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Abuse of Dominant Position: Protector of the Underdogs

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ABSTRACT

There is no dispute to the fact that abuse of dominant position is a danger to the operations in a free market. This is one of the major reasons as to why the effect of abuse of dominant position in the Indian market is necessary to be studied. These sort of practices are unsafe both for Competition and for customers, so that ought not to be permitted to grow. Further, there is also an imperative need to provide various suggestions and remove anomalies so as to keep up and invigorate competition in the relevant market and to advance reasonable challenge among various enterprises. Dominance in law implies that a firm has a high degree of immunity from the normal disciplining forces of rival's competitive reactions and consumer behavior. On the other hand, dominance as an economic concept is associated with the notion of market power. (Anand Sree, 2018) (Berinde, 2017) The Indian Competition Law, the Competition Act of 2002, like other modern competition laws covers agreements, abuse of dominant position and mergers. Under the Competition Act of India, section 4 deals with Abuse of Dominance or dominant position by an enterprise or a group. The ultimate concern of the competition law is about market power and its abuse. The Law of Competition in India seeks to ensure fair competition by prohibiting trade practices which cause appreciable adverse effect on competition in markets within India. Market power is used to mean the ability of enterprises to raise price above the level that would prevail under the competitive conditions. The Competition law prohibits the use of market controlling position to prevent individual enterprises or a group from driving out competing businesses from the market as well as from dictating prices. The concept of abuse of dominant position of market power refers to anticompetitive business practices in which dominant firm may engage in order to maintain or increase its position in the market. (Malik, 2017).

Keywords: Abuse, dominant position, Competition Law, Indian market.

I. INTRODUCTION

Competition law dissimilar to some other assortment of business laws, manages the very way wherein undertakings lead their business – what they produce, how they produce, the amount they produce, at what cost do they sell their items, how they convey their items, how they

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communicate with peers, how they go into business coordinated efforts, how they draft contracts, how they put resources into different organizations, etc. Pretty much every procedure of the typical working of a business is inside the area of Competition law. (Singh, 2017) (Malik, 2017)

In this way, dissimilar to 'contract law' that stipulates formal lawful standards for an agreement to be substantial, Competition law has a social measurement. All things considered, similar to some other law, Competition law endeavors to classify direct that is anticompetitive or procompetitive. In spite of the codification Competition law authorization is basically determined by the manner by which a challenge authority peruses and translates the law and the risk standard it embraces for setting up anticompetitive lead.

A few jurists may carefully keep the stated aim of the law and consequently embrace a structure based approach, without really extrapolating the impacts of the exchange or direct on Competition and shopper welfare. In any case, different specialists should seriously mull over the actual intent of the law and embrace an impacts based methodology by adjusting the professional competitive impacts against the anticompetitive impacts of the lead or exchange on a case by case premise. It is imperative to note here that structuralism lawful strategies, which are basically static in nature, are lacking for investigating characteristically powerful challenge marvels. Competition specialists receive diverse legitimate gauges for various sorts of exchanges and direct, contingent on their impression of its potential anticompetitive or procompetitive impacts. (Singh, 2017)

For example, mergers and acquisitions and certain level understandings, for example, those identified with innovative work joint efforts and innovation sharing are surveyed utilizing an impacts based methodology in many wards. This is principally in acknowledgment of their capability to make efficiencies and improve advancement and purchaser welfare. Be that as it may, a considerable lot of the maltreatment of predominance direct are yet to accomplish firm ground in receiving an impacts based methodology over a few purviews, despite the fact that the net impact of an activity embraced by a prevailing firm isn't really anticompetitive, and can't be assumed. (Koul, 2017)

In India, abuse of dominant position is disallowed under Section 4 of the Competition Act 2002 and is dominantly implemented utilizing a structure based methodology. Area 4 of the Act characterizes "predominance" and records down activities which are to be viewed as damaging, whenever embraced by a prevailing firm. At present, the Competition Commission of India (CCI) generally implements this arrangement of the Act dependent on three key advances –

- (i) recognizing the pertinent item and geographic markets
- (ii) surveying the strength of the concerned enterprise, and
- (iii) Deciding if the predominant firm sought after a movement that can be established as a maltreatment of strength under the Act.

