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' ENTERPRISE ' AND ' DOMINANT POSITION ' UNDER COMPETITION ACT, 2002



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Abs tract:-This paper analyses the definition of 'enterprise' as defined under the Competition Act, 2002. It highlights that only business entities are not considered as an enterprise but revenue generating organisations including National Sports Federations fall under the purview of definition of an 'enterprise'. The author attempts to explain this with the help of the BCCI case study, a recent case decided by the Competition Commission of India. This paper also throws light on the factors that determine the dominant position and the abuse of the said dominant position.

Keyw ords:Competition Act, 2002, Enterprise, Dominant Position, Abuse of dominant position.

1.INTRODUCTION

When we say enterprise, what is it that strikes our mind? A business organization or a government profit making entity. Let's find out if a society or a Non-Government Organisation that is working as a no profit no loss entity for social causes be considered as an enterprise.

The issue has no longer been res-integra. Recently the Hon'ble Competition Commission of India in the case of Sh. Surendra Singh Burmi V/s. Board for Control of Cricket in India (Case No. 61/2010 decided on 08.02.2013) has delivered a landmark judgment holding Board for Control of Cricket in India, a National Sports Federation within the ambit and purview of definition of an enterprise under section 2 (h) of Competition Act, 2002.

2.CASE STUDY

The highlights of the case are as follows:

2.1 Brief Facts:

A person named Sh. Surendra Singh Burmi (informant), a cricket fan from New Delhi filed a case against BCCI (opponent) before the Competition Commission of India.

BCCI is a society registered under Tamil Nadu Society Registration Act, 1975. It conducts and promotes the game of cricket in India and is a full member of ICC (International Cricket Council).

The informant alleged while conducting the T-twenty matches in IPL tournament that the BCCI has shown certain irregularities as under:

Irregularity in grant of franchisee rights
Irregularities in grant of media rights
Irregularities in grant of sponsorship rights and other contracts

2.2 Relevant Legal Provisions under the Competition Act, 2002.

Section 2(h) defines the term 'enterprise' as "enterprise means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate...."

Section 3 provides that "no enterprise shall indulge in any activity that adversely affects or is likely to affect the competition".

Section 4(1) provides that "no enterprise shall abuse its dominant position".

Section 4(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise,-

(c) – indulges in practice or practices resulting in denial of market access;

The Expression "dominant position" has been defined under explanation (a) of Section 4 as under:

"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 favour.

2.3 Opponent's View

BCCI submitted that it is a non-profit society and hence section 3 and Section 4 of the Competition Act, 2002 does not apply.

It also relied upon a High Court Judgment wherein it has been held that the job of Cricket Federation is not only to conduct the matches but also to promote and entertain people and thus it should not be seen at par with other

business organisations and hence it is beyond the ambit of definition of the term 'enterprise' as provided under Section 2(h) of the Competition Act, 2002.

BCCI, further submitted that though it has a monopoly but as it is a non-profit organisation there cannot be negative effects of monopoly and no case of abuse of dominant arises.

BCCI rebutted to the allegations made on it for tipping off the bidders for the bid price submitting that Mr. Lalit Modi, the Chairman, was acting outside the scope of his authority. Prior to which bidders agreements were cancelled and two more new teams had been formed.

2.4 Findings of Director General:

The Director General finds that other activities of IPL like promotional campaigns, advertisements, sale of tickets etc. generates huge revenue which cannot be seen as non-profit initiative. The Income Tax officers have also demanded a change in the memorandum of BCCI in this regard.

The Director General also very heavily relied upon a judicial pronouncement by the European Union wherein FIFA was considered as entity for the economic activities it followed while conducting Football World Cup, in support of his contention that BCCI is covered by the term 'enterprise' as provided under Section 2(h) of the Competition Act, 2002 and thus, it is applicable in the case under consideration.

Further, it was also observed that the dominant position of BCCI is evident from the fact that when ICL approached ICC for recognition, the rights were denied, as there was pressure instilled by BCCI on ICC to refuse recognition to ICL.

Furthermore, the following facts were also found:

That while distributing the franchisee rights the teams were advised about the rate to quote.

That there was lack of transparency in dealings between the bidders and IPL and new entrants were not allowed.

That there was a clause of termination of right of the franchisee and clause of sale of franchisee rights only on completion of 3 years which are discriminatory practices.

That for granting media rights again transparency was not followed.

That in all six sports channels purchased the tender documents but only 3 of them were present for bidding. Later, the other two also withdrew from the bidding and only WSGI- Sony put forth his bid for the IPL Tender.

That in grant of other rights ranging from transport, to catering, event management, airlines etc which involved a huge price, no tenders were floated and franchisee were awarded and promoted to deal with the same vendors fixed by BCCI.

2.5 Court's Verdict:

On the conspectus of the above the Competition Commission of India held that though BCCI is a National Sports Federation yet it is indulged in a commercial venture hence, falls within the definition of enterprise and thus governed by Competition Act, 2002.

It also pronounced that cricket cannot be substituted with any other sports or game, because the amount of revenue it generates from the advertisements during each IPL match (Rs. 4-5 Lakh per 10 sec.) and it's TRP, according to TAM system is very high.

The court also observed that the BCCI has a dominant position in the market as it has power in varying dimensions namely: regulatory role, monopoly status, control over infrastructure, control over players, ability to control entry of other leagues etc.

The court further, observed that BCCI has abused its dominant position in contravention of the provisions under Section 4(2)(c) of the Competition Commission Act, 2002. This section states that enterprises shall be accused of abuse of dominance if it indulges in practices of market access denial.

On the conspectus of the above, the Court directed the BCCI to not to indulge in the practice of abusing its dominance in future, either in distributing franchisee rights or in its media rights. and imposed a penalty amounting to Rs.52.24 crores @ 6% of average turnover of last three years.

3.CONCLUSION

We conclude that enterprises are not restricted to only business entities or government undertakings or profit making organisations rather any commercial venture under taken to generate revenue qualifies as an enterprise for the purposes of Competition Act, 2002.

After satisfying that the organisation falls under the definition of an 'enterprise', next step is to examine carefully the ground realities in that particular sector which may be different and unique from one organisation to another to satisfy if dominant position exists. There are various mitigating factors which are imperative to decide as to whether or not it is a case of undue abuse of dominant position.

Under Section 19(4) of the Competition Act, 2002, the CCI has been empowered to inquire the following factors to determine whether or not an enterprise enjoys dominant position:

- a)Market share of the enterprise
- b)Size and resources of enterprise
- c)Size and importance of competitors
- d)Economic power of the enterprise including commercial advantages over competitors
- e)Vertical integration of enