

IMPORTANCE OF DLF CASE IN INDIA IN CONTEXT OF ABUSE OF DOMINANCE

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ABSTRACT: The abuse of any particular position can cause problems to many people around whether it is the nature we are surrounded or by the market that runs according to demand & supply. The term abuse itself is self explanatory and it open to interpretation by the scholar's. The Abuse of Dominance is a serious offence in the eyes of law. The Competition Act,2002 is the legislation governing the Competition Law in India along with it we have Competition Commission of India, the authority responsible for the enforcement of the law. The Abuse of Dominance is covered under Section 4 of the Competition Act,2002. Relevant market plays as the determining factor for assessing abuse of dominant position by an enterprise. The Case of Amit Mittal v DLF Limited has brought a new concept as 'Relevant Period' in the definition of Market. The Competition Commission of India (CCI) under this case has broadened the area of the relevant market under the act.

Keywords: Abuse of Dominance, relevant market, relevant period

INTRODUCTION

For so many years, the legal framework outside the West was for most part seen as trivial. Globalization has anyway leaded to expanding cross-cultural contacts, which successively has generated a more ardent interest in non-Western legal systems. Competition law is about the economic evaluation of markets within a legal course and is made to protect the operation of competition orderly to augment welfare of consumers. The Competition law is concerned with the practices relating to anti-competitive agreement (horizontal and vertical), mergers, combinations and abuse behaviour by firm. Abuse of Dominant Position (ADP) occurs when a company with a large market share uses that market share in ways that obstructs competition in an unfair way. Competition Act, 2002 is an act to provide, keeping in view the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the

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interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto² Under the act it covers the laws relating to prohibition on certain agreements, abuse of dominant position, and regulation of combinations. Section 3 talks about the Anti-competitive agreements and Section 4³ talks about the abuse of dominant position which will be dealt in this study. Relevant market is important factor for determining the abuse of dominance which is provided under Section 2(r)⁴. The act defines relevant market as the market, which may be determined by the commission with reference to 'relevant product market' and 'relevant geographic market' or with reference to both the markets. It can also be defined as the relevant market can be defined as an instrument to recognize and define the limitations of competition between companies and can be determined by defining the relevant product market or the relevant geographic market or with reference to both the markets.⁵

The relevant geographic market illustrates the locations of the producers or sellers of the product or service and whereas the relevant product market describes the market comprising of 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.⁶ Both the agreements have importance in the assurance of the agreements and anti-competitive, in assessing combinations and dominance of an enterprise or group.

² Preamble, The Competition Act, 2002, No. 12 of 2003

³ [(1) No enterprise or group shall abuse its dominant position.]

(2) There shall be an abuse of dominant position [under sub-section (1), if an enterprise or a group].—

(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

⁴ Competition Act, 2002

⁵ Nidhi Singh Prakash, L&L Partners, Is a Relevant Market to be Delineated in Cartelization Cases?, Published on Mondaq.com, last accessed: 20/02/2019

⁶ Supra 4

ABUSE OF DOMINANT POSITION

Every modern law on competition intent to deal with two main types of problems first is the anti-competitive agreements and abuse of market power by dominant firms. Abuse of Dominant Position is another method for meddling with market competition. Just expressed, it alludes to the lead of an enterprise that is commanded by the demonstration. The Competition Act, 2002 forbids the utilization of market controlling power to confine individual enterprises from pushing out contending firms from the market just as from controlling costs.⁷

Abuse of Dominant Position is another method for meddling with market competition. Essentially expressed, it alludes to the direct of an enterprise that is dominated by the demonstration. The Competition Act, 2002 prohibits the utilization of market controlling capacity to limit individual enterprises from pushing out contending firms from the market just as from controlling prices. Thus, the idea of abuse of overwhelming position or market control involves the likelihood of Anti-competitive business⁸ rehearses by a predominant firm or group so as to continue or build its situation in the specific market. A market condition in which either the purchaser or the dealer, by and large, has command over the market is known as Pure competition. Subsequently, in such financial circumstance the expense is constrained by the wheeling and dealing of a significant number of buyers and merchants and both the players of the market acting unreservedly of the other. In such a condition, none of them overpowers the market and has imposing business model power or expert over the expense. In order to achieve this recognized focus on, the Competition Act gives that no enterprise or group will abuse its dominant position.⁹ The enterprise or group is in a predominant position and that it