Under this structure based approach, the activity of a prevailing endeavor happening to fall in the classifications characterized in the arrangement of the Act is set up as a maltreatment. This in itself is viewed as an infringement of the law, with constrained or no endeavor to distinguish some other conceivable target support for the activity of the prevailing firm. (Tigga, 2017) (Malik, 2017)

II. DOMINANT POSITION

To comprehend the presence of predominance we have to likewise comprehend the CCI's meaning of the significant market as it varies from case to case, which depends on the sort of real network. In the non-nearness of guidelines for characterizing the significant market, the CCI doesn't pursue the general methodology in outlining the important market. In that capacity, the CCI has confined the pertinent geographic market to specific rural areas now and again, (for example, *Belaire Owners' Association v DLF Limited*³ and *Mr Om Datt Sharma v M/s Adidas AG and Ors*) and has, with no particular separation, characterized the significant market on a „all India basis“ in different cases. A restricted meaning of the important market just encourages setting up an entity's predominance. (Upadhyay, 2017) (Koul, 2017) (Koul, 2017)

Predominance then again is needed upon the situation of monetary prevalence valued by an enterprise, which enables it to disallow any sort of proficient challenge being followed in an important market by giving it the position to act to a suitable degree independent of its rivals. Predominance implies gaining the market control, which approves the endeavor to control the cost or its creation autonomously of its rivals. Predominant position must be resolved in the important market and the elements for such assurance are given in the Act. On the substance of it "Predominance" isn't awful it is the "Prevailing position" which is disallowed by the law. The counter – competitive business visionary activity urges a prevailing endeavor to include it with rehearses, to expand its situation in showcase. Rivalry rules and laws preclude such sort of conduct, as it harms genuine soul of rivalries between the endeavors and adventures the connection among them and shoppers. (Singh, 2017) (Koul, 2017)

"Abrogating" or "persuasive" are the word reference implications to the expression "Predominant." Predatory in this sense then again implies overwhelming misuse for securing

money related reason or gains. An endeavor holding a position which is "ruling" is just conceivable in the event that it can carry on freely or independently without the dread of its rivals, clients, providers and, a definitive shopper. Market being held by such intensity of the ruling endeavor gives it the control of controlling the cost according to its desires or needs. This will empower them to sell items or administrations of lower quality or lower cost of advancement underneath the level in which it really exists in a competitive market.

(A) Dominant position has two significant perspectives:

Firstly, the position of a dominant enterprise, empowers it to work free of competitive powers produced by its opponents. This is significant on the grounds that solid challenge among contenders advances beneficial and designate efficiencies and advances customer excess. So if a venture takes measures with goal to make section obstructions, drive out existing adversaries, control yield or value, it causes concerns.

Also, the part of predominance given in clarification (a) (ii) to Section 4 of the Act identifies with the capacity of an endeavor to influence its rivals or buyers or the significant market. In sense, this is higher level of solidarity where an undertaking might be uninhibitedly ready to embrace cost or non-evaluated methodology to defeat descending weights on its benefit from its rival, or to catch or tie shopper or to make a market domain that would deflect more current finish, both as far as contending endeavors or opponent items.

Assurance of prevailing position relies on two primary variables – piece of the pie and passage conditions. It is essential to take note of that to accomplish a predominant situation by real means, for example, through item development, prevalent generation or appropriation methods or through more noteworthy innovative endeavors. The Competition Commission of India has perceived certain conditions while deciding the understandings prevailing status according to area 19 of the Competition Act. The assurance of the prevailing position however piece of the pie, marketing projections and dynamic stock. In any case, much of the time the market control is resolved based on the useful attributes, of the items on the example of buyer conduct. (Malik, 2017) (Koul, 2017)

