.02.2003. The MoU is in perpetuity. The subject matter of the MoU is the procurement by IR of long rails. In order to meet the requirement of long rails SAIL undertook a project to produce long rails for supply to IR. The purpose of the MoU was that railways got a regular supply of long rails and that SAIL got the assurance of regular placement of orders. In the MoU it was envisaged that 50% of the total demand for rails was for long rails. IR agreed to buy the total requirement of long rails from SAIL and the balance of its normal requirements of smaller rails from SAIL. SAIL was to meet the delivery schedule and a joint pricing committee of SAIL and IR was to decide the price. The MoU was entered into after SAIL became aware of the fact that JSPL was setting up a rail mill which would provide competition to SAIL. The threat of competition led to the MoU and SAIL also upgraded its facilities to produce better rails. SAIL also spent substantial sums of money to upgrade facilities for better products. Thus the threat of competition had its effects but the MoU dated 01.02.2003 foreclosed the market for JSPL.

28. It has been argued that the MoU is not an agreement but an arrangement. Agreement in the Competition Act has been defined in an inclusive manner and it includes any arrangement or understanding or an action in concert. Arrangement, understanding or an action in concert may be formal or informal or it can be written or unwritten. They many not be enforceable by legal proceedings. Thus, any arrangement for the purposes of the Competition Act would be an agreement. Section 3 of the Competition Act deals with anticompetitive agreements. Under Section 3(1) of the Act, no enterprise or group of enterprises could enter into an agreement for production, supply etc. of goods and services which cause or like to cause appreciable adverse effect on competition in India. Section 3(3) of the Act is a

deeming provision and horizontal in nature and it expands the scope of Section 3(1) of the Act by bringing practices / decisions taken on par with agreements. This assertion is clear on a reading of Section 27 of the Act where practices carried out / decisions taken are treated as anticompetitive agreements. Section 3(4) of the Act is vertical in nature and is illustrative. It is defined in an inclusive manner and it is possible to give it a wider interpretation. The provisions of Section 19(3) of the Act has to be examined before the Commission can treat an agreement under Sections 3(1) and 3(4) as creating appreciable adverse effect to competition (AAEC) in India. Under the provisions of the Act, agreements under Sections 3(1) and 3(4) can be declared as void if they cause AAEC but under Section 3(3) of the Act agreements, practices and decisions taken cannot be treated as void agreement even when violation of Section 3(3) of the Act is observed. But for violations under Section 3(3) of the Act there is no necessity to examine the provisions of Section 19(3) of the Act.

29. In this particular case the D.G. has also made out a case of violation of Sections 3(4)(b) and 3(4)(d) of the Act. Section 3(4) of the Act is attracted when the parties to the agreement are in different markets. In this case, SAIL is in the Steel market whereas IR is the market of supplying the service of transportation through a rail network. Section 3(4)(b) of the Act reads as follows – "exclusive supply agreement includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person." The MoU envisages that IR committed to buy its entire requirement of rail from SAIL. Thus on the strength of the MoU, IR had agreed to buy its entire requirement of rail from SAIL. Further IR could not buy rails from any other person other than SAIL. Thus, there is a contravention of Section 3(4)(b) of the Act. But the date from which the default occurs has to be worked out.

30. Section 3(4)(d) of the Competition Act reads as follows-

> *"refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought.*

In this particular case by entering into the MoU IR has restricted itself from purchasing rails from any other person other than SAIL. As IR is going to purchase its entire requirement of rails from SAIL it restricts its ability to purchase rails from

any other party. Thus, the provisions of Section 3(4)(d) are attracted but the date from which the said provisions would apply to this case has to be identified.

31. This is a case of public procurement. On public procurement the Supreme Court has given certain decisions which are the law in India. The details of the ruling of Supreme Court are as under:-

In the case of Nagar Nigam vs. Al Faheem Meat Exports Pvt. Ltd. & Ors. SLP(Civil) No. 10174 of 2006. The findings of the Suprement Court are as under :-

> *It is well settled that ordinarily the State or its instrumentalities should not give contracts by private negotiation has been carried out by the High Court itself, which is impermissible. We have no doubt that in rare and exceptional cases, having ragard to the nature of the trade or largesse or for some other good reason, a contract may have to be granted by private negotiation, but normally that should not be done as it shakes the public confidence. The law is well-settled that contracts by the State, its corporation, instrumentalities and agencies must be normally be granted through public auction / public tender by inviting tenders from eligible persons and the notification of the public-auction or inviting tenders should be advertised in well known dailies having wide circulation in the locality with all relevant details such as date, time and place of auction, subject-matter of auction, technical specification, estimated cost, earnest money Deposit, etc. The award of Government contracts through public-auction / public tender is to ensure transparency in the public procurement , to maximize economy and efficiency in Government procurement, to promote healthy competition among the tenderers, to provide for fair and equitable treatment of all tenderers, and to eliminate irreguarities, interference and corrupt practices by the authorities concerned. This is required by Article 14 of the Constitution. However, in rare and exception cases, for instance during natural calamities and emergencies declared by the Government. Where the procurement is possible from a single source only; where the supplier or contractor has exclusive rights in respect of the goods or services and no reasonable alternative or substitute exists; where the auction was held on several dates but there were no bidders or the bids*

offered were too low, etc., this normal rule may be departed from and such contracts may be awarded through 'private negotiations'.