⁷ The provisions relating to abuse of dominance are dealt under section 4, 19, 26, 27, 32 & 34 of the Competition Act, 2002

⁸ Abuse of dominance firm will certainly result in suppressing, preventing or distorting of competition. hence its effect is always anti-competitive in nature. However, under section 3 the restrictive trade practices is defined as the result of agreements between firms but abuse of dominance may arise even without any such agreement. Abusive conduct under Section 4 may result in a competitor leaving or preventing a potential competitor from entering the market.

⁹ Subs by Competition (Amendment) Act, 2007 for "No enterprise shall abuse its dominant position"

abuses the dominant position.¹⁰ In this manner, the Competition Act, 2002 disallows acts or leads which include abuse of predominant position of market control however not thin dominance. In this way, the demonstration doesn't prevent a firm from securing dominance by real methods yet abuse of dominance is unquestionably disapproved of by it. Consequently, Competition Act, 2002 goal is to control the conduct of the overwhelming enterprise or a group which lessens competition and develops predominant position. Section 4 just disallows the direct of an enterprise which is misusing its predominant position not the enterprise or group holding an overwhelming position

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CASE : AMIT MITTAL V. DLF LIMITED, CASE NO. 73 OF 2014

Parties to the case: Informant: Amit Mittal

Respondent: i)DLF Limited

ii) DLF New Gurgaon Home Developer Pvt. Limited

Facts of the case: The case was filed by the informant under section 19(1)(a) of the Competition Act, 2002 by Amit Mittal against DLF Limited (hereinafter OP) alleging contravention of the provision of the Section 4 of the Act. The OP launched a residential township by the name of 'Regal Gardens' in sector 90, DLF Garden City, Gurgaon Consisting of 3 BHK and 4 BHK Apartment units. The Informant applied for the flat and paid 10% of the sale price of the apartment. By making the payment there was an agreement entered between the parties and apartment was allotted to the informant.¹¹

The informant alleged that the agreement was highly unfair and discriminatory, as there were several clauses in the 'Agreement' that was violative of provisions of Section 4(2)(a)(i) of the act. The informant also alleged that the Agreement which was entered between the parties was non-negotiable and the informant has to execute it within 30 days, and If he fails to do then the booking amount will be liable to be forfeited without any notice to the informant.¹²

CCI upon considering the facts and circumstances of the case, found that OP is dominant in the relevant market of "*provision of services for development and sale of residential units in Gurgaon*" and notice the

¹⁰ Section 4(2) provides there shall be an abuse of dominant position if an enterprise or a group

(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

¹¹ Para 1-3, CCI, Case 73 of 2010

¹² Ibid, Para 4

conduct of the OP was prima facie abusive and in violating Section 4 of the act. After this the matter was referred to Director General (DG) for investigation under Section 26(1)¹³ of the act.¹⁴

The DG in his report submitted to the commission for analysis of dominance defined the relevant market as market for “*provisions of services for development/sale of residential units (apartments/flat/independent floor/villas) under the licensed category of Residential Group Housing (RGH) and Residential Plotted Land (RPL) in Gurgaon*”¹⁵. Upon analysis of the report of the DG, the commission evaluated that the DG while defining the relevant market has included the residential units developed under RGH and RPL license in the same category even though they consist of different types of properties, such as apartments/flats, plots and villas. The Commission has a different opinion in defining relevant market and they defined the relevant market as market for ‘*provision of services for development and sale of residential apartments/flat in Gurgaon*’. The DG was directed to conduct further investigation and submit its report.

