

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**

**PRINCIPAL BENCH, NEW DELHI**

**COMPETITION APPEAL (AT) No.48/2019**

(Arising out of judgement and order dated 25.07.2019 in Case No.19 of 2019 passed by Competition Commission of India, New Delhi)

**In the matter of:**

Beach Mineral Producers Association

Represented by its Secretary

C Sakthi Ganapathy,

Ittamozhi Road,

Mahadevankulam (Post)

Tirunelveli District 627657

2. V Velmurugan,

Proprietor

M/s Phoenix Agency

4, A.M.L. Theri Road,

Keeraikarantattu Tisayanvilai P.O.

Tirunelveli District 627657

Appellants

Vs

1. Government of India  
Through Secretary,  
Ministry of Commerce and Industry  
Deptt of Commerce,  
Directorate General of Foreign Trade,  
Udyog Bhavan,  
New Delhi 110001
2. Director General of Foreign Trade, Through Secretary,  
Ministry of Commerce and Industry  
Deptt of Commerce,  
Directorate General of Foreign Trade,  
Udyog Bhavan, New Delhi-110001
3. Indian Rare Earths Ltd  
Through its Secretary,  
Deptt of Atomic Energy,  
Plot 1207, ECIL Building, Veer Savarkar Marg,  
Opp Siddhivinayak Temple,  
Prabhadevi,

Mumbai 400028

4. Competition Commission of India,  
Through its Secretary,  
9<sup>th</sup> Floor, Block 1  
Kidwai Nagar(East)  
New Delhi-23.

For Appellant: Mr Kinngsly Solomon J, Mr. G Balaji, Mr AR Rubhavathy, Advocates.

For Respondent: Mr Soni Singh, Ms Parkhi Singh, Ms Sunaina Dutta, Joint Secretary, CCI for R4, Advocates.

Mr Balaji Subramaniaum, Ms Aayushi Sharma, Mr Akash Kundu, for R3, Advocates.

### **JUDGEMENT**

#### **JUSTICE YOGESH KHANNA, MEMBER (JUDICIAL)**

This appeal is filed by the appellant against an impugned order dated 25.07.2019 passed by Competition Commission of India, New Delhi in Case No.19/2019.

2. Before we examine the legality of the order it would be appropriate to state the facts as narrated in the impugned order, as under:-

- a) *The present Information has been filed by Beach Mineral Producers Association ('Informant-1') and Mr. V. Velmurugan ('Informant-2') under Section 19(1)(a) of the Competition Act, 2002 (the 'Act') against Directorate General of Foreign Trade ('DGFT')/('OP-1'); Director General, DGFT ('OP-2') and Indian Rare Earths Limited ('OP-3') alleging, violation of the provisions of Section 4 of the Act (hereinafter, Informant-1 and Informant-2 are collectively referred to as Informants and OP-1, OP-2 and OP-3 are collectively referred to as Opposite Parties/ OPs);*
- b). *as per the information, Informant-1 is a society registered under the Societies Registration Act, 1860, formed with the objective of protecting the beach mineral industry, particularly its members. It has been in existence to espouse the cause of miners engaged in mining and processing of beach sand minerals (BSMs) in the State of Tamil Nadu. Informant-2 is the proprietor of M/s Phoenix Agency and a dealer/ trader in BSMs*

having an Importer Exporter Code (IEC) allotted by Madurai regional office of DGFT in May 2016;

c). as per the website of OP-1, it is an attached office of the Ministry of Commerce and Industry and is responsible for formulating and implementing the Foreign Trade Policy (FTP) of the country. It also provides facilitation to exporters about developments in international trade, such as WTO agreements, anti-dumping issues, etc. OP-1 is headed by OP-2. As per the Information, OP-3 is a wholly owned public sector undertaking (PSU) under the administrative control of Department of Atomic Energy (DAE), GOI. Presently, it has mineral processing units in Tamil Nadu, Kerala and Odisha;

d). It has been stated that five coastal states, namely, Tamil Nadu, Kerala, Andhra Pradesh, Odisha and Maharashtra have beach sand deposits available on various beaches. Beach sand deposits, also called as placer deposits, **contain associated BSMs such as ilmenite, rutile, garnet, monazite, zircon, sillimanite and leucoxene**. BSMs have multiple uses, such as sand blasting, creating welding flux, manufacture of refractories, **extracting rare earth components, atomic power** etc. As per the information, Garnet is used for manufacture of abrasives and as an essential ingredient in sand blasting. Rutile and Leucoxene are utilised for creating welding flux. Zircon is used as a pigment for ceramics, refractories and abrasives. Sillimanite is used in manufacture of refractories. Monazite, a thorium ore, **is used for strategic purposes and for extracting rare earth** components;

e). it is further stated that post-independence, under the Atomic Energy Act, 1948 (repealed and replaced by the Atomic Energy Act, 1962) the concept of 'Prescribed Substances' was introduced according to which Prescribed Substances, which included BSMs, could be used only for production or application of atomic energy or research. Further, prior to liberalisation, only two companies namely, OP-3 and Kerala Minerals and Metals Ltd., a state PSU of Government of Kerala, were allowed to mine and process BSMs.