In another case i.e. Sachidanand Pandey vs. State of West Bengal 2SCR223, Justice O. Chinnappa Reddy after considering various decisions of the apex court summaried the legal propositions in the following terms :-

On a consideration of the relevant cases cited at the bar the following propositions may be taken as well established : State owned or public owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest when it is considered necessary to dispose of a property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive or discrimination. Appearance of public justice is as important as doing justice. Noting should be done which gives an appearance of bias, jobbery or nepotism. The public property owned by the State or by an instrumentality of the State should be generally sold by public auction or by inviting tenders. This Court has been insisting upon that rule, not only to get the highest price for the property but also to ensure fairness in the activities of the State and public authorities. They should undoubtedly act fairly. Their actions should be legitimate. Their dealings should be above board. Their transactions should be without aversion or affection. Nothing should be suggestive of discrimination. Nothing should be done by them which gives an impression of bias, favouritism or nepotism. Ordinarily, these factors would be absent if the matter is brought to public auction or sale by tenders. That is why the Court repeatedly stated and reiterated that the State owned properties are required to be disposed of publicly.

32. The law laid down the Supreme Court is the law of the land and has got to be followed in all government contracts and procurement. An argument may be raised

that though it may be the law of the land, unless it is violative of the competition Act, no notice can be taken by the Commission. In this connection it is necessary to examine the preamble to the Competition Act which reads as under :-

> *An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interest of consumers and to ensure freedom of trade carried on by other participants in market, in India, and for matters connected therewith or incidential thereto.*

33. In India, public procurement by Central and State governments, corporations and other instrumentalities account for 30% of the GDP of India. As India's GDP is around 2 trillion dollars, the expenditure on public procurement is very high. This large public procurement leads to competition effects. The procurement by the Govt. and its instrumentalities leads to economic development and creation of jobs. The public sector can promote competition by sourcing requirements from a range of suppliers. It can also restrict competition by restricting participation in tenders and it can also discriminate against particular types of firms. The public sector can also contribute towards an improvement of competitive conditions. In fact, public sector enjoys buyers power. Buyer power is related to the size of demand relative to total demand in a relevant market. It also enjoys power because it is strategically important customer for its suppliers. There are differences betweeen public procurment and private procurement. There are legal and regulatory requirements for public procurement which do not exist for private procurement. Transparency and non discrimination are necessary for public procurement. Decision to purchase is different for a public sector as compared to private procurement. Public Sector is more risk averse and therefore failure is normally avoided. Public Sector purchases are not with a desire to maximise profits. There are other policy objectives which binds a public sector such as employee welfare, govt. Policies etc.

34. When tendering process is adopted in public procurement it leads to breaking entry barriers. It results in lower prices and better quality and savings which leads to surplus for investment. It also increases competition in the market and more contracts can be given to large number of firms/persons. Public procurement can

lead to significant effects on investment and innovation. In fact large public sector demand leads to increase in productive capacity and employment. In fact, public sector demand can create a market. For these reason, the Supreme Court came up with the decisions as reproduced above.

35. Incidentally, the Competition Act has constitutional sanction. This is evident from the Preamble of the Constitution which is reproduced as under :

> *The PEOPLE of India, having solemnly resolved to constitute India into a {SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC) and to secure to all its citizens ;*
>
> *Justice, sociak, economic and political;*
>
> *LIBERTY of though, expression, belief, faith and worship'*
>
> *EQUALITY of status and of opportunity; and to promote among them all*
>
> *FRATERNITY assuring the dignity of the individual and the (unity and integrity of the Nation)*
>
> *IN OUR CONSTITUTENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.*

36. The Preamble talks about about economic justice and the equality of opportunity. In accordance with equality of opportunity and economic justice in the market, there is a necessity to prevent practices resulting in an adverse effect on competition and to protect the interest of consumers and also to ensure freedom of trade carried out by participants in the market. For this purpose, if someone enters into an agreeement which would have adverse effect on competition then such an agreement is a void agreement. Similiarly the effort to fix prices, limit or control production, supply development and provision of services or allocating markets is presumed to have appreciable adverse effect on competition. Even exclusive distribution agreement etc. or the discriminatory practices in sale or purchase of goods or even having conditions in purchase or sale of goods, denial of market access infringe on the economic freedom and equality before law. Therefore, any public procurement which has anti competitive elements is hit by the provisions of the Competition Act.