The DG’s report with his finding as directed by the commission and the issue which was identified for the investigation was “Whether OP is dominant as per the provisions of the Competition Act, 2002 or not, in the revised relevant market as defined by the commission”. The DG examined the above issue for the years 2011-2012 to 2014-2015. It was noted that the project in question, ‘Regal Gardens’ in sector 90, DLF Garden City, Gurgaon. The execution of agreements of the projects in question was started on 16 May 2012 and during the financial year 2014-15, about 80% of the level execution of agreements was achieved. Hence, the assessment of dominance of OP group for determination of relevant scope/period was based on residential units launched and sold was considered as 2011-2012 to 2014-15 (i.e. 4 years).

The DG while determining the dominance of OP in the relevant market, took into consideration factors such as the market shares of OP and other developers, size and resources of the enterprise, economic power of the enterprise including commercial advantage over other competitors, dependence of consumers on the enterprise, entry barriers etc.

After submission of report by the DG, there was submission of arguments by the OP. The OP contended that it doesn’t enjoy a dominant position in the relevant market and also that they lacked ability to affect the (i) Competitors; (ii) Consumers; or (iii) Relevant market in its favour.¹⁶ The OP stated that the data submitted and concluded by DG is highly competitive and fragmented.¹⁷

The CCI after submission of arguments of the party analyses it. As per the material available on record the commission finds the issue for determination in the case is: “Whether the OP has contravened the provision of Section 4 of the Act?” The relevant market as defined by commission is the market for the “provision of

¹³ 26. Procedure for inquiry on complaints under section 19.—

(1) On receipt of a complaint or a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information, under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter.

¹⁴ Ibid Para 5

¹⁵ Ibid, Para 6

¹⁶ Ibid, Para 13

¹⁷ Ibid, Para 14

services for development and sale of residential/flat in Gurgaon". The Commission considered the factors provided under Section 19(7) of the Act and came to point where the relevant product market was defined as the market for "*the provision of services for development and sale of residential apartments/flats*". The Commission after some observation made with the help of some criteria and compared with cities in NCR like Noida or Ghaziabad or Faridabad, came to point, where the relevant geographic market opined by commission was *Gurgaon*.

The Commission with respect to dominance observed and analysed the market from the primarily data submitted by DG. In DG observed that the residential license land allotted by the DGTCP to around 96 developers out of which OP has occupied 3rd position with highest no. of market share of 8.30%. Then with regard to total residential apartments/flats launched during the period of 2011-12 to 2014-15, the DG observed from the data submitted that of around 40 developers, 30 developers who launched their project in relevant market in the particular period, out of which OP group was at 2nd position with market share of 8.93%. Moving on to other criteria where it was observed in relation to apartments/flat sold unit-wise as value-wise during the same duration. It was seen that during that relevant period OP was at 1st Position in terms of units sold among 39 developers. It was analysed at last where more than 90% of the units were sold by developers other than OP group and approximately 50% by the top then developers, it cannot be said that OP has ability to operate independently regardless of its competitors. DG also assessed the financial strength of the OP and found out that OP group no longer has the ability to influence the market in its favour. It was also seen that there is no regulatory barrier on the new players in the market and consumers were not dependent on the OP group as there were option available in the relevant market.

After assessing of facts, the commission came to view that OP group does not have a dominant position in the relevant market in terms of Section 4 of the act. In this case the commission found that the OP was found dominant in the case of *Belaire Owner's Association v DLF Limited and Others*¹⁸ and in other subsequent cases. But here it noteworthy that this case is different from the other and distinguishing factor is the period of assessment. The Commission concluded that there is no contravention of Section 4 of the act.

Conclusion

The CCI dealt with this case with precision as the DG report states about the criteria used to determine the abuse of dominance of the OP. In this case there were different criteria assessed to determine the dominance over the relevant period of time. The commission rightly held "in this case that while analyzing dominance under the provision of the act, an important factor that needs to be taken into consideration is the relevant time-period during which the contravention of the provision of the act is alleged"¹⁹.

¹⁸ CCI, Case no. 19 of 2010

¹⁹ Para 33, Supra10

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