

## COMPETITION COMMISSION OF INDIA

Dated: 14.06.2010

Case No. 20 of 2010

Pawan Kumar Agarwal

Informant

Vs.

Rashtriya Ispat Nigam Ltd.

Opposite Parties

Per R. Prasad, Member (dissenting):

Information was submitted in this case by Shri Pawan against the Rashtriya Ispat Nigam Ltd. The information was in respect of the abuse of dominance by Rashtriya Ispat Nigam Ltd. In the order of the majority, the facts have been discussed. The majority view of the Commission is that there existed a case of dominance in the relevant market but there was no abuse of dominance.

2. The DG in his report had held that RINL was dominant in South India in the relevant product market of rounds. The majority view has accepted the findings of the DG. But the majority held that they did not find an abuse of dominance. The DG found that the price discount given to a trader was not announced and there was no transparency about it. The DG also found on the basis of his inquiries that the stock of rounds used to accumulate in the stockyard of RINL which was then sold at a heavy discount and for this reason, RINL suffered a loss. Thereafter RINL restricted its production and as a consequence, shortages were created which made the traders sell at a large profit. The Information Provider (I.P.) is a small-scale unit and according to the I.P there appears to be a system by which the officers of RINL and the traders cheat RINL. To support this contention the I.P. brought on material to show that there was no production of rounds of the appropriate sizes in April 2010. This was accepted by RINL but it was also stated that it was done in the interest of business and not to benefit certain traders. It was also argued that RINL priced the rounds at a high price at branch level and when the sale did not take place, it sold the rounds at huge discount to big traders. As a consequence, in the policy laid down for the year 2010-11 the small and medium producers which had to buy at branch level and had to suffer a loss. It was found by the DG that the discount ranges from 500 per metric ton to 2500 per metric ton depending on the quality purchased. On

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the other hand RINL said that it offered no discount but only quantity-based incentives to buyers. RINL also said that the volume-based incentives were announced from time to time. As discount was given on the basis of quantity purchased and as the small units could not purchase in the big volumes the discount offered to them was much less than that offered to the traders. The traders were not actual users but could buy huge quantity of material due to the heavy discounts and because of their deep pockets. It was therefore a finding of the DG that the entire system was geared to help the traders and not small consumers. The DG therefore held that this amounts to a discriminatory practice in contravention of Section 4(2) of the Competition Act. Regarding pricing policy RINL said that prices of the good were fixed on the basis of the market reports on monthly basis. But, in the view of the DG, RINL was dictating the price in the relevant market and on certain occasions RINL was selling the goods at below cost which amounts to predatory pricing and an abuse of dominant position. The DG found that RINL sales policy is loaded in its favour as it charges Rs.500 per metric ton as advance booking. It was also found by the DG that the prices to be charged against advance booking were not disclosed to the buyers at the time of booking. Even the supply of the quantity was not guaranteed and as RINL was the only supplier the actual buyers were forced to agree to the terms of RINL in order to have the supply of materials. If the goods booked were not lifted by the buyer the advance paid to RINL was forfeited. For these reasons the DG held that RINL had contravened the provisions of Section 4(2)(a) and 4(2)(b) of the Competition Act.

3. On the other hand the majority view of the Commission is that as the Government of India had a policy of reserving part of the material sold at reasonable prices for the small scale sector and as the supplies were routed through NSIC and SSIC the small units got the material cheap and for this reason the clauses in the policy for the year 2010-11 were neither unfair nor discriminatory. Regarding the volume discounts taken by the large traders the majority view was that as it led to a sale of large amount of product and inventory such an activity cannot be regarded as unfair or discriminatory. In the opinion of the majority the I.P. should have purchased the materials through NSIC or SSIC instead of directly purchasing them from stockyard of RINL. The majority also did not find any infirmity or unreasonableness taking advance deposit against future supplies. Regarding sale at a discount the majority view was that it was done for the purpose of inventory control and that

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sometimes the sale was even below the cost of production. Therefore no abuse of dominance was found by the majority order of the Commission.

4. I have considered the facts of the case. The Central Government has a policy where supplies could be made to small units through NSIC and SSIC and in such cases, the small units do not have to make advance deposit. But it is too simplistic a view to hold that the small units should buy only through NSIC and SSIC. The small units should have the liberty to buy goods from the branch office of RINL or any other outlet. If the requirements of the small units are more than what is allocated to NSIC and SSIC, the small units can also purchase the materials from the branch office of RINL. **The second issue** is the deposit of advance of Rs.500/- per M.T. for the purchase of material against an unknown price. It is alleged that as the small units do not have the financial muscle on many occasions to lift the goods they are unable to take delivery and therefore the advance deposits are forfeited. On the other hand, RINL has stated that on the basis of the booking its production is planned and if a buyer does not lift the goods the company loses. To recoup the loss the amounts deposited are forfeited. The arguments of RINL are correct. But RINL should follow two practices – (i) it should specify the rates at which the goods are sold to the prospective buyers and it should not be on unspecified rates (ii) Before an amount is forfeited, the parties who have booked the goods should be given a notice. Forfeiture cannot be a unilateral right of RINL. **The third issue** is that the prices at stockyards are higher than the prices through NSIC and SSIC. The pricing has to be looked into by RINL. If there are two sets of prices and they are discriminatory then in that case, there is a case of violation of the Competition Act. **The fourth issue** is the issue of discounts. There are volume discounts and other types of discounts. The discounts should be in such a manner that percentage discount to a small user and a trader is that same and any discrimination in favour of trader would lead to a contravention of the Act. **The fifth issue** is related to prices again. As the prices at the stockyards are kept high, there are no buyers. RINL then sells the goods at a discount and the large traders then buy the goods and RINL in the coming months stops production of such goods which leads to a shortage of goods in the market and prices rise and the traders sell their inventory at a high price. In the process RINL is a loser. RINL should correct its procedures so that it does not suffer a loss and traders do not gain. Corrective measures are therefore