37. A concept of buyers' choice has been brought into competition analysis in the majority order. Buyers' choice is not a part of competition law. Further, as already discussed above in the case of public procurement as the law has been laid down by the Supreme Court, there cannot be buyers' choice. Buyers' choice cannot supersede the law. The procuring agency has to follow the guidelines and the instructions of the Government as well as the law as laid down whenever public procurement is being made. There are other issues and it is necessary to discuss them.

38. Another issue is the economic rationale for IR to sign the MoU with SAIL. Till 1997 rails were imported in India but with the demand for a larger and a safer network the demand for rails increased. It was at the instance of IR that SAIL setup its rail plant. The imported rails were costly because of the freight component and taxes. For this reason IR wanted developed a domestic source for the supply of rails. As SAIL was a government company and as IR was government itself the natural course was for IR to approach SAIL to setup the facility. There is no material to hold that IR compensated SAIL for shifting to rails from heavy structurals. Heavy structurals is a big market where the margins are higher because there are numerous buyers. Whenever there is one buyer the margin would be low and SAIL realised it but probably due to government policy it setup the rail plant mainly for the economic development of the country. Under Competition law we do not have to look at efficient outcome of economic decision. This aspect of efficient outcome not relevant as far as competition law is concerned. What is required as to whether the MoU signed by IR and SAIL led to an appreciable adverse effect to competition in India. If it is held that AAEC exists then the MoU is anti-competitive.

39. IR buys rails only which are RDSO compliant because RDSO sets the standard. Till April 2008 the only supplier of RDSO compliant rails was SAIL. Further the capacity of the rail plant of SAIL is much higher than the plant of JSPL. Till April 2008 there was only one buyer and one supplier in India and for this reason there was no question of any AAEC in India. A question arises as to what happened after 2008. It was at the instance of IR that SAIL had invested Rs. 711 crores in building up the facilities at the rail plant at Bhilai. Therefore in the fitness of things the exclusive agreement between IR and SAIL should operate till the investment made by SAIL in the plant machinery was recovered. This recovery can be made in

the form of depreciation claim on the plants / machinery set up by SAIL. SAIL has submitted that the depreciation on plant and machinery is at the rate of 5.28%. There is no basis for arriving at a figure of 5.28% for depreciation. Under the Companies' Act which follows the straight line method of depreciation, depreciation is worked out at 10% of the cost. Under the Indian Income Tax Act 1961 depreciation is allowed on plant and machinery by the written down method. The rate prescribed is 15%. On the basis of these rates SAIL would recover its cost of setting up the plant within a period of 10 years. The rail plant was setup as discussed above between the period 1998 to 2007. In the fitness of things taking into account the straight line method of depreciation at the rate of 10%, the entire plant would depreciate fully by the year of 2012 on approximate basis mainly because investments were made in different years. There is no material to hold as submitted by SAIL that the entire plant would depreciate by 2016-17. Therefore under the fitness of things no AAEC would be caused between the period 01.02.2003 – 31.03.2012. Therefore any competition concern which would arise in the markets in India would arise after the March 2012.

40. As no competition concerns arise till 2012 the question of AAEC in India under Section 3(1) of the Act would be applicable only after 01.04.2012. If IR and SAIL continue with the MoU which is an agreement after 2012 they would be creating AAEC in India. Thus, after 01.04.2012 there would be a case of violation of Section 3(1) of the Competition Act. Further as per the law laid down by the Supreme Court in the case of government procurements it is necessary to advertise the procurement and get bids. This helps the procurer in getting a better value and would also introduce competition in the market which in turn would lead to greater efficiency, technical development and innovation. Therefore after March 2012 the MoU between IR and SAIL would be void because it would cause AAEC in India. Further, the MoU is a contract in perpetuity. Under the Contract Act there cannot be a contract in perpetuity. A contract in perpetuity is void. IR is therefore advised to call for tender and procure its rails so that both SAIL and JSPL can participate.

41. As already discussed above the provisions of Section 3(4) are an extension of Section 3(1) of the Act. Section 3(4) illustrates Section 3(1) of the Act. I have already held that the agreement in the form of MoU violates Section 3(4)(b) and 3(4)(d) of the Act. Further, we have to examine whether the agreement in the form

of MoU creates AAEC in India. For this purpose it is necessary to examine the factors mentioned in Section 19(3) of the Act. By entering into the MoU, IR and SAIL foreclosed the market for any other entrant in the market for rails. Further by entering into MoU when there were no competitors in the rail market, there was no foreclosure of market. Competition concerns arose when a new entrant arrived in April 2008. But I have already held that as SAIL made investments at the instance of IR, competition concerns would arise after only after SAIL recouped its investments. I have also held that the recoupment of the investments would be over by 31.03.2012. As the MoU between IR and SAIL would cause AAEC in India after 31.03.2012 as it forecloses the market for new entrants in the market, MoU would be void w.e.f. 01.04.2012.

