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Seminal Cases that have Shaped the Jurisprudence around Anti-Trust Laws in India in the Last Decade

GAIRIK SANYAL¹ AND SHILPI GHOSH²

ABSTRACT

This paper discusses four of the most prominent cases adjudicated by the Competition Commission of India over the past 10 years which have shaped significant portions of the jurisprudence around competition laws in India that operates today. These cases are not merely seminal because they have clarified important ambiguities in the statute ie. the Competition Act of 2007 but also because they have laid down standards of adjudication, especially regarding the determination of relevant market that would apply to subsequent cases and would most certainly have a critical impact on the corporate scene of the nation. The instant paper tries to critically analyse the judgments while giving a brief summary of the facts situations and how the court applied the law to the relevant facts situations. The paper is essentially a commentary on the following cases viz re Mukul Kumar Govil and Ors vs ET Infra Developers Pvt. Ltd, RE Vipul Jain vs Samsung and ors, C Shanmugam and Manish Gandhi vs Reliance Jio Infocom Ltd (RJIO), XYZ vs Alphabet Inc. and ors, The paper is written in a narrative style and is a commentary on existing literature.

Keywords: Anti-trust laws, competition laws, restrictive trade practices.

I. INTRODUCTION

In the case of Mukul Kumar Govil and Ors vs ET Infra Developers Pvt. Ltd., One Mr Mukul Kumar Govil's complaint was clubbed with the complaint of another informant, Mrs. Anshoo Bansal (**hereinafter referred to as informants**) against ET Development Pvt Ltd. and Noida Development Authority (**hereinafter referred to as respondents**). The brief facts of the case are as follows.

The informants have alleged that respondent 1 had to hand over possession of the office premises in World Trade Tower Avenue Noida within 36 months under clause 19 of the contract. Both the informants alleged that respondent 1 had failed to deliver the foregoing promise for as long as five years and to circumvent the penalty clause had colluded with

¹ Author is a student at Amity University, Kolkata, India.

² Author is a student at Amity University, Kolkata, India.

respondent 2 to deliver exorbitant and illegal demand notices to the informants. The informants further allege that respondent 1 has been given the exclusive right to construct office space in a prime location by respondent 2 and hence respondent 1 enjoys a dominant position in the market. Inter alia, the informants have urged the commission to restrain respondent 1 from issuing such notices and set up an enquiry panel to confirm contravention of sections 3 and 4 of the Competition Act, 2002.

The commission after a careful analysis of the materials on record has come up with the following observations and conclusions.

(A) Observations;

1. The market under s.2(r) of the Act needs to be delineated in the above case before further analysis. The commissions observed that the respondents belong to the real estate market which can be divided into two sub categorizations namely residential and commercial markets. The residential markets can further be divided into apartments/flats and plots markets.
2. The commission in its judgment has opined that the “relevant geographic market in the instant case would be ‘Noida & Greater Noida’. Thus, the relevant market would be the market of “provision of services for development and sale of commercial space in Noida & Greater Noida”.

(B) Conclusions;

1. The commission has concluded that the allegation of collusion by the respondents to create a position of dominance for respondent 1 in the market is baseless as respondent 2 had given necessary permissions to other developers as well to operate in the relevant market on equal footing with respondent 1.
2. The commission closed all cases against the respondents under section 3 and 4 of the Competition Act of 2002 using the provision under section 26(2) of the same Act.

(C) Inference

1. The reasoning of the commission seems to be sound as the allegations of dominance have not been substantiated by the informants. The commission on a preliminary enquiry has found numerous competitors operating in the relevant market. Hence there appears to be no position of dominance enjoyed by respondent 1 in the instant case.
2. The informants are well within their rights to seek relief in other appropriate fora but no case appears to be made out under sections 3 and 4 of the Competition Act of 2002.

3. I think the reasoning of the Commission is sound in law and meets the ends of justice.

RE Vipul Jain vs Samsung and ors

In the instant case the informant Mr. Vipul Jain had filed a complaint against 12 opposite parties including Samsung India Electronics in the Competition Commission of India for alleged contravention of sections 3 and 4 of the Competition Act of 2002 by the opposite parties while participating in the auctions of various government departments. It has been averred by the informant that in all the government auctions that have been referred to in the complaint, one Infratech Ltd won the bid. The crux of the complaint is that all the opposite parties had acted in concert and indulged in bid-rigging as envisaged in s. 3(d) read with s.3(1) of the Competition Act of 2002. The informant further alleged that money was exchanged between the bidders to ultimately see one party bagging all the government projects.

The commission in response to the foregoing complaint sought the response of the concerned procurer government departments before passing any orders in the instant case. The commission on careful perusal of all the material on record and the responses of the procurers observed that the auctions were taking place in automated and digital platforms called GEMS and hence transparency is not an issue. Further, they observed that allegations of cover bidding do not hold water as many of the allegedly colluding firms did not actually participate in some of the auctions. Even the firms which participated did not bid in narrow ranges (known as price parallelism) as is often the case in collusive cover bidding cases. The commission observed that the informant could not provide a shred of evidence to corroborate his allegations against any of the opposite parties.

The alleged money trail said to be received as quid pro quo was also left completely unsubstantiated by the informants. Hence, the commission came to the inevitable conclusion that no prima facie case was made out against the OPs in so far as section 3 and 4 of the Competition Act was concerned.

