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Abuse of Dominance in Competition Law

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In basic words, “dominant position refers to anything that is in a better position than others due to a variety of circumstances.” However, in Indian civilization, one “caste” was deemed superior to another, and this sense of supremacy was common. Staying in a better position, on the other hand, does not hurt anybody unless someone is abusing their position of power. As a result, having a dominating position isn't always a negative thing. Mishandling such a stance as a result of its prevalence, on the other hand, is regarded insufficient.

Keywords: *market, monopoly, dominance, competition law.*

INTRODUCTION

Misuse is characterized as happening once a business or a set of organizations exploits their present situation in a major market in a debarring or/and shady way. This Act contains a thorough record of acts that are considered to be maltreatment of a ruling situation, just as the circumstances in which these practices are precluded. It is only when such techniques are accepted by an enterprise that is exploiting a current situation in the applicable market in India that they would be considered to be maltreatment. Abuse of dominating spot is determined as far as the established ways of conduct undertaken by a prevailing organization in order to

maintain such a position. According to the law, such activities are prohibited. Consequently, any misuse of the predominant situation as characterized in the Act by a predominant business would be rejected by the court. Following the definition given in Section 4 of the Competition Act, 2002¹, the predominant spot is characterized as a feature possessed by an undertaking in a basic market in our country that engages it to work independently of certifiable powers winning on the lookout as well as to apply impact over clients, contenders, and the market in its backing.

VARIABLES TO DECIDE THE PREVAILING POSITION

Traditional definitions of market dominance have been applied to enterprises or groups of enterprises based on their percentage market share of the whole market. Be that as it may, an assortment of different elements have an influence in deciding how well a business or a category of organizations do on the lookout.

These include:

- *“a market share.*
- *the size and assets of the undertaking.*
- *size and significance of contenders or competitors.*
- *the financial intensity of the undertaking.*
- *a vertical combination or integration.*
- *a reliance on customers on the undertaking or undertaking.*
- *degree of section and exit barriers in the market.*
- *countervailing purchasing power.*
- *market structure and size of the market.*
- *a source of dominant position viz. regardless of whether acquired because of resolution or statute and so on.*
- *social expenses and commitments and commitment of big business getting a charge out of the prevailing situation to financial improvement.”*

¹ Competition Act, 2002, s 4

The Competition Commission of India has moreover been allowed to recognize no-matter-what other contemplations that it considers significant for the insurance of prevailing position.

RELEVANT MARKET

The 'relevant market' is one where the denounced party possesses an overwhelming spot, is the first issue to be determined in a case that has been pending for quite some time because of alleged misuse of the dominant position. This is accomplished by showing an important market to portray how much the circumstance of an undertaking is to be gone after for its solidarity as well as for its abuse of that strength. According to the product and geography criteria, the applicable market identifies a particular thing/organization or category of products made or advantages provided by an organization in a predefined geographic region. Product and geography criteria are used to define the applicable market.

RELEVANT MARKET PRODUCT

When it comes to goods or services, a market includes all of those that are compatible or maybe swapped by the customer. Factors deciding the applicable item market are:

- *“Physical characteristics or end-use of goods.*
- *Price of goods or services.*
- *Consumer preference*
- *Exclusion of in-house producers.*
- *Existence of specialized producers.*
- *Classification of Industrial products”.*

As a result of its decision in *Atos Worldline v Verifoneindia*,² the Competition Commission of India (CCI) determined a certain pertinent item market ought to be analyzed from both demands as well as supply point of view, taking into consideration the qualities of the item, its cost, and its expected use. In a similar vein, in *Surinder Singh Barmi v The Board of Control*

² *Atos Worldline v Verifoneindia* [2012]

for Cricket in India (BCCI),³ it had been resolved that the important market had been established based on the demand exchangeability of various types of diversion and enjoyment. In this case, it had been resolved that one cricket match was not up to be viewed as exchangeable by another game in view of not one or the other the quality of the players nor the intentions of those who were viewing the cricket match.

