

Cryogas Equipment Private Limited vs Inox India Private Limited on 8 March, 2022

COMPETITION COMMISSION OF INDIA

Case No. 08 of 2021

In Re:

Cryogas Equipment Private Limited
A-36, Ghanshyam Nagar,
Society 2, G.I.D.C. Road Manjalpur,
Vadodara-390011, Gujarat.
And

Informant

Inox India Private Limited
9 K P Platina, Race Course Road,
Gopal Baug
Vadodara-390007, Gujarat.

Opposite Party

CORAM

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Present

Cryogas Equipment Private Limited

Mr. Vaibhav Gaggar, Advocate
Ms. Kokila Kumar, Advocate
Mr. Ketan Sarraf, Advocate
Mr. Pankaj Bhatt, Party in person
Mr. Nayan B. Pandya, Party in person

Inox India Private Limited

Mr. Rajshekhar Rao, Senior Advocate
Ms. Anisha Chand, Advocate
Mr. Soham Banerjee, Advocate
Mr. Areeb Amanullah, Advocate
Mr. Sudhir Sethi, Authorised Representative

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

1. The present information has been filed by Cryogas Equipment Pvt. Ltd. ("CEPL/Informant") under Section 19(1)(a) of the Competition Act, 2002 ("Act") alleging contravention of the provisions

of Section 4 of the Act by Inox India Pvt. Ltd. ("Inox"/ "Opposite Party").

Facts and allegations, as per information

2. CEPL is stated to be a private limited company incorporated under the provisions of the erstwhile Companies Act, 1956. It is, inter alia, involved in the business of manufacturing, supply and export as well as engaged in providing solutions with regard to air, gas and Liquefied Natural Gas ("LNG") and also caters to the need of city gas distribution.

3. Inox is stated to be a business conglomerate incorporated in 1976 under the provisions of the erstwhile Companies Act, 1956. The Inox Group has diversified across several businesses and is engaged in activities pertaining to industrial gases, manufacturing refrigerants, fluorochemicals, polytetrafluoroethylene, cryogenic equipment, LNG storage and distribution equipment, wind turbine renewable energy and building multiplexes in India. CEPL has stated that Inox has grown to become a market leader in the field of vacuum insulated cryogenic equipment and LNG solutions in India and across the world. Inox's portfolio includes products in three different segments: (i) Industrial Gas, (ii) LNG, and (iii) Oil and Gas.

4. Since 2017, CEPL and its group companies are, inter alia, engaged in the repair and maintenance of Indian Oil Corporation Limited's LNG Cryogenic semi-trailers and are providing a complete overhaul, including refurbishing accidentally damaged cryogenic tankers and also repairing complex cryogenic semi-trailers for and on behalf of Cryolor, France. As per CEPL, LNG Tankers have a simpler design compared to industrial gas cryogenic semi-trailers, which involve complex piping cabinet, instrumentation and metering systems.

5. In 2019, CEPL ventured into the market of manufacturing of LNG semi-trailers and service of transportation of LNG through LNG semi-trailer, based on its considerable experience of design, manufacturing, testing and repairing several such tankers and semi-trailers manufactured by other companies from Europe and USA, knowledge and understanding of the domestic market and the needs of the customers, and inputs received from an expert, viz., Mr. Ron Baker, CEPL devised the design keeping in view the requirements mentioned by the Road Transport Office (RTO) and the requirements under the codes specified by international organizations such as the American Society of Mechanical Engineers (ASME)/European Commission. It also obtained the requisite approval, a mandatory requirement, from the concerned regulatory authority on 05.10.2017 with respect to the drawings of the design for 46KL LNG semi-trailer, pursuant to its application dated 05.08.2017.

6. While CEPL designed the LNG semi-trailer taking into consideration the fact that it would not manufacture the undercarriage and the prime mover and purchase the same from companies such as TATA DLT and Ashok Leyland, it is stated that Inox manufactures its own undercarriage.

7. CEPL has stated that the LNG semi-trailer is to be mounted on an Automotive Research Association of India (ARAI) pre-approved undercarriage which is thereafter attached exclusively to an ARAI approved prime mover from original equipment manufacturers like Ashok Leyland and TATA. CEPL, vide application dated 10.10.2017, also sought approval from the regulatory authority

for the mounting drawing as per extant rules. The regulatory authority granted approval to CEPL with respect to the mounting drawing.

8. After obtaining the necessary approvals and procedures, CEPL made a foray into the LNG semi-trailer market and, purportedly on account of its superior quality and design (capable of storing much larger quantity of LNG than its competitors), reasonable price. etc., began to give tough competition to the other competitors in the market.

9. Inox has been engaged in the manufacturing of LNG semi-trailer for the past 12 years and is the largest manufacturer of cryogenic liquid storage and transportation tanks in India and is a supplier to leading international gas companies worldwide like Air Liquide, Air Products, Linde, Messer, Taiyo Nippon, Sanso and Praxair.

10. CEPL has alleged that Inox maliciously instituted a civil suit before the Court of the Learned District Judge at Vadodara on 26.09.2018 being Trademark Civil Suit No. 03/2019 (earlier numbered Commercial Trademark Suit No. 11 of 2018) against CEPL, its group company LNG Express and two of its employees, claiming infringement of Inox's copyright over proprietary engineering drawing in relation to the LNG semi-trailer. Inox also filed an application seeking temporary injunction against CEPL and LNG Express to restrain them from using or causing to be used the drawing of LNG semi-trailer of Inox. Inox further moved an application on 25.09.2018 in the aforesaid suit, seeking to appoint a Court Commissioner for the purposes of searching the premises of CEPL including making/preparing an inventory of the impugned drawing and making copies of the same from the computer's hardware, promotional materials, etc., found in CEPL's possession.

11. CEPL has also stated that the application seeking injunction is still pending before the Learned Court, and following the visit to the office and factory of CEPL, the Court Commissioner appointed by such Court did not find any satisfactory evidence to showcase that impugned drawings of CEPL are similar to the drawings of the LNG semi-trailer prepared by Inox.

12. CEPL has averred that the features and details of both the drawings of CEPL and that of Inox are essentially found on the requirement to follow designing codes which are universally practiced such as EN 13530 CODE for designing LNG semi-trailer, which is a European code and is typically the design code followed in India. Accordingly, it has been alleged that the civil suit instituted by Inox against CEPL and its group company LNG Express is in bad faith and is in abuse of dominant position.

13. CEPL stated that, during the pendency of the civil suit, which in itself has been instituted with a mala fide intent of ousting CEPL from its business and irretrievably damaging its reputation, Inox has addressed several communications regarding the pendency of the civil suit to the regulatory authority, clients/customers of CEPL with an anti-competitive intent.

14. As per CEPL, Inox India wrote a letter to the regulatory authority, intimating the said authority of the pendency of the civil suit before the Learned Court and requesting it to withdraw the

approvals granted in respect of the drawings of certain semi-trailers submitted by CEPL and not grant it any approvals in the future pertaining to the transportation of LNG as well as industrial gas. Pursuant to the same, a letter was received by CEPL from the regulatory authority seeking a reply/explanation to the aforesaid letter of Inox. CEPL replied to the same, specifically denying the baseless objections and allegations raised by Inox. CEPL submitted that it has not received any further letters or orders from the regulatory authority, therefore, it can be safely assumed by it that the regulatory authority is satisfied with the reply furnished by CEPL and does not require any further clarifications in this regard.

15. Inox also wrote an email/letter to a potential customer of CEPL, a global energy and solution company, intimating the said company about the aforementioned civil suit and dissuading it from entering into any business collaboration with CEPL or its group company, failing which, the said company would bear consequences of the same. In response, the said company, through an email intimated CEPL of the letter it had received from Inox and after deliberations, expressed their intention not to proceed with the proposed collaboration, to the detriment of CEPL.

16. CEPL also stated that a letter was issued by Inox to an existing customer of CEPL, a government company/state PSU, intimating about the civil suit pending against CEPL for copying the drawings of Inox with respect to LNG semi-trailer and misrepresented to the said government company that during the search conducted by the Court Commissioner as appointed by the Learned Court, the Commissioner found various documents which are related to the quality control of Inox's products/proprietary material(s) consisting of their exclusive intellectual property rights. The said government company contacted CEPL seeking clarifications with respect to the allegations levelled by Inox. CEPL furnished adequate clarifications to the said company regarding the bad faith and exclusionary practices on the part of Inox to mislead the customers of CEPL and demoralize CEPL from competing with Inox in the market. The said government company, after being satisfied with the clarifications tendered by CEPL, awarded the work to CEPL and its group companies on the precondition of indemnifying it from all the risks that may arise from an adverse order, if any, in the sub-judice civil suit.

17. CEPL also stated that, during the course of negotiations between it and a potential customer, another global company, Inox wrote a letter to the said potential customer regarding the sub-judice civil suit and erroneously claiming that CEPL violated the intellectual property rights of the Inox and warned the said potential customer against doing business with CEPL or face consequences of civil and/or criminal actions for aiding and abetting the violation/ infringement of Inox's intellectual property rights. The said potential customer, allegedly, put on hold the understanding previously arrived at with CEPL.

18. Thereafter, Inox served a legal notice upon one of the vendors/suppliers of CEPL, i.e., a fabricator alleging a breach by said service provider of the non-disclosure agreement (NDA) entered into between the said service provider and Inox, stating that the said fabricator, by undertaking fabrication work for CEPL, has violated the contract and NDA. In the said legal notice, Inox demanded of the said service provider, inter alia, to forthwith cease and desist from carrying out manufacturing, fabrication or any other related or unrelated work for CEPL and additionally,

furnish an undertaking to that effect.

19. As per CEPL, apart from the above, Inox has been employing tactics to harm CEPL's business, such as poaching specifically trained employees of CEPL by giving them higher incentives. As per CEPL, Inox is writing to its own customers to not engage in any kind of business with CEPL. Some business houses/prospective clients who have approached CEPL have not given them orders despite CEPL quoting competitive prices. Due to the abusive conduct engaged in by Inox, there are several semi-trailers of CEPL that are lying idle and not in use.

20. CEPL, for the purpose of the present case, has delineated relevant market as the "market for manufacturing of LNG semi-trailer and transportation of LNG through LNG semi-trailer in the territory of India".

21. CEPL stated that, as per the Rating Rational issued by CRISIL, Inox, for a long period of time, has consistently maintained a market share of approximately 60% in the cryogenic tank segment in India and is the largest manufacturer of the same. A market share of 60% is clearly sufficient to demonstrate Inox's dominance in the relevant market. The turnover of Inox and its competitors are as under:

Company name	Turnover (in INR)		
	2017-18	2018-19	2019-20
Inox	449,77,00,547	645,25,18,180	640,00,86,2
CEPL	17,37,00,200	30,39,10,375	23,07,40,97
VRV Asia Pacific	105,68,39,855	112,11,03,927	96,55,20,01

Source: Information filed by the Informant

22. From the above, it is clear that the revenue of Inox is 27 times more than CEPL and 7 times more than VRV Asia Pacific for the FY 2019-20. Further, Inox has made self-proclaimed statements of dominance and of being an expert and market leader. CEPL has further stated that CRISIL has assigned "CRISIL A/stable" rating to Inox for long term credit due to revenue growth of 44 percent. It has also been stated that Inox has strong liquidity of over 100 crores in cash and unutilized bank limits. On the other hand, CEPL has been assigned "CRISIL BB+/Stable", on total revenues of Rs. 23 crores. According to CEPL, Inox has the ability to operate independently of the market forces, its competitors and customers and simultaneously dictated the terms to entire market in an abusive manner.

23. As per CEPL, the anti-competitive conduct of Inox allegedly attracts provisions of Sections 4(2)(a)(i) and 4(2)(c) of the Act, wherein Inox has indulged in the practice to deny market access to CEPL and abused its dominant position in multifarious ways. In this regard, CEPL has placed reliance upon *In Re Biocon ltd. vs. Hoffmann La Roche* (Case No.68 of 2016); *In Re: Bull machines*

Vs. JCB (Case No. 105 of 2013); JSW Paints Private Limited Vs. Asian Paints (Case No. 36 of 2019); Cadbury Schweppes PL Vs. Kenman developments Australia (1991) 13 ATPR 41-116 and Professional Real estate Investors Vs. Columbia Pictures Industries (508 US 49 (1993) and AstraZeneca (Comp/A 37.507 EU) to state that Inox has initiated a bad faith litigation against CEPL on baseless grounds to oust CEPL from the market.