In light of the above discussion, we can safely conclude that the informant could not corroborate any of his allegations with evidence nor did the commission find any evidence on a preliminary enquiry. The response from the government departments namely the Medical Health and Family Welfare Department (National Health Mission), the Government of Uttar Pradesh and the Department of Posts, Government of India also did not point to any irregularity. Thus the reasoning of the commission seems to be sound and well-aimed. The commission performed its duty well by digging records and conducting a preliminary investigation considering the nature and gravity of the allegations. But in the absence of any credible evidence, it was bound to reach

the conclusion that it did. It is worth mentioning here that even the Supreme Court earlier had dismissed a Special Leave Petition in this matter allowing the petitioner however to pursue other legal remedies in a suitable forum. The informant had lodged the complaint with the CCI following the dismissal of the SLP. The CCI judgment has once again dismissed the informant's allegations.

In the case of XYZ vs Alphabet Inc. and ors, an informant whose name has been kept confidential filed a complaint against Alphabet Inc (parent company of Google India) and five of its associated companies. A brief summary of the facts of the case is as follows.

Google India Ltd, a subsidiary company of Alphabet Inc. launched a payments application initially named Tez and later rebranded as Google Pay to capitalize on its global reputation in the year 2018. Google operates several allied businesses which are predominantly web-based services. These services include a search engine (Google), a video-sharing app (YouTube), an app store (Google Play Store), a web-based navigation system (Google Maps) etc. It has been alleged by the informants that Google has abused its dominant position in contravention of sections 43 and 4 of the Competition Act of 2002 to unfairly promote its own product Google pay as against rival UPI Apps.

The informant has alleged the following against the respondents.

1. It has been alleged that Alphabet inc has manipulated its search algorithms in favour of Google Pay in Play Store to manipulate users to prefer Gpay over rival UPI Apps.
2. It has further been averred by the informants that Google Pay has been made the default app for payment for buying apps in Google Play Store. This adversely impacts consumers using other UPI Apps and also incentivizes downloading of Google Pay as opposed to other payment applications.
3. Further it has been alleged that the data localisation rules have been flouted by Google as it shares the data of its consumers with foreign servers and other associated entities.

Google's response to the allegations is as follows;

1. Google denies any promotion of its products by favourable algorithms. It has claimed that whichever application is shown at the top in its search engine or app store is based on a transparent algorithm and based on the merits of the product decided by established standards.
2. Google has further denied making Google Pay the default or compulsory payment app in case of app purchases in its app store. It claimed to have provided a level field for all.

3. In so far as the third allegation regarding data localisation is concerned, it has cited that this is the exclusive domain of RBI and a seminal matter is being heard by the Hon'ble High Court of Delhi.

Conclusions drawn by the commission;

1. The commission on careful perusal of the available materials on record has found the allegations by the informant prima facie credible. It has been found that there was a presence of manipulation of AI in favour of Google's own products.
2. The commission has thus directed the DG to conduct an inquiry to unearth the truth and proceed accordingly.
3. The commission has however rejected the informant's claim that it is not liable to be cross-examined by the respondents. The commission directed the DG to subject the informant to cross-examination if it is in the interest of the investigation.
4. Thus Alphabet Inc. and the associated companies have been found to have contravened section 4 of the Competition Act of 2002 and an investigation has been ordered under section 26(1) of the said Act.

C Shanmugam and Manish Gandhi vs Reliance Jio Infocom Ltd (RJIO)

The instant case was filed by one Mr. C Shanmugam and Manish Gandhi against Reliance Jio Infocom Ltd. (RJIO), Telecom Regulatory Authority of India, Department of Telecommunications, Ministry of Communication and Bharat Sanchar Nigam Ltd (BSNL). Following is a brief summary of the facts of the case and allegations levelled against the respondents.

RJIO (hereinafter OP1) was established as a venture of Reliance Industries Ltd. OP1 launched its 4G connectivity services as a new entrant into the telecom sector on 5th September 2016. The other respondents viz Department of Telecommunication, Government of India (hereinafter OP 2), Telecom Regulatory Authority of India (TRAI) (hereinafter OP 3) and Bharat Sanchar Nigam Ltd (BSNL) (hereinafter OP 4) are either government departments or regulators and op 4 has been added by the commission as a significant market player could assist the commission in reaching a logical conclusion on the impact the market could face.

The informant levelled the following allegations on OP 1

1. It has been alleged that OP 1 having unfettered access to the funds of its parent company viz reliance Industries enjoys a dominant position in the market. OP 1 started with a colossal seed capital of 150000 crores which in itself is unheard of globally. This huge

financial backing allows it to operate in the market independently of market forces and thus creates a dominant position for OP 1.

2. OP 1 has been alleged to resort to predatory pricing by offering to offer its services including calls, 4G internet services et all at zero costs for 90 days in the guise of a welcome offer. This appears to be clearly below-cost pricing to eliminate competition in the relevant market. This has already attracted a subscriber base of 72 million.
3. Users of the services of OP-1 should have a smartphone which supports a 4G network and voice over LTE. For that purpose, OP-1 is offering the 4G compatible Mobile Handsets @ Rs 3,000/- per handset unit.
4. It has been alleged that the unprecedented discounts and offers that OP 1 is offering are to abuse its dominant position in the market to eliminate competitors and establish a monopoly-like business structure with negligible real competition. In response to the above allegations, the Competition Commission of India (CCI) requested the response of the OPs to the grave allegations levelled against them. After analyzing the materials on record and the response of OPs, the CCI drew the following conclusions,
5. The commission accepted Op 1's argument that the relevant market should not be considered only 4G connectivity but wireless telecom services market including 3G and 2G services. The commission adduces the following reasons for the conclusion. Firstly, uniform license is granted by the government for all the service providers and secondly the newer technology is reverse compatible with older handsets and mobile instruments.
6. The commission found that entrenched players in the market already exist with comparable financial strength. The commission observed that just heavy investment and attractive offers by a new entrant into the market cannot lead to the conclusion that it enjoys a dominant position.
7. The commission thus summarily dismissed the contentions of the informants and closed the case under section 26(2) of the Competition Act of 2002

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