The SVS Raghavan Committee set up by the Government laid down in crystal clear terms that although dominance is a necessary condition for establishing violation of provision regarding abuse of dominant position; it is by no means a sufficient condition. Therefore the committee suggested that "dominance" and "dominant undertaking" may be appropriately defined in the competition law in terms of "the position of strength enjoyed by an undertaking which enables it to operate independently of competitive pressure in the relevant market and also to

appreciably affect the relevant market, competitors and consumers by its actions"

Following the recommendations of the Raghavan Committee, Competition Act, 2002 was enacted which includes Section 4, prohibiting the abuse of dominant position by enterprises. Section 4 of the Competition Act, 2002 reads as follows:

(1) No enterprise shall abuse its dominant position.

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise.— (a) directly or indirectly, imposes unfair or discriminatory— (i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods or service, Explanation (a) to this section defines dominant position as: (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 favor. (CCI, 2019)

III. CASES IN OTHER JURISPRUDENCES

The laws of various nations restrict or proclaim unlawful, the maltreatment of predominant position/restraining infrastructure or endeavor to hoard/the abuse of market control or accommodate a forbiddance of certain lead by endeavors in a prevailing position/having a generous level of market control. Be that as it may, the way wherein "prevailing position", 'restraining infrastructure' or 'generous level of market control' is characterized is diverse in various nations. (Upadhyay, 2017)

The general meaning of dominant position or market control followed in locales, for example, the European Commission, United Kingdom, Australia, Germany and India consider the capacity of a firm or endeavor to carry on freely of its rivals and the nonattendance of rivalry or requirement from the lead of contenders.

Section 19(2) of the German "Demonstration against Restraints on Competition" gives a general definition and considers factors, for example, overwhelming situation in the market and nonappearance of rivalry totally or no generous presentation to rivalry. It expresses, "An endeavor is prevailing where, as a provider or buyer of particular sorts of products or business administrations, it,

- has no contenders or isn't presented to any significant challenge, or
- has a foremost market position in connection to its rivals; for this reason, account will be taken specifically of its piece of the overall industry, its money related influence, its entrance to provisions or markets, its connections with different endeavors, lawful or

genuine hindrances to showcase section by different endeavors, real or potential challenge by endeavors built up inside or outside the territory of use of this Act, its capacity to move its stockpile or request to different merchandise or business administrations, just as the capacity of the contrary market side to fall back on different endeavors. (Upadhyay, 2017) (Berinde, 2017)

Article 86 of the EC Treaty disallows the maltreatment of strength, yet doesn't contain a meaning of the term 'predominance', leaving it to legal tact. It was characterized by the Court of Justice in the *United Brands* case: a predominant position is "a place of financial quality delighted in by an endeavor which empowers it to avoid compelling challenge being kept up in the applicable market by enabling it to carry on to an obvious degree autonomously of its rivals, clients and eventually of purchasers". (Upadhyay, 2017)

This is frequently cited as portrayal of a prevailing position. Comparative perceptions were made by the court in *Hoffman-La Roche* case and in *N. V. Netherlands Banden Industrie Michelin v. Commission of the European Communities [1983] ECR 345*. According to the Competition Act of the United Kingdom, Section 18 (3), "predominant position" signifies a prevailing situation inside the United Kingdom; and "the United Kingdom" signifies the United Kingdom or any piece of it". Section 18 doesn't offer what is implied by predominant position. (Berinde, 2017) (Upadhyay, 2017)

Section 60 (1) of the UK Competition Act gives that the motivation behind this segment is to guarantee that so far as is conceivable (having respect to any important contrasts between the arrangements concerned), questions emerging under this part in connection to rivalry inside the United Kingdom are managed in a way which is reliable with the treatment of comparing questions emerging in Community law in connection to rivalry inside the Community. As needs be, the Competition Authorities of the United Kingdom have put dependence on the meaning of prevailing position set somewhere near the European Court of Justice.