24. Based on the above averments and allegations, CEPL has, inter alia, prayed to the Commission to direct the Director General to investigate the anti-competitive conduct of Inox, direct Inox to cease and desist from its anti-competitive conduct and impose monetary penalty upon Inox. CEPL also sought interim relief under Section 33 of the Act that Inox cease from issuing any such communications to third parties regarding the pending civil suit and furnish a list of all such third parties with whom Inox has communicated regarding the pending civil suit and discouraged such parties from associating with or transacting with CEPL.

25. The Commission considered the information in its ordinary meeting held on 08.06.2021 and decided to seek a response thereon from Inox. CEPL was also granted liberty thereafter to file its further response, if any, to such reply filed by Inox, with an advance copy to Inox. Such replies (in confidential and non-confidential versions) were thereafter filed by Inox and CEPL on 06.09.2021 and 25.10.2021, respectively, after obtaining access to confidential records, as was permitted by the Commission. On 10.11.2021, the Commission considered the information, the reply of Inox and further response of CEPL to the reply of Inox and decided to call the parties for preliminary conference on 21.12.2021. On 21.12.2021, the Commission heard the detailed submissions made on behalf of the said parties and the preliminary conference was concluded. The Commission also gave liberty to the parties to file their respective written submissions/synopsis of their oral arguments, within two weeks of receipt of order. Accordingly, CEPL and Inox filed their written submissions on 07.01.2022 and 17.01.2022, respectively.

26. The submissions of Inox in their reply as well as written submissions filed subsequently are summarized below:

i. Inox invested considerable resources in developing the Inox proprietary drawings, which were created by the employees of Inox, during their course of employment with the said company. Accordingly, by application of Section 17(c) of the Copyright Act, Inox is the exclusive owner of the copyright subsisting in the said Inox proprietary drawings.

ii. Inox has further submitted that in August 2018, when it studied the drawings submitted by CEPL with the regulatory authority, it noticed blatant plagiarism of the drawings. These were considered in light of the surrounding circumstances entailing the poaching of key employees from Inox who had all the know-how, technical skillset, competence and requisite information for manufacturing LNG semi-trailers. Hence, Inox was constrained to file the civil suit. The Court Commissioner appointed by the Learned Court to inspect the premises of CEPL noted in his Panchnama that "copies of the disputed design are found from the desk of Mr. Vikasbhai Patel". The

Court Commissioner also found folders with the subject "INOX CONTROL PANEL, INOX (manifold)", etc., from the desktop computer of Mr. Vikasbhai Patel.

iii. Inox's communication to CEPL's customers and Inox's intimation to the regulatory authority was borne out of commercial necessity, and the same does not qualify as abuse of dominant position. Approaching a regulatory authority with the correct factual information without any falsification cannot be considered abuse of dominance, as this will greatly hinder the ability of enterprises to reach out to various regulators across the country.

iv. There was a justifiable basis for informing the customers/potential customers of CEPL that they could potentially be abetting a copyright infringement which could expose such customers to civil and criminal liability.

v. Upon receipt of the letter from Inox, one potential customer clearly provided CEPL the opportunity to give an explanation. Subsequently, post receipt of an explanation from CEPL, the said customer chose to not engage with CEPL after considerable deliberations. Another customer, being the government company, did not terminate the contract immediately upon receipt of the intimation from Inox. Post receipt of the intimation from Inox, the said customer engaged in deliberations with CEPL for weeks and provided CEPL an opportunity to explain the scope and details regarding the civil suit. Pertinently, only after considering all the explanations did the said customer choose to proceed with CEPL, conditional upon an indemnity. Another customer, after receiving the intimation from Inox, did not abort its business relation with CEPL.

vi. As per the provisions of Section 55 and Section 63 of the Indian Copyright Act, 1957 a claim for damages for copyright infringement against any party exists only when such third party knowingly infringes or is aware that their actions amount to abetment of infringement. It is based on these circumstances and provisions of law as aforementioned that Inox addressed communications to the customers/potential customers of CEPL.

vii. In relation to the usage of the expression "aid and abet" as contained in the letters to customers/potential customers of CEPL, it has been submitted that it was not a threat but used in ordinary legal parlance.

viii. The fact that all the recipients were able to appreciate the usage of the term appropriately and consistently with the spirit of the Copyright Act is further supported by the reactions of each of the third parties to Inox's letter.

ix. The delay of proceedings in civil suit meant the enrichment of CEPL since it had a free pass to violate Inox's copyright. The third parties, viz., customers, as a consequence of purchasing the infringing products voluntarily or involuntarily, are

also participating in the copyright violation. Since infringement was causing financial losses to Inox, Inox was constrained to file a special leave application for expediting the hearing in the civil suit. Despite three years having elapsed since the filing of the suit, the suit has not progressed, and its application seeking interim relief is yet to be heard by the Learned court.

x. Section 60 of the Copyright Act provides a sanctity for actions taken pursuant to legal proceedings and does not regard it as a threat. Therefore, none of the third parties filed any declaratory suit against the copyright owner and obtained any injunction against threat of legal proceedings or liability.

xi. With respect to one of the vendors being the fabricator, Inox re-emphasized that CEPL is neither a party to the agreement with the said vendor nor to the NDA. Accordingly, Inox submitted that no rights or liabilities under the Agreement with the fabricator and NDA vests in CEPL.

xii. Next, advertent to the provisions of the Competition Act, 2002 Inox has contended that Section 3(5) of the Act recognizes the right of an owner of intellectual property to restrain any infringement of its products and protect the rights granted under the Copyright Act.

xiii. CEPL has consciously defined the relevant market to be the market for manufacturing of LNG semi-trailer and transportation of LNG through LNG semi-trailer and has then chosen to provide a market share for a very different and a broader market for the manufacture of cryogenic tank in India. Inox has also submitted that the relevant market for CNG semi-trailers is small, and therefore, de-minimis principle is applicable in the present case xiv. The size and resources of Inox are not unique in the market that provides Inox any additional advantage over its competitors. Similarly, other competitors in the market for the manufacture of LNG semi-trailers include IOCL and VRV. IOCL is one the largest petroleum conglomerates in India, and its size and resources easily dwarf that of Inox. CEPL has maliciously suppressed disclosing the revenues of IOCL. Because, the revenue of Inox is miniscule when compared to that of IOCL.

xv. Inox has emphasized that, though it and CEPL compete in various businesses, the LNG semi-trailer is an insubstantial part of the overall business, especially for Inox in India. Inox has never instituted a suit of any kind (apart from the instant case) against CEPL, including for violation of an IPR.

xvi. Inox has further submitted that no loss has been occasioned to CEPL on account of issuance of letters and, in the event, that Inox's civil suit fails, then financial losses suffered by CEPL can be claimed as compensation from Inox.

xvii. It has been submitted that the Learned District Court at Vadodara is the relevant authority to determine the applicability of Section 15(2) of the Copyright Act to the facts of the present case. This is a substantial question of law, which involves careful examination of whether Inox's proprietary drawings could be considered as a 'design' under the provisions of the Designs Act, 2000.

xviii. Based on the above, Inox has prayed to the Commission to dismiss the present Information.

27. The submissions of CEPL in its further response to the reply of Inox as well as in its written submissions are summarized below:

i. Inox has completely manipulated the competition, marketplace and the customers, thus trying to oust CEPL from the market in order to create a total monopoly in times to come.

ii. The civil suit is an afterthought, since Inox filed the civil suit almost a year after the approval was granted by the regulatory authority to CEPL for the design of 46 KL LNG semi-trailer, and it is only after the said approval that Inox felt threatened by the entry of the incumbent, i.e., CEPL in the relevant market, that Inox then decided to use the above-mentioned civil suit as a ploy to thwart the fledgling business operations of CEPL.

iii. The sham litigation is based on alleged IPR violation by CEPL, and the same was initiated in 2018. However, Inox filed for registration of copyright as recently as September 2020 and that the entire process of instituting the civil suit and copyright application is an afterthought.