42. As I have held that the MoU would be void in accordance with Section 3(2) of the Act w.e.f. 01.04.2012, it is necessary for IR to call for tenders for the supply of rails. JSPL and SAIL could submit tenders and IR may get better price for its procurement of RDSO complaint rails. The savings to IR may be beneficial to railways and ultimately for the consumers in the form of lower prices. But IR should refrain from entering into a long term policy of procurement of rails. Any MoU / agreement for a period exceeding five years would be anti-competitive as it would again foreclose the market. IR and SAIL should cease and desist from enforcing the MoU after 01.04.2012. These are the directions issued under Section 27 of the Act.

43. The Secretary is directed to send copies of these orders to Indian Railways, Steel Authority of India and Jindal Steel and Power Ltd.

Certified True Copy

27/12/2011

Sd/-
Member (R)

COMPETITION COMMISSION OF INDIA

29.06.2010

Case No.11/2009

Jindal Steel & Power Ltd. Informant

v.

Steel Authority of India Ltd. Opposite Party

ORDER UNDER SECTION 26(1) OF THE ACT

The Jindal Steel & Power Limited (for short, 'JSPL') has filed the instant information dated 16th October, 2009 as amended by its application dated 24th October, 2009 under section 19 of the Competition Act, 2002 (the 'Act') alleging infringement of the provisions of sections 3 and 4 of the Act by the opposite party, i.e., Steel Authority of India Ltd. (for short, 'SAIL')

2. The relevant facts as stated in the information may be summarized as under :

2.1 That the informant, viz., JSPL, is a public limited company and is engaged in the manufacture of steel products at its factory at Raigarh, Chattisgarh.

2.2 That in April, 1998, the Indian Railways (IR) issued a public notice stating that it had plans to develop an indigenous source for manufacturing quality rails conforming to international standards and out of their total requirement of approx. 4-5 lakh tones per year, about 1 lakh tones per annum was to be procured from a new source and this was to be assured for a period of 5 years.

2.3 That on 4th January, 2001, JSPL informed IR that after setting up its Rail Mill, it would have the capacity to manufacture rails conforming to international standards.

2.4 That in June [illegible] conveyed to JSPL that the rails produced by [illegible] bought if they were of appropriate quality and were offered at competitive prices. On the basis

of this communication, JSPL invested substantial sums in building its Rail Mill and vide letter dated 7th September, 2002, it informed IR that the deliveries from the Rail Mill could begin in the second quarter of 2002-03.

2.5 That the IR entered into an exclusive supply agreement on 1st February, 2003 with SAIL as per which the IR committed itself to buy all its requirements from SAIL and under the MoU, SAIL has been granted the exclusive right to supply rails to IR subject to annual review by IR and this agreement continues till date.

2.6 That on the representations made by JSPL requesting IR to purchase rails from it, the IR informed in February, 2009 that it does not intend to review its exclusivity obligations with SAIL.

2.7 That although the Rail Mill of the informant was inspected and approved by RDSO and its product is RDSO compliant but due to exclusivity agreement between IR and SAIL, the informant is denied market access which has the effect of foreclosing a substantial part of relevant market to the competitors including the informant and it has further led to reduction/elimination of competition in the relevant market.

2.8 That in the year 2008-09, SAIL supplied a total of 8,31,922 tonnes of RDSO compliant rails in the relevant market as against 34,787 tonnes supplied by the informant. Therefore, the market share of SAIL is nearly 96% in the relevant market in India and thus SAIL is a dominant player of RDSO compliant rails and that this market share has been consistently maintained during the last 7/8 years.

3. On the basis of these facts and the averments, it is alleged that the exclusive supply agreement between IR and SAIL is an anti-competitive agreement which has caused appreciable adverse effect on the competition in the relevant market in India. It is further alleged that the opposite party, viz., SAIL has abused its dominance and as a consequence of this agreement, there is foreclosure of the relevant market for new similar players. The informant accordingly prayed to the Commission to order investigation into the opposite party's conduct in abusing its dominant position.

4. In its meetings held on 4.11.2009 and 10.11.2009, the Commission considered the information and decided to seek the views/comments of SAIL. For this purpose, a notice was sent to SAIL on 19.11.2009 to submit its comments within 2 weeks but SAIL did not file its views and prayed for some more time vide letter dated 30th November, 2009. However, the Commission after rejecting its request for further time, considered the matter in its meeting held on 8.12.2009 and decided to refer it for conducting investigation. The opposite party SAIL, thereafter filed interim reply in the form of caveat on 15.12.2009.