IV. DOMINANT POSITION AS AGAINST RELEVANT MARKET

It can be seen that dominant position is talked about always in reference to a relevant market. So understanding the market in question will be helpful for a better understanding of dominant position in that market. The concept of relevant market has two dimensions namely, the relevant product market and the relevant geographical market. The Competition Act, 2002 states that for determining the relevant market, the relevant product market or the relevant geographic market, or both are to be taken into account.

The Act defines "relevant market" as: "... the market which may be determined by the

Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;

Section 2(s) defines the “relevant product market” as: “....a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use”.

Section 2(t) defines "relevant geographical market" as: "..... a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas" The definition of the relevant market in both its product and geographic dimensions often has a decisive influence on the assessment of a competition case. (CCI, 2019)

The purpose of ascertaining market is to be able to examine whether an enterprise is dominant in a specific market, made up of the product or service, the competing suppliers and the buyers of the product or service, all operating in a geographical area. The Competition Act requires that the relevant geographic and product market are determined on consideration of certain factors which are given in Section 19(5) to (7).

V. ABUSE OF DOMINANT POSITION

The possibility of the idea of "abuse" of a dominant position is extremely objective as it identifies with the conduct of the endeavor putting itself into the predominant position in order to impact the structure of a market. This outcomes within the sight of the predominant substance in the market and the level of rivalry is debilitated by the plan of action of strategies attempted by the element which is not the same as those conditions which are commonly typical in rivalry of items or administrations exchanges of business administrators. This has an impact which ruins the upkeep of a sound level of rivalry which is as yet existing in the market and the development of that challenge. (Berinde, 2017)

The entire thought behind keeping a guideline or Act for the admission rivalry in the market is that a circumstance of imposing business model on its essence isn't against open welfare approach however to utilize a similar status wherein it works to the benefit of its maximum capacity and before the real contenders. The Act doesn't deny the endeavors to turn into the "predominant" player or having a "prevailing" position. There is no physical control keeping the endeavor from getting predominant or unrivaled. The good and objective of the Act is to restrict the "Misuse" of the prevailing position. The Act on its substance restricts "maltreatment of predominance" and not "prevailing position". This is the good behind the Act which is

reasonable and is a stage towards an economy which is really worldwide and liberal. (Koul, 2017)

In this way in light of the fact that an endeavor retains a position which is predominant doesn't mean it is breaking or not submitting to the law. The "giganticness" of barely any endeavors is regular and even basic, as a result of this enormity there is a need or necessity for modern proficiency and advancement in advertising and generation. The arrangements of the Competition Act will meddle in advertise circumstances where the size of the endeavor impacts the reasonable challenge. An oligopolistic showcase needs these arrangements under Section 4 to keep these huge endeavors from swiping out the free and relatively private companies from the market and from directing costs.

An endeavor is said to have "manhandled its predominant position" when it straightforwardly or in a roundabout way completes unreasonable, predisposition and oppressive economic situations, thus disposing of its rivals. It reinforces its situation by standing to unjustifiable methods which is outside the hover of a solid challenge driven market and balance.

For instance: X is an agent and appreciates a predominant situation in the nourishment showcase as he keeps colossal loads of vegetables and the majority of the retailers get supplies from him, which is the explanation behind which he appreciates a prevailing position. What's more, one day X buys around 80 percent of the all-out produce of onions and afterward will not supply the equivalent to the retailers, therefore the stock of tomatoes in the market has decreased and interest for tomatoes has expanded, as tomatoes structure the base of Indian cooking. As the interest for tomatoes has expanded the cost of tomatoes has gone up also, so when the cost of tomatoes expanded X sold the entirety of the tomatoes at an exceptional rate and made an immense benefit. This demonstration done by X is called as manhandling of one's predominant position. The buyers needing tomatoes will get them at whatever value X will direct. These are the couple of sorts of „abuse of prevailing position' circumstance broke down as under (Marginean, 2017)

Predatory Pricing according to Section 4(b) of the Act clarifies it as the exercise by which the sale of merchandise or the arrangement of various services, is at such a rate of value which would bring down the cost with the view to lessen the challenge or take out the contenders. (Marginean, 2017)

Refusal to supply-This training includes deliberately retaining the stock of the item or administration therefore expanding the interest for the equivalent and afterward constraining the clients to purchase the item or administration at a more significant expense subsequently

controlling the requirements of the client. This demonstration of refusal has a significant negative effect on the condition of reasonable challenge in the pertinent market. (Marginean, 2017)

Constraining Supply-The act of restricted supply of results of lavish and valuable nature in this way having the upside of raising the value as a result of its shortage. The fitting model for this is the jewel showcase, however enormous amounts of them are in kept away, just a little amount is just cleaned and made accessible to the clients, consequently bringing about its significant expense.