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necessary by RINL. Considering the facts of the case, there is material to hold that RINL has contravened the provisions of Sections 4(2)(a) and 4(2)(b) of the Act.

5. There is another issue to be discussed in this case with reference to Sections 26 and 27 of the Competition Act. When an information is furnished to the Commission and the Commission finds that there was no case of competition then the Commission may not take cognizance of the same and pass an order under Section 26(2) of the Competition Act dismissing the complaint. There can be cases where the Commission on the basis of information came to a conclusion that a case of anticompetitive behaviour was made out and therefore under Section 26(1) can it order the Director General to investigate the case. Therefore whenever such a direction is issued, the Commission had formed a prima facie belief that competition issues are involved. The DG thereafter submits an investigation report to the Commission under Section 26(3) of the Competition Act. In view of Section 26(4) of the Act the Commission is required to forward a copy of the report to the parties concerned. If the Director General had recommended that he found no contravention of the provision of the Competition Act then after hearing the objections of the Central government or the State Government or the parties concerned the Commission comes to finding that there was no case then it can close the matter and pass such orders under Section 26(6) of the Competition Act. If after considering the objections and suggestions of the concerned parties where the DG had found no contravention, the Commission feels that further enquiries were required then it can either carry out enquiries on its own or ask the Director General to further investigate the case. This is in accordance with Section 26(7) of the Competition Act. If contravention of the provision of the Competition Act are found by the Director General, then the Commission is required to carry out further inquiries regarding the contravention in accordance with the provisions of the Act. This is as per the provisions of Section 26(8) of the Competition Act. Section 27 talks about the orders to be passed by the Commission after an inquiry under Section 26 has been carried out. Section 27 reads as follows:-

*Where after inquiry the Commission finds that any agreement referred to in Section 3 or action of an enterprise in a dominant position, is in contravention of Section 3 or Section 4, as the case may be, it may pass all or any of the following orders, namely:-*

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- (a) *Direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;*
- (b) *Impose such penalty, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse;*
- (c) *[Omitted by Competition (Amendment) Act, 2007]*
- (d) *Direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission.;*
- (e) *Direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;*
- (f) *[Omitted by Competition (Amendment) Act, 2007]*
- (g) *Pass such other [order or issue such directions] as it may deem fit.*

A reading of Section 27 would show that an order under this Section can be passed only when there was a contravention of Section 3 or Section 4 of the Competition Act. The question is as to what would happen if the Commission finds that no case is made out after the DG finds a contravention. Such a situation is not provided in the Act. This is due to the fact that once the Commission had formed a prima facie opinion under Section 26(1) of the Competition Act then it cannot revisit its opinion again and drop the case. If the DG's investigation has confirmed the prima facie view of the Commission by finding contravention of the Act then the Commission cannot close the case in view of its prima facie view. For dropping a case provisions have to be provided in law. If such a provision does not exist then the Commission cannot import the provision in the Act. Therefore after the Commission has formed the prima facie view and the DG has found contravention then only view left to the Commission is to pass an order under Section 27 of the Competition Act. Under Section 27 of the Act, an order can only be passed when a contravention is established. Therefore dropping of case after DG has found a contravention is not authorised under the Competition Act of 2002. This proposition is further strengthened by the fact that appeals are provided against orders under Sections 26(2) and 26(6) of the Act. An order of dropping is an order and such an order

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cannot be passed in the absence of provisions. Further an order of non admission of a case or closure of case after the DG finds no contravention can be appealed against, it does not appear to be logical to hold that no appeal would be provided against an order of closure where the Commission had formed a prima facie view under Section 26(1) of the Act and the DG had found contravention. The Legislature had not envisaged such a situation as in such a case the logical course would be an order under Section 27 of the Act. Incidentally, no order of closure can be passed under Section 27 of the Act.

6. To sum up, RINL has contravened the provisions of Section 4 of the Act. In the consequence, the opposite party RINL has to take corrective measures as suggested above in accordance with the provisions of Section 27 of the Act. The corrective measures should be communicated to the Commission within three months of this order.

Sd—  
Member (R)