RELEVANT GEOGRAPHIC MARKET

A market is characterized as a geographical region where the conditions of rivalry for the stock or interest of items or administrations are recognizably homogenous and can be isolated from the ones existing in nearby regions. Factors deciding the applicable geographic market:

- *“Regulatory trade barriers.*
- *Local specialization requirements.*
- *National procurement policies.*
- *Adequate distribution facilities.*
- *Transport cost.*
- *Language.*
- *Consumer preference.*
- *Need for secure or regular supplies or rapid after-sales service.”*

Specifically, it was determined in *Bijaya Poddar v Coal India Ltd*⁴ that there are some regions where demand, as well as supply for items of organizations, might be professed to be homogeneous and recognizable from business sectors in adjoining areas. As an example, in *Atos Worldline v Verifone India*⁵, it had been held that normally there are a couple of variables by then, for example, administrative exchange boundaries, local detail prerequisites, public procurement approaches, good movement workplaces, as well as transportation costs, that come into play in the realm of consideration. As a result, if each such component were

³ *Surinder Singh Barmi v The Board of Control for Cricket in India (BCCI)* [2010]

⁴ *Bijaya Poddar v Coal India Ltd* [2013]

⁵ *Atos* (n 2)

consistent across the country compared to a thing, the entire country would be thought of as the applicable geographical area to be studied.

IDENTIFICATION OF ABUSIVE USE OF DOMINANT POSITION [SECTION 4(2)]

“Section 4 (2) of the Act specifies the following practices by a dominant enterprise or group of enterprises as abuses:

- (i) directly or indirectly imposing unfair or discriminatory conditions in purchase or sale of goods or services;
- (ii) directly or indirectly imposing unfair or discriminatory price in purchase or sale (including predatory price) of goods or service;
- (iii) limiting or restricting the production of goods or provision of services or market;
- (iv) limiting or restricting technical or scientific development relating to goods or services to the prejudice of consumers;
- (v) denying market access in any manner;
- (vi) concluding contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
- (vii) using its dominant position in one relevant market to enter into, or protect another relevant market.”⁶

There are five sorts of oppressive utilization of predominant position –

- **Out of line or then again uneven trade deals with** As per this definition, misuse of principal spot occurs at the time when a business or association authentically or by implication forces one-sided conditions on the proposal of product, the conveying of

⁶ Competition Act, 2002, s 4(2)

costs, the expense of an exchange, or the securing of savage expenses of items or organizations.

- **Maltreatment of prevailing position:** A market maltreatment of the predominant position happens when a business or organisation legally or indirectly imposes limits on the development of goods or the progress of science or technology that results in the creation of goods or services.
- Limiting the availability of new products or services and Exclusion from a showcase, establishment of an entrance, and development barriers mean any circumstance which makes renouncing admittance to the market in any manner possible would be an abuse of a dominating position in any jurisdiction.
- **The burden of beneficial obligations:** when an undertaking chooses the fruition of arrangements dependent upon the assertion of helpful obligations by different parties, as well as those obligations are such a lot of that, by their real nature or as demonstrated by business usage in that area, no relationship is there to the subject of the agreement.
- **Security of independent business sectors:** When a business takes utilization of its overwhelming situation in one market to venture into another market, this is alluded to as maltreatment of the predominant position.

Along these lines, it might be communicated that Section 4(2) of the Act shows “the accompanying practices by a dominant enterprise or group of endeavors as misuses are straightforwardly or in an indirect way of imposing out of line or oppressive condition in the sell or purchase of goods or administration; straightforwardly or in an indirect way of imposing an unjust or prejudicial cost in buy or deal (counting ruthless cost) of products or administration; constraining or confining the creation of products or arrangement of administrations or market; constraining or confining specialized or logical improvement identifying with merchandise or administrations to the partiality of buyers; denying market access in any way; making the finish of agreements subject to acknowledgment by different groups of beneficial commitments which, by their temperament or as per business use, have no association with the subject of such agreements; and using its dominant situation in one important market to enter into or ensure other applicable markets.”

TYPES OF DOMINANT POSITION

- **Exploitative such as excessive pricing**

Exploitative actions are the ones in which the dominant group makes use of its position by imposing unfair or possibly low conditions on other enterprises or customers. For example, in the case of *Pankaj Agarwal v Delhi Land and Finance*, the agreements drafted solely by Delhi Land and Finance (DLF) empowered them to be discretionary about the designation of super-areas, secretive about data pertinent to the buyer, such as the number of apartments on a floor, and to drop portions of projects and relinquish booking sums, among other things. The Commission determined that the agreements were exploitative to consumers, and as a result, they were one-sided and abusive in their terms.

- **Exclusionary such as a denial of market access**

Exclusionary activities are those where a dominating entity uses its power to prevent new competitors from entering a market that is already crowded with competitors. Examples include *Re Shri Shamsher Kataria v Seil Honda*⁷, in which the predominant elements, as well as the Overseas Suppliers of remarkable vehicle parts, reached an agreement that prevented the Overseas Suppliers from giving components to free repairers. These types of comprehensions had been viewed as hostile to cutthroat since they confined the passage of new firms into the market.