Obstructions to section or refusal of the market evaluate - Barriers to passage incorporates patent just as vital first mover favorable circumstances.

A nexus of conspiring various providers which could influencing the relevant market "appreciably".

VI. CASES

There are many cases that have come up for consideration before the CCI regarding abuse of dominant position.

Recently, a decision with far – reaching consequences was handed down by the CCI, involving all the major car manufacturers and suppliers in India. The issue was regarding restriction on completion by the car manufacturers on sale of spare parts in the downstream market.

In *Shamsher Kataria* case, two levels of market were identified. One is the main market available i.e. of purchasing of cars in India and another one is the post-retail marketplaces, at auxiliary level, which act as showrooms for the purchase of extra parts and after sales services. Original Equipment Manufacturers (OEMs) contended that there is no such division as essential and optional markets and there is just a single framework advertise. It was by the CCI perception the two perspectives were resolved in order to see the ability to influence contenders and purchasers, piece of the overall industry and passage conditions. With respect to share, it was noted by the CCI that OEMs have 100 percent share in the reseller's exchange for their very own image of autos. (Koul, 2017) (Tigga, 2017)

This is a direct result of the between and intra-brand non substitutability of extra pieces of one brand with other, because of high level of specialized particularity. Without substitutability, OEMs were protected from any competitive limitations in the secondary selling stations from their rivals in the essential market. Besides, through a system of agreements, OEMs turned into the sole provider of their own image of extra parts and symptomatic apparatuses in the reseller's

exchange and protected themselves from any challenge. This implies OEM's have 100% offer in their very own image of autos. (CCI, 2019) (Koul, 2017)

In *Ramakant Kini case*, the DG suggested that provision of maternity services by super specialist hospitals to be the relevant product market and „area within a distance of 0-12km from OP hospital“ as the relevant geographical market. This was suggested by the DG on the basis of the inflow of patients from different wards to the hospital. The DG found that 63.70% of the maternity patients in the hospital were coming from certain areas. The opposite party, on the other hand, contended that relevant geographical market should not be bound to 12 km distance travelled, but should also include a catchment area where the patient has to travel 16-20km or roughly 12 crow flight(straight line), The CCI finally held relevant market to be of “provision of maternity services by super specialty /high end hospitals within a distance of 0-12km from the Hiranandani Hospital covering S, L, n, K/E, T and P/S wards of the Municipal Corporation of Greater Mumbai”. Thus CCI in this case concluded that the opposite party hospital is not dominant in the relevant market of „provision of maternity services by super specialty/high end hospitals within a distance of 0-12 km from the Hiranandani Hospital covering S, L, n, K/E, T and P/S wards of the Municipal Corporation of Greater Mumbai. (CCI, 2019)

In *Ajay Devgn Films case*, the informant alleged that the opposite party is tying up two of its films and is forcing single-screen theatres to buy either two or none. It was averred that the opposite party released its mega – starrer film Ek Tha Tiger on 15 August 2012 was contemplating to release another untitled film, later name as Jab Tak Ha Jaan (JTHJ), at the time of Diwali. The opposite parties before the release of Ek Tha Tiger had put a condition on single screen theatres that if they wanted to exhibit the other film, JTHJ, at the time of Diwali. The informant contended that since Ek Tha Tiger was a big ticket film, it was bound to be block buster, and its exhibition was profitable for the single screen theatres; thus, a majority of the single- screen theaters entered into the agreement for exhibition of both the films of the big name and dominance of the opposite party. The grievance of the informant arose because the informant feared that he would not get enough theaters for his own film Son of Sardar because of the agreement of single- screen theaters with the opposite parties at the time of the release of Ek Tha Tiger. The CCI noted that as per the information available in public domain, in Bollywood itself, 107 and 95 films were released in 2011 and 2012 (till now), respectively . Out of this, the opposite party produced only two to four films each year. This cannot be said to amount to dominance even in the Bollywood industry, leave aside film industry in India. The case was closed under Section 26(2) of the Act. (CCI, 2019)