5. Aggrieved by the direction dated 8.12.2009 of the Commission passed under section 26(1) of the Act, the opposite party preferred appeal before the Hon'ble Competition Appellate Tribunal. The Hon'ble Tribunal vide its order dated 15.2.2010 while allowing the appeal directed the Commission to consider the objection/reply filed by the opposite party along with further material to be filed by it and then to take a fresh decision under section 26(1) of the Act on the basis of such material.

6. In compliance with the directions of the Hon'ble Tribunal, SAIL has filed reply dated 22nd February, 2010 and a further rectified reply dated 26th February, 2010.

7. The informant has also filed rejoinder dated 3.3.2010 to the replies of the opposite party.

8. During the course of hearing, Ms.Pallavi Shroff, learned counsel appearing for the informant and Shri Dhankar, learned counsel appearing for the opposite party made detailed submissions. Besides the voluminous documentary material including paper books and case laws, the parties have also filed written submissions.

9. In the setting of the above factual background, the Commission proceeds to examine this matter under section 26(1) of the Act. [illegible] the opposite party, apart from denying allegations and averments made by the informant, has

raised some issues assailing the jurisdiction of the Commission and challenging the applicability of the provisions of the Act to the present matter vide interim reply dated 15th December, 2009, reply dated 22nd February, 2010 and further rectified reply dated 26.2.2010 as also through their written and oral arguments. The Commission, therefore, before delving into the information for taking a prima facie view under section 26 of the Act considers it necessary to dispose of these objections.

10. The main objections taken by the opposite party are being summarized as under:

i) that IR carries out the sovereign functions of the State and therefore, it is exempt from the application of the Act.

ii) that the informant JSPL having already approached Delhi High Court for similar reliefs in relation to the same matter cannot be allowed to invoke the jurisdiction of the Commission on the identical issue.

iii) that the arrangement between IR and SAIL is a record of policy decision taken by the Government and the Commission does not have the jurisdiction to interfere with the same.

iv) that since IR and SAIL are two limbs of the Central Government, the MoU being an agreement between two entities of the same group, is beyond the purview of the sections 3 and 4 of the Act.

v) that the MoU between IR and SAIL cannot be treated to be an anti competitive agreement and it does not adversely affect competition in the relevant market.

vi) that SAIL has not indulged into any abusive conduct and therefore, it cannot be held that it has abused its dominant position in the relevant market.

vii) that the informant has not impleaded IR as a party in the present proceedings and therefore, the information is not maintainable due to non-joinder of necessary parties.

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For dealing with these objections, the following points are required to be determined:

Point No. 1 – 'Sovereign Functions'

11. A preliminary objection has been raised by the learned counsel appearing for the opposite party as to the maintainability of the present proceedings. It is submitted that the IR is a public body carrying out sovereign functions and, therefore, it is not covered within the definition of 'enterprise' as given under section 2(h) of the Act and hence the instant proceedings are not maintainable.

12. Per contra, the learned counsel appearing for the informant has refuted the plea by submitting that the running of railways is a commercial activity and not a sovereign function of the government and, therefore, the plea raised by the opposite party is baseless and has to be rejected.

13. In support of its contention, the learned counsel for the informant has placed reliance on the following decisions:

Common Cause v. Union of India, (1999) 6 SCC 667, Union of India v. Sri Ladulal Jain (1964) 3 SCR 624, Chairman, Railways Board v. Chandrima Das, (2000) 2 SCC 465 and N.Nagendra Rao & Co. v. State of A.P. (1994) 6 SCC 205.

14. The learned counsel appearing for the opposite party sought to distinguish the above decisions and contended that it is not the case of the opposite party that running of railway service is not a business. The contention is that the development and maintenance of a safe and secure railway network is a sovereign function of the government. Accordingly, the counsel for the opposite party has sought to draw a distinction between running railway services and laying down a network of rails. It has been further canvassed that railway networks are never laid down by IR on purely commercial considerations, rather it is laid down for the furtherance of national objectives of industrial development and development of backward areas etc. On the strength of [illegible] enterprise, the counsel has averred that whereas providing [illegible] services may amount to a commercial activity and [illegible] be taken up by private

parties, the actual development and maintenance of the safe and secure railway network cannot be taken up even theoretically by private individuals.

15. We have considered the rival submissions including the case law on which reliance has been placed by the learned representatives of the parties.

16. The issue relating to the concept of 'sovereign functions' has been examined by various courts. The Hon'ble Supreme Court has also considered this issue on various occasions and in different contexts. For deciding the issue under consideration in the context of the facts of this case, we do not wish to add to the bulk of this order by referring to the historical background and dimensions of this concept. However, we deem it appropriate to refer to some leading judgements of the Hon'ble Supreme Court wherein basic propositions of law on the meaning and concept of 'sovereign acts' have been laid down.