f). informants have averred subsequently, as per GOI Resolution dated 06.10.1998 issued by DAE, most of the restrictions on private participation were removed and foreign direct investment (FDI) up to 74 per cent (subject to prior approval by GOI) for extracting and trading of BSMs was allowed. Further, vide Press Note 6/2008 dated 12.03.2008, Government permitted FDI up to 100 per cent in mining and mineral separation of titanium bearing minerals and ores, value addition and integrated activities subject to sectoral regulations

and Mines and Minerals (Development and Regulation) Act, 1957 (MMDR Act). Specifically, Part B of the First schedule of MMDR Act deals with Atomic Minerals, which corresponds to Prescribed Substances under the Atomic Energy Act, 1962;

g). it is stated in the information that production and export of Ilmenite and Rutile increased tremendously with the entry of private players and exports soared from around Rs. 35 crore in 1997-98 to around Rs. 4000 crore in 2017-18 which compelled OP-3 to start joint ventures with international players from Australia and Japan etc.

h). it is averred that after around two decades of gradual liberalisation of the sector, vide notification dated 21.08.2018 issued by OP-1 under the provisions of Section 3 of the Foreign Trade (Development and Regulation) Act, 1992 (FTDR Act) read with paragraphs 1.02 and 2.01 of FTP for the period 2015- 20 (Notification), **export of BSMs was brought under State Trading Enterprise (STE) and consequently, OP-3 was designated as the canalising agent/ STE for export of all BSMs which places it in a dominant position and skews the level playing field;**

i). it is also submitted that along with the Notification, a Standard Operating Procedure (SOP) in respect of export of BSMs was also published by OP-1.

3. The Ld. CCI on the above facts had passed the following impugned order:-

14. In this regard, the Commission observes that STEs deal with export/ import of products in pursuance of government policies in relation to products/ industries considered to have strategic importance. The Commission also notes that BSMs, inter alia, have **space, defence and atomic applications** and have also been **specified as Atomic Minerals** under the provisions of the MMDR Act and Prescribed Substances under the provisions of the Atomic Energy Act, 1962.

15. The Commission observes that the impugned allegations arise from the policy formulation by OP-1 regarding export of BSMs under the provisions of FTDR Act and FTP and implementation thereof by OP-3. Having looked into the nature of allegations raised by Informants the Commission is of the considered view that change in export policy by OP-1 in pursuance of its statutory duties and implementation thereof by OP-3 are not amenable for examination within the framework of Section 4 of the Act.

16. In view of the foregoing, the Commission is of the view that no case of contravention of the provisions of the Act is made out

*against OPs. Thus, the matter is ordered to be closed forthwith under the provisions of Section 26(2) of the Act.*

4. We have heard the learned counsels for both the parties. Firstly we find the notification does not stop the appellants to do business with foreign buyers but only says such exports need to be channelized through Respondent No.3, in view of material being related to the 1<sup>st</sup> Schedule of Mines and Minerals (Development and Regulation) Act, 1957 and Prescribed Substances under the Atomic Energy Act, 1962. Secondly we find the provisions of Section 4 of the Act shall not be applicable in the present case. Section 4 of the CCI Act is as under:-

*4. (1) No enterprise or group shall abuse its dominant position.  
(2) xxxx*

5. A bare perusal of sub-section(1) of Section 4 would show it relates to an *enterprise* or a *group*. Let us find if the Respondents are covered within the definition of the word *enterprise*. Enterprise is defined in sub-section (h) of Section 2 of the CCI Act, 2002 as under:-

*(h) “enterprise” means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, **but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.***

*Explanation.-For the purposes of this clause,—*

*(a) “activity” includes profession or occupation;*

*(b) “article” includes a new article and “service” includes a new service;*

*(c) “unit” or “division”, in relation to an enterprise, includes*

*(i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;*

*(ii) any branch or office established for the provision of any service;*

6. Admittedly Section 2(h) clarify *enterprise* does not include any activity of government relatable to sovereign functions of the government, including all activities carried on by the Central Government, dealing with the *atomic energy* etc.

7. Thus to our mind the learned CCI has rightly closed the information under the provisions of section 26(2) of the Act as *vide* the appeals, the appellant proposed to challenge the notification dated 21.08.2018, which in fact is a policy issue and this being not a forum to seek orders *qua* its quashing. In case the appellant has any grievance or intends to get such notification quashed, the appellant may seek its remedy elsewhere. The impugned order does not require interference by this Tribunal, hence the appeal stands dismissed.

All pending applications are closed.

**(Justice Yogesh Khanna)**  
**Member (Judicial)**

**(Mr Ajai Das Mehrotra)**  
**Member (Technical)**

**Date:23.09.2025**

**Bm/**