iv. Inox has stated in its response that the alleged impugned drawings contain similar clerical/typographical errors which are literary work under the IPR's. These instructions/notes cannot be part of any IPR. Further, the allegations that some information was found on the desktop of an employee of CEPL by Court Commissioner is not factually correct as what was found was a product ordered by Inox which was to be supplied by a group company of CEPL.

vi. The Court Commissioner's report dated 26.09.2018 stated that there were no objectionable items present in the factory.

vii. As admitted by Inox, it got information about CEPL allegedly copying the proprietary drawings of Inox in August 2018. The civil suit along with an injunction application was duly filed in September 2018. However, the letters were sent belatedly to customers after the filing of the civil suit. This practice is evidence of that the fact that Inox was frustrated by the Learned Court not passing any orders in the baseless suit filed by it and Inox resorted to shaming and disgracing CEPL in the market.

viii. Inox issued threatening communications to its three customers/potential customers. The threatening letters to one of its customers resulted in cancellation of the agreement CEPL had with it and caused a huge loss to it. The zero-hour withdrawal by another customer was highly detrimental to CEPL's business as the said global energy company was about to invest millions of dollars to sell LNG in India. Further, Inox dissuaded the said customer at the last minute to not get into business with CEPL, which led to cancellation of the MOU between the parties.

ix. The letter of Inox to the regulatory authority highlighted that CEPL appeared to have copied Inox's proprietary drawings, whereas, as per the original letter sent by Inox to the regulatory authority, Inox categorically mentioned that CEPL has exactly copied from Inox. Even though Inox has claimed infringement of its drawings pertaining to the 46 KL LNG semi-trailer, it has requested the regulatory authority in the said letter to withdraw the approvals granted to 24 KL and 46 KL LNG semi-trailers as well as of not granting fresh approvals to the drawings submitted by CEPL.

x. Inox has admitted, in the response, that potential customers could unwittingly abet the infringement of the copyright. However, Section 63 of Copyright Act relied upon by Inox only makes a person who knowingly infringes or abets in the infringement of a copyright liable for such infringement.

xi. It is evident from the pleadings of Inox that the letters to customers of CEPL was due to financial necessity rather than legal necessity.

xii. The total LNG semi-trailer manufactured and in use until 2021 is 128, out of which CEPL has 4 semi-trailers whereas Inox has 89. With regard to the claim of Inox regarding copyright, CEPL submitted that Inox has manufactured more than 50 units of LNG semi-trailers till date and is now barred to avail the protection/remedy under the Copyright Act by virtue of Section 15(2) of the said Act.

xiii. It is evident that Inox has not been able to make out a prima facie case before the Learned Court, highlighted by its failure to obtain a temporary injunction for alleged copyright infringement against CEPL, and thus, such contention of Inox is liable to be rejected.

xiv. IOCL is not a participant in the relevant market, and thus, the financials of IOCL cannot be taken into consideration for calculating market share. IOCL does not sell LNG semi-trailers in the market but uses the same for captive use only. Thus, they cannot be considered competitors but consumers, as they have purchased such products from both CEPL and Inox.

Analysis of the Commission

28. The Commission has carefully considered the Information, reply and other pleadings and written submissions of the parties on record, as well as the oral submissions made by the counsel for the parties during the preliminary conference held on 21.12.2021. The Commission, at the outset, notes that the allegations in the instant matter emanates from a suit instituted by Inox against CEPL for infringement of its copyright in the drawings of LNG semi-trailer by CEPL, which CEPL alleges is

in the nature of sham litigation, coupled with actions resorted by Inox, in writing various threatening communications to the customers/potential customers of CEPL, as well as to a regulatory authority, with a view to jeopardize the business interests of CEPL, a competitor of Inox in the supply of LNG semi-trailers in India. This conduct, according to CEPL, is an abuse of dominant position by Inox in contravention of provisions of Section 4 of the Act.

29. The Commission, based on its previous orders, observes that a litigation from a competition perspective may be termed as a sham when it is initiated by a dominant undertaking to cause anti-competitive harm, via, the inappropriate use of adjudicatory/government processes or legal rights. Usually, the aim behind any 'sham' litigation is to either subdue a competitor by increasing operational costs or delay the entry of a competitor in the market by resorting to the invocation of governmental process.