17. The concept of sovereign function was extensively examined by the Hon'ble Supreme Court of India in one of its landmark judgements in the case of *Bangalore Water Supply & Sewerage Board v. A.Rajappa, (1978) 2 SCC 213*, by a large Bench comprising seven judges. While interpreting the term "industry" as given under section 2(j) of the Industrial Disputes Act, 1947 considered the scope and meaning of 'sovereign functions' and observed as under:

> "....sovereign functions, strictly understood, alone qualify for exemption, not the welfare activities or economic adventures undertaken by government or statutory bodies."

18. Recently, a five judges Bench of the Hon'ble Supreme Court in the case of *State of U.P. v. Jai Bir Singh, (2005) 5 SCC 1* again examined the issue in the light of the decision of the Hon'ble Supreme Court in the case of *Bangalore Water (supra)*. However, the Court could not take a different view and only referred the matter to a larger Bench for consideration which shows that the decision of the Hon'ble Supreme Court in the case of *Bangalore Water Supply (supra)* still holds the field.

19. Adopting the same approach, the Hon'ble Supreme Court of India, in the case of *N.Nagendra Rao & Co. v. State of A.P. (1994) 6 SCC 205* observed as under:

"25. ..... In welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. *Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the state cannot claim any immunity."*

20. In a subsequent case, the Hon'ble Supreme Court again considered the concept of 'sovereign functions' in *Common Cause v. Union of India, (1999) 6 SCC 667* and quoted with approval the aforesaid observations in the case of *N.Nagendra Rao (supra).*

21. The concept of 'sovereign function' in the context of railway services was considered by the Hon'ble Supreme Court in the case of *Union of India v. Sri Ladulal Jain, (1964) 3 SCR 624*, while dealing with the question as to whether the running of railways ceases to be a business when they are run by the government. The Hon'ble Court held as under:

> "... the only question then is whether the running of railways ceases to be a business when they are run by government. There appears to be no good reason to hold that it is so. *It is the nature of the activity which defines its character.* Running of railways is such an activity which comes within the expression 'business'. The fact as to who runs it and with what motive cannot affect it."

22. The learned counsel for the [illegible] has also placed reliance on this authority for supporting [illegible] argument to the effect that

running of railways is only a commercial activity of the government. According to her it is a direct authority which is applicable on the facts of this case. We cannot easily brush aside her contention.

23. We may also refer the decision of the Hon'ble Supreme Court in the case of *Chairman, Railway Board v. Chandrima Das, (2000) 2 SCC 465* wherein it was held as follows:

> "... ...It may be pointed out that functions of the government in a welfare state are manifold, all of which cannot be said to be the activities relating to exercise of sovereign powers. The functions of the State not only relate to the defence of the country or the administration of justice, but they extend to many other spheres as, for example, education, commercial, social, economic, political and even martial. These activities cannot be said to be related to sovereign power."

Accordingly, the Hon'ble Supreme Court in this case held that running of the railways is a commercial activity and the same cannot be equated with the exercise of sovereign power.

24. On analytical examination of these and other decisions of the Hon'ble Supreme Court, it is found that for laying down the propositions of law, the stress is laid on the nature of a particular activity carried out by the State or its instrumentalities. It is not the nature of the governmental body or the enterprise which is a determinative factor, but it is the nature and character of the activity which is carried out by such body, which qualifies its activity for granting immunity from any action before a court of law. In taking this view, we are fully fortified by the observations of Hon'ble Supreme Court of India made in the case of *Ladulal Jain (supra)*.

25. We may also point out that IR is not a party in the case and the opposite party SAIL is engaged in manufacturing and supplying rails and is not entrusted with the task of securing railway networks and, therefore, even the fine distinction sought to be drawn by the learned counsel appearing for the opposite party SAIL between running of railway services AND development and maintenance of a safe and secure railway network is not of any avail to it.

26. The view taken by us, in the context of Competition Act, 2002 is also in consonance with the legislative intent and objects behind it which is clearly manifested by the definition of 'enterprise' as given in section 2(h) of the Act whereby government departments have also been included therein.

27. Adverting to the facts of the case, the undisputed facts about the impugned MoU are that it relates to the procurement of rails by IR from SAIL for carrying out railway services. Viewed in the context of these facts and on applying the legal propositions propounded by the Hon'ble Supreme Court of India in the above referred cases, we can safety come to the conclusion that the activity, i.e., procurement and supply of rails cannot tantamount to sovereign activity

28. In the premises, we reject the contention urged by the learned counsel for the opposite party on the issue.

Point No. 2 – Forum Shopping/Res sub judice/doctrine of election

29. The opposite party has raised another objection to the maintainability of the present proceedings by arguing that this is a clear case of abuse of process of law as the informant had earlier filed a writ petition before the Hon'ble High Court of Delhi bearing WP (C) No.8531 of 2008 wherein the issues involved and reliefs prayed for are substantially the same, as are being agitated before the Commission in the present proceedings. It has been further pointed out by the learned counsel for the opposite party that SAIL had moved an application for impleadment in the pending writ petition and the same has been allowed by the Hon'ble High Court vide its orders dated 26.2.2010. Accordingly, it has been canvassed before us by the learned counsel for the opposite party that the instant proceedings may be stayed by the Commission to await the decision of the Hon'ble High Court on the pending writ petition as the issues involved and reliefs prayed for are substantially the same in both the proceedings.