DEFENCES MAY BE RAISED TO ALLEGATIONS OF ABUSE OF DOMINANCE

For unfair valuing or conditions, the sole explicit protection given in the Act is the 'meeting rivalry' guard. This guard permits organizations in ruling situations to answer to their opponents' developments. The CCI, for instance, allowed compromises presented by a port administrator in *Dhruv Suri v Mundra Port and Special Economic Zone Ltd* (2010)⁸, taking note that they had been customized to deal with rivalry from other port administrators in the important market.

⁷ *Shri Shamsher Kataria v Seil Honda* [2011]

⁸ *Dhruv Suri v Mundra Port and Special Economic Zone Ltd* [2010]

Albeit the Act doesn't accommodate a genuine explanation safeguard, the CCI has analyzed contentions in specific examples. The CCI chose in the Schott Glass case (2012) that Schott Glass had been inside its privileges to quit providing a client to defend its brand names, also that it's withholding to do as such was impartially legitimate. The Competition Appellate Tribunal (the COMPAT) additionally said during the Schott Glass request (2014) that giving more great objective limits to a more client business might not be called anticompetitive expecting there is no damage to showcase rivalry. Notwithstanding, assuming that the prerequisites for allowing such limits had been distinctive for similar exchanges, the market would become anticompetitive. However, target limits and loyalty refunds (limits advertising in exchange for a purchaser's commitment to put all or the vast majority of its requests with the dealer) can be an enticing flat exclusionary gadget pointed toward dispossessing rivalry, they were defended for this situation on the grounds that Schott Glass offered the rebate to an element that has been buying a bigger amount of the item and subsequently didn't get certified as an identical exchange. Besides, the estimating rules, as well as agreements, were designed to ensure higher quality notwithstanding contests from Chinese competitors. Efficiency and economies of scale were used as justifications for offering such favourable conditions.

The CCI concluded in *Faridabad Industries Association (FIA) v M/s Adani Gas Limited (AGL) (2014) (Adani Gas case)*⁹ that an impediment forced by a prevailing organization isn't harmful assuming the predominant firm is forcing the limitation since it is dependent upon an outsider limitation. The COMPAT neglected to perceive that vehicle makers' confined dispersion of extra parts was adequate to abstain from falsifying and establishment by undeveloped autonomous repairers in Auto Parts (2016). Although this was a real worry, the COMPAT presumed that clients would be better off if minimal expense new parts had been made commonly accessible on the open market, bringing down the requirement for fakes. The COMPAT constrained the public authority to interrupt and make repairer standard necessities. The Supreme Court has requested the COMPAT's decision to be postponed till the time of the result of the allure.

⁹ *Faridabad Industries Association (FIA) v M/s Adani Gas Limited (AGL)* [2014]

While unfair valuing is disallowed under section 4(2) of the Act, the COMPAT held in *Anand Parkash Agarwal v Dakshin Haryana Bijli Vitran Nigam and Ors (2017)*¹⁰ that assuming there has been a single true defense or a 'redeeming prudence' at various costs being imposed on various buyers, it might not be prejudicial estimating. The CCI confirmed that the value change had been passable as per section 62(4)¹¹ of the Electricity Act since it depended on aim usage factors.

ANALYSIS: “DOMINANCE PER SE IS NOT ILLEGAL, BUT THE ABUSE OF THE POSITION OF DOMINANCE IS ILLEGAL”

The Competition Act, 2002 depends on the hypothesis of current contest law and is planned to advance rivalry while likewise shielding Indian business sectors from anti-competitive actions by businesses. To guarantee that there is no unfriendly impact on competition in India, the Act outlaws hostile to cutthroat arrangements and the abuse of prevailing positions by firms. It also controls business combinations (mergers, amalgamations, and acquisitions). Competition laws in every country in the globe are mainly worried about the activity of market power as well as the misuse of that position. According to multiple definitions, the phrase “market power” may refer to “dominant position,” monopoly power,” and/or considerable market power. As defined by the Act, “a dominant position (dominance) is a position of strength enjoyed by an enterprise in the relevant Indian market that allows it to operate independently of the competitive forces prevailing in the relevant market; or affect its competitors, consumers, or the relevant market in its favour.”¹²

The capacity of a company to behave/act in a way that is independent of market factors is what defines whether or not it has a dominating position. Any firm that attempts to exert influence over the market, particularly in terms of the setting of product prices, will fail. In a truly competitive market, Perfect market conditions, then again, are a greater amount of a financial "ideal" than a reality. In view of this, the Act stipulates several elements that should