30. The Commission notes that, to determine whether a litigation or legal recourse is an abusive strategy of a dominant player, firstly, it needs to establish that a case filed against an enterprise on an objective view is baseless and appears to be an instrument to harass the enterprise. Secondly, what needs to be examined is whether the legal action appears to be conceived with an anti-competitive intent/plan to eliminate/thwart competition in the market. The lawsuit must be objectively baseless that no reasonable litigant could realistically expect success on the merits and be filed and prosecuted, not with a view to protect a legitimate right but to prevent a competitor from effectively competing or thwarting a potential entrant into the market.

31. With regard to the suit for infringement of copyright instituted by Inox, the Commission notes that the suit for permanent injunction, inter alia, restraining CEPL (Defendants in the suit) from using or relying upon the drawings of 46KL LNG semi-trailers, has been filed by Inox (Plaintiff before trial court) on the premise that CEPL has poached certain employees of Inox, who were directly involved in the development of the design and manufacture of LNG semi-trailer for the said company. Further, Inox has alleged that the drawings of the LNG semi-trailer based on which CEPL took the approval from regulatory authority is an imitation of the drawing of Inox and carries the same errors that exist in the original drawings of Inox. This imitation is alleged to be an infringement of copyright by CEPL. Inox has also stated that the Court Commissioner who inspected the premises of CEPL found certain material which supports its claim of infringement which, however, has been seriously disputed by CEPL. Further, CEPL has attacked the subsistence of any copyright in Inox by stating that the drawings of both CEPL and Inox can be traced to a common European code which is an open-source and even otherwise, the drawings of CEPL have been developed in collaboration with one Mr. Ronald Baker, who is an independent consultant and who has stated that there is no patent in his drawings. Inox in this regard has claimed that Mr. Ronald Baker was its employee and the copyright in drawings made by its employee vests with it. It has been alleged that certain employees of Inox despite signing confidentiality clauses, joined the services of CEPL within a few days of resignation from Inox. The drawings were developed within a couple of months of their joining CEPL, and the drawings were thereafter approved by the regulatory authority, and soon, manufacture commenced of such LNG semi-trailer. Inox has contended that the aforementioned suit has been filed by it almost within one year of the manufacture of LNG semi-trailer by CEPL, whereas limitation for filing a suit for infringement of

copyright is 3 years from the cause of action. Thus, the suit, though not filed at the earliest opportunity is still within limitation. It has been stated by Inox that it could, so far, not obtain an interim injunction from the civil court as its application for the said purpose has not been fully heard by the Learned Court yet. With regard to the various communications issued by Inox to customers/potential customers and regulatory authority, CEPL has vehemently contended that the tenor of the said communications, despite there being no injunction in its favour from the Learned Court, would indicate that it was done with an intention to prejudice the customers/potential customers of CEPL so that they stop dealing with CEPL and ultimately, CEPL is driven out from the market, and there exists no competition for Inox from CEPL, which was offering efficient products at much lower prices compared to Inox.

32. Per contra Inox has submitted that it was justified in the issuance of such communications, in view of the legal right it possesses for protection of its copyright, which has been copied by CEPL. Drawing sustenance from the provisions of Section 63 of the Copyright Act, Inox has submitted that its communications have been issued to certain companies/customers in the teeth of the said provision as it wanted to notify them that dealing with the product of CEPL, viz., 46 KL LNG semi-trailer, would amount to aiding and abetting CEPL in violation of the Copyright Act, for which the said parties can be held liable at a later date if the suit is decided in favour of Inox. Inox also contended that it filed a suit and notified the customers of CEPL only in respect of the product, viz., 46 KL LNG semi-trailer, and no other product of CEPL, which itself shows that it has no intention to oust competition, but actions have been taken only to protect its IPR qua the said product.

33. Having considered the facts and circumstances of the above case, the Commission observes that the test, from an alleged IPR infringement perspective, requires an examination of whether there is substantial copying or copying of material features, which is based on the appreciation of evidence. This is a thicket which should be left untouched by the competition authority for want of subject matter competence, save to the extent specifically provided under the Act. Further, as per the established jurisprudence worldwide, in matters relating to sham litigation resulting in alleged abuse of dominance, the competition authority is to look into the matter objectively as to whether the litigation resorted to by the dominant entity is *ex facie* baseless, i.e., no reasonable litigant could realistically expect success on the merits, and it is filed with the intent to prevent competition.