30. The learned counsel appearing for the informant has controverted the aforesaid contention by stating that the informant

has disclosed the fact of pendency of the said writ petition in the information itself. Besides, it is argued that the issues involved and remedies pursued are distinct and separate in both the proceedings. It has been contended that the proceedings before the Hon'ble High Court involve the issue of violation of fundamental rights, promissory estoppel and breach of legitimate expectation etc. whereas the proceedings before the Commission involve issues of anti-competitive agreement and the abuse of dominant position and these issues are to be examined by the Commission in exercise of the powers and jurisdictions conferred upon it under the Act.

31. The next argument of the learned counsel appearing for the opposite party was that the informant is also barred from pursuing the present proceedings as the same are hit by doctrine of election. It is submitted that when more than one fora are available to a litigant, it is his discretion to choose one of such fora that may be available and once a litigant has chosen one forum, he cannot thereafter look to the other forum for the same purpose. It is elaborated by him that after having chosen to approach the Hon'ble High Court, the informant cannot be allowed to invoke the jurisdiction of the Commission. For supporting this contention, reliance is placed by him on the following decisions :-

Premier Automobiles v. Kamlekar Wadke, AIR 1975 SC 2238; Sunita Nambiar v. KSFC 2008(4) Kar LJ 408; Shyam Babu Sinha v. Cement Corporation of India, MANU/DE/8908/2006; Transcore v. Union of India, AIR 2007 SC 712; Pramod v. Joint Director of Health Services, MANU/MH/1054/2008; National Insurance Co. v. Mastan & Ors.; AIR 2006 SC 577; HB Stockholding v. DCM Shriram Industries, Order dated 25.8.2009 by the Delhi High Court in CS (OS) 2011 of 2008.

32. For countering the submission made by the opposite party on this issue, the learned counsel for the informant has relied upon the decision of the Supreme Court in the case of *Transcore v. Union of India (2008) 1 SCC 125* and submitted that doctrine of election has to be considered at the point of time when two remedies were available to the informant. It was argued by the learned counsel for the informant that the writ petition before the High Court was filed in the year 2008, at the point of time when the Act was not in force and

the Commission could not have decided matters under the Act. It is further submitted that as a matter of fact, at the time of filing of the writ petition, the only legal remedy available to the informant was to pursue the matter under the writ jurisdiction of the High Court. Thus, there was no question of making an election and the first limb of the doctrine of election is not satisfied. It is further urged before us that the doctrine of election cannot apply to situations where a new legislation allowing for the issues to be raised before a new statutory authority did not even exist. Further, the doctrine has no application where the remedies are concurrent or cumulative. It is contended that in the present case, there is no inconsistency between the two albeit distinct remedies and on that basis, the doctrine of election has no application.

33. We have heard the learned counsel appearing for the parties and have gone through the decisions cited above. We find sufficient force in the arguments raised on behalf of the informant for contesting this issue. In our considered opinion, the remedies sought for by the informant before the High Court and the Commission are distinct and disparate. The Commission under the Act is empowered to inquire into any alleged contravention of the provisions contained in sub section (1) of section 3, viz., anti-competitive agreements or sub-section (1) of section 4, viz., abuse of dominant position and the same being statutory remedies, the Commission is bound to examine such information for discharging legal duties mandated under section 18 of the Act. Resultantly, the pendency of the writ petition before the Hon'ble High Court alleging, inter-alia, violation of fundamental rights etc., in our opinion, can have no bearing upon the jurisdiction of the Commission under the Act.

34. For supporting this view, we may rely upon a recent decision of the Hon'ble High Court of Delhi in *WP (C) No. 1287 of 2001 in Ankur export Private Ltd. V. MRTPC* decided on 26.3.2010 to the following effect :

"Distinct and independent grounds of action arising from the same transaction and which may be concurrently or consecutively pursued to satisfactory are not subject to doctrine of election

35. We are also supported in this view by a decision of Hon'ble Supreme Court in the case of *Transcore v. Union of India (2008) 1 SCC 125* wherein the Hon'ble Court while dealing with the doctrine of election held as under :

"64. In the light of the above decision, we now examine the doctrine of election. There are three elements of election, namely existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply...."