¹⁰ *Anand Parkash Agarwal v Dakshin Haryana Bijli Vitran Nigam and Ors*. [2017]

¹¹ Electricity Act, 2003, s 62(4)

¹² 'Provisions Related to Abuse of Dominance' (*Advocacy Series*, 2002)

<https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/AOD.pdf> accessed 16 January 2022

be considered when deciding whether an organisation is dominant or not in a certain market. Just when the proper market has been recognized does strength have any significance for the contest. At the point when the CCI alludes to an applicable market, it implies “the market that may be defined by the Commission concerning the relevant product market, the relevant geographic market, or about both markets.”¹³ According to the Act, numerous elements should be considered by the Commission while deciding the applicable market, and any one or all of these considerations must be thought about by the Commission.

The substitutability of a product market is used to define a relevant product market. It is the littlest gathering of things (counting products and administrations) that are exchangeable among themselves when a slight however extensive non-brief ascent in cost is imposed on all of the products in question. For example, the market for automobiles may be divided into separate important item advertises for little automobiles, mid-size automobiles, luxury automobiles, and so on, since they are not substitutable for one another when the price of one automobile is changed by a tiny amount. According to the definition, an important geographic market is characterized as “the area in which the conditions of competition for the supply of goods and provision of services, as well as the conditions of competition for the demand of goods and services, are distinctly homogeneous and can be distinguished from the conditions prevailing in the neighbouring areas.”¹⁴

Dominance is not seen negatively in and of itself, but its misuse is. “Abuse, according to the definition, occurs when a business or a group of businesses takes advantage of their dominating position in a particular market in an exclusionary or/and exploitative way. It is specified in the Act that a comprehensive list of activities that are considered to be an abuse of dominant position and, as such, is forbidden.”¹⁵ It is just when such methods are utilized by an organization that has gotten an overwhelming situation in the important Indian market that they are viewed as harmful. The abuse of dominance of a dominating business is measured in

¹³ *Ibid*

¹⁴ Harman Singh Sandhu, Rohan Arora, & Shweta Arora, ‘In Brief: Abuse of Dominance in India’ (*Lexology*, 12 March 2021) <<https://www.lexology.com/library/detail.aspx?g=00e0f87a-ff41-4ba2-a6ff-5a026e7793b0>> accessed 16 January 2022

¹⁵ *Ibid*

terms of the specific sorts of activities done by such an organisation. Acts of this kind are expressly banned by the law. Any misuse of a dominating position of the sort mentioned in the Act by a dominant business is forbidden.¹⁶

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- (iv) limiting or restricting technical or scientific development relating to goods or services to the prejudice of consumers;
- (v) denying market access in any manner;
- (vi) concluding contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
- (vii) using its dominant position in one relevant market to enter into, or protect another relevant market.”¹⁷

Following the implementation of significant underlying change in 1991, India continued out and about of market advancement, and thus, it has come to rely more and more on market

¹⁶ SS Rana & Co. Advocates, ‘Abuse of Dominant Position An Anti-Competitive Practice’ (*Mondaq*, 29 January 2018) <<https://www.mondaq.com/india/antitrust-eu-competition-/668306/abuse-of-dominant-position-an-anti8208competitive-practice>> accessed 16 January 2022

¹⁷ Competition Act, 2002, s 4(2)

competition as the organising force for economic activity.¹⁸ Markets have played a pivotal role in ensuring that resources are allocated efficiently, and this has largely been recognised. Despite this, given the fact that markets are flawed and regularly inclined to disappointment, the significance of contest law and strategy can't be overstated. It is possible to state that ending with the observation that the restriction on abuse of dominating position is essentially important for the preservation of fair competition in an economy, and particularly for a growing economy such as ours.

CONCLUSION

As a result of the rising utilization of maltreatment of prevailing positions, our execution of legal provisions pertaining to the Competition Act has become more significant as well. One of the primary goals of such legislation is to protect the independence of business while also allowing for a non-stigmatized economic viewpoint that is not influenced by the dominating position of another component in the economy. Therefore, watching out, there should be an identical entryway and comparable possibility for every one of the individuals who decide to engage in economic activities. Competition, on the other hand, should be encouraged as long as it is healthy and contributes to the overall development of society; nevertheless, it becomes dangerous when one company begins to dominate the other in terms of its own business practices.

¹⁸ Abuse of Dominance and Vertical Agreements in India: Cheat Sheet' (Cyril Amarchand Mangaldas, 21 April 2021) <<https://www.cyrilshroff.com/wp-content/uploads/2020/09/Abuse-of-Dominance-Vertical-Agreements.pdf>>accessed 16 January 2022