34. The Commission, based on a limited appreciation of the facts, the submissions made and evidence on record is of the *prima facie* finding that the aforementioned suit filed by Inox against CEPL cannot be, at this stage, said to be fraught with any lack of bona fide. However, any final and conclusive determination on this aspect can only be made by the competent Court. The Commission is conscious that nothing further is germane to be said in the context of this issue, which is to be decided by the court of competent jurisdiction where the matter is pending and is beyond the domain of this authority.

35. With regard to the communications issued by Inox to various customers/potential customers of CEPL or even to the regulatory authority, Inox could be said to have the right to inform the concerned entities of the factum of the suit having been filed against CEPL by it, alleging infringement of copyright and of the rights available to Inox under the Copyright Act, 1957 to pursue

its remedies against others too, should it succeed in establishing the infringement claim. Inox, while trying to convey the factual position of a suit having been filed by it against CEPL, went further, and the tenor of the communication issued by Inox could arguably indicate that more was said than what was perhaps required and which could give rise to an impression that Inox was trying to frighten such customers into not dealing with CEPL. Even if Inox submitted that the entities to which the aforementioned communications were addressed are not small players but entrenched in their fields who understood the entailing legal position very well, that cannot take away the fact that Inox dropped a strong word that was way more than what may have been necessary to convey a factual position.

36. In the view of the Commission, these communications ought to have been commensurate with the legal rights that Inox sought to enforce in the civil court and having regard to the orders passed by such Learned Court till date in the pending suit. This is regardless of weighing the merit in the submissions of Inox that bigger, established companies do not act merely on the basis of communications received by them, but are bound to do their own due diligence before reacting on the same. Though Inox has submitted that its actions are justified on the anvil of Section 63 of the Copyright Act, 1957 and are primarily to prevent aiding and abetting, the Commission is of the view that it may not be apposite to give any finding on this issue, in view of the reasoning given above. In relation to the letters addressed by Inox to one of the vendors, viz, fabricator, the same appear to be in furtherance of the exclusive terms of the contract between the said entities, and the Commission does not prima facie find any competition issue in the face of a large number of fabricators present in the market, as has been submitted by Inox.

37. The Commission, in the specific facts and circumstances of this case, is of the view that this may not be a fit case warranting an investigation at this stage and has thus obviated the requirement of defining a relevant market and assessing dominance of Inox. However, it goes without saying that Inox ought to be mindful in issuing communications or acting in any manner perceived to be having any anti-competitive overtones. It is axiomatic that the entities, subject to their legal rights, behave competition on merits and not eschew the same in the interest of the market and its stakeholders.

38. In view of the foregoing, the Commission is of the opinion that there exists no prima facie case at this stage, and the Information filed is directed to be closed forthwith under Section 26(2) of the Act. Consequently, no case for grant for relief(s) as sought under Section 33 of the Act arises, and the same is also rejected.

39. Before parting with the order, the Commission deems it appropriate to deal with the request of CEPL and Inox seeking confidentiality over certain documents/information filed by it under Regulation 35 of General Regulations, 2009. Considering the grounds put forth by CEPL and Inox for the grant of confidential treatment, the Commission grants confidentiality to such documents/information in terms of Regulation 35 of the General Regulations, 2009, read with Section 57 of the Act for a period of three years from the passing of this order. It is, however, made clear that nothing used in this order shall be deemed to be confidential or deemed to have been granted confidentiality, as the same have been used for the purposes of the Act in terms of the provisions contained in Section 57 thereof.

40. Notwithstanding the order passed above, the Commission particularly emphasizes that the findings reflect the views of the Commission purely from the standpoint of the provisions of the Competition Act, 2002 and may not be construed as expressing any opinion on merits in any manner in respect of other ongoing proceedings inter se the parties in any other court or forum.

41. The Secretary is directed to communicate to the parties accordingly.

Sd/-

(Ashok Kumar Gupta) Chairperson Sd/-

(Sangeeta Verma) Member Sd/-

(Bhagwant Singh Bishnoi) Member New Delhi Date: 08.03.2022