36. We may also refer to the provisions of section 62 of the Act which in clear terms states that the provisions of the Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

37. In view of the above, the plea raised by the opposite party is thoroughly misplaced and is liable to be rejected.

Point No. 3 – Review of policy decisions

38. The next preliminary objection raised by the opposite party to the maintainability of the present proceedings is based on the premise that the impugned MoU being a reflection of government policy is outside the purview of the Act. It has been contended that it is a settled legal position that Courts/Authorities/Tribunals should refrain from interfering with the matters of governmental policy. In support of the contention, reliance has been placed upon the decision of the Supreme Court in *Ekta Shakti Foundation v. Govt. of NCT. Delhi, AIR 2006 SC 2609.*

39. It is further contended that the impugned decision has been taken at the Ministry level and evidently for the purpose of ensuring achievement of government objectives and in these circumstances the MoU dated 1st February, 2003 was arrived at and the same goes to show that it is a policy decision.

40. The learned counsel appearing for the informant has contested the aforesaid submissions of the learned counsel for the opposite party by arguing that the decision [illegible] rails from SAIL is a

commercial decision of IR and it is not a policy decision of the State. According to the counsel, if the MoU were to be considered as government policy, then all the public procurement functions of state departments would be policy decisions of the government which is fundamentally flawed. It is further submitted by the counsel that IR while running the railways is not acting as a State but like any other party in a contractual arrangement and, therefore, any decision of IR in that capacity is a purely commercial decision. The learned counsel contended that IR's decision to procure rails from one particular vendor is in relation to its commercial activities and cannot be treated to be a decision in discharge of the government's executive powers or in relation to the administration of the State. Distinguishing the case law on the subject, it has been argued that these decisions are inapplicable to the facts of this case. Further, according to the learned counsel, these judgements have limited applicability as they only refer to the judicial review of administrative actions.

41. We have heard the counsel on the issue and have gone through the material on record. In our considered opinion, when the statute confers power upon the Commission to inquire into certain agreements and dominant position of enterprise. The scope of judicial review of administrative actions is different and limited, and the same can have no bearing upon the jurisdiction of the Commission in exercise of its statutory duties and functions which specifically empower the Commission to inquire into certain anti-competitive agreements and abuse of dominant position by the enterprise. The case law cited has no relevance to the scope of present proceedings. We, therefore, are not inclined to lend our concurrence to the submissions of the counsel for the opposite party on this issue.

Point No. 4 – Agreement between two limbs of the same entity

42. A further plea is raised by the learned counsel for the opposite party that since the IR and [illegible] two limbs of the Central Government, the MoU being an agreement between two entities of the same group, is beyond the purview of the Commission. It is argued that the Union of India [illegible] majority shareholding and retains overall control in the management and in the affairs of both

IR and SAIL and thus clearly the Union of India. IR and SAIL fall under the definition of the 'Group'.

43. We find no force in this plea. The definition of enterprise clearly includes a department of the government under section 2(h) of the Act and further sections 3 and 4 of the Act clearly envisage possibility of an enterprise or group entering into anti-competitive agreements which includes arrangements and abusing its dominant position and, therefore, it is possible and conceivable that even a government department being an enterprise may abuse its dominant position. Moreover, the administrative Ministry for SAIL is the Ministry of steel and IR falls within the Ministry of Railways, both of which are separate Ministries and operate independently. Therefore, the plea is without basis and has to be rejected.

Point Nos. 5 & 6 – Anti-competitive Agreement & Abuse of Dominant Position

44. The learned counsel for the informant, after narrating the facts, argued that in this matter, provisions of section 3 relating to anti-competitive agreement and those of section 4 relating to abuse of dominance are clearly attracted. On the other hand, controverting these submissions, the learned counsel for the opposite party contended that on facts, these provisions are not attracted. As these issues require examination of full facts and evidence which may be collected at a later stage and are to be decided on merits, we are not expressing any view on these issues at this stage for the purpose of taking a view under section 26(1) of the Act.

Point No. 7 – Non-joinder of Necessary Party

45. The learned counsel for the opposite party during the course of arguments has also argued that since the informant has not impleaded IR as a party in the present proceedings, therefore, the information is not maintainable due to non joinder of necessary parties.

46. We, however, are of the view that at this stage, the plea is not required to be gone into and the same may be agitated by the opposite party at the appropriate stage, if so required.

In view of the foregoing, we do not find any force in any of the objections raised on behalf of the opposite party for challenging the jurisdiction of the Commission and in assailing the invokability of the provisions of the Act. Hence, after rejecting the jurisdictional objections, we proceed to take up the matter under section 26(1) of the Act.

47. Having gone through the entire relevant material on record and after taking into consideration all the facts and circumstances of the case, the issues involved and on appreciating the arguments placed before the Commission, we are of the opinion that there exists a prima facie case for making a reference to the Director General to conduct investigation into the matter.

48. It is, however, made clear that observations made in this Order shall not influence the proceedings before the Director General in any manner.

49. The Commission, therefore, directs the DG to conduct enquiry into the matter and submit his report within 60 days from the date of receipt of the order of the Commission.

50. The Secretary is directed to send the entire material to the office of D.G.(Investigation) as required under relevant regulations.