VII. SOLVING THE PROBLEM OF ABUSE BY CCI

If there is a slight hint of an enterprise abusing its dominant position, there are a few remedies available with the Commission such as follows:

- Firstly, it can guide the enterprise or undertaking to cease or stop such activities that may add up to such abuse of dominant position. (S.27 (a)) of the Competition Act. For instance the utilization of this power by the CCI can be found in cases like *In Re Shamsher Kataria and Atos* in which the prevailing gatherings were requested to end and debilitate the endeavors structure including in exercises which had been seen as against section.4.
- Secondly to impose punishments of up to 10% of the normal of the turnover for the last three going before money related years. (S.27 (b)) of the Competition Act. (Koul, 2017) (Tigga, 2017)

There has been a great deal of worry about the arrangement as it gives no count yet simply as far as possible for the punishment, CCI is yet to plan any rules on this issue. Directly the CCI has in general attentiveness in count and evaluation of punishments which should be forced upon such people or undertaking who are gatherings to such sort of misuse.

The COMPAT (The Competition Appellate Tribunal) has placed a few preclusions on the CCI in connection to granting punishments which are identified with it. COMPAT in the one occasion has additionally scolded CCI for its activity of granting enormous punishment without clarifying any explanation behind the equivalent and prescribed that it should be determined based on the 'pertinent turnover'.²² So even for a situation of where the maltreatment is done against a multi-item organization, the turnover used to ascertain the punishment against it would be the turnover from the sort of item or administrations which is in the conflict, and not the general turnover. (Tigga, 2017)

In any case, this anomaly is exceptionally wild in this condition, when we talk about of the working of the CCI and the Appellate Authority, with respect to COMPAT has itself neglected to follow its very own point of reference of 'pertinent turnover' in *M/s DLF Limited v Competition Commission of India & Ors*²³. COMPAT didn't limit itself from evaluating the punishment based on DLF.

VIII. CONCLUSION

Dominance or power of creating monopoly of various enterprises is characterized in various areas as capacity to work freely of rivalry or to raise/control costs. Various factors are to be

considered over to decide strength/financial control/imposing business model control. Such criteria may have been indicated in the rule itself, for example, in Germany and India or may must be resolved from chose cases. It very well may be seen that the Indian challenge law generally pursues the EU model thus its impact is obvious in the Indian arrangements with respect to prevailing position moreover. In any case, the Indian meaning of predominant position varies from the EU definition in two viewpoints.

In the first place, Section 4 Explanation (a) (i) alludes to capacity to carry on autonomously of competitive powers just though the EU definition discusses conduct free of contenders as well as shoppers. Second, the EU definition doesn't manage the capacity of the venture to influence its rivals, buyers or the applicable market, similar to Explanation (a) (ii) of Section 4.

The importance given to 'dominant position' in the Indian Competition Act is especially steady with the 'social definition'- which is alluded to in the report of the ICN Unilateral Conduct Working Group as it permits a multidimensional investigation of prevailing position. Piece of the overall industry isn't the main foundation to build up predominance of an endeavor, just like the case in the prior MRTP Act.

Recognize that the Competition Act doesn't disapprove of places of market predominance as such, dissimilar to the Monopolies and Restrictive Trade Practices Act, 1969. It isn't illicit for an endeavor to have a prevailing position; in any case, where a firm is seen as in a predominant position it has a unique duty not to enable its lead to impede real challenge on the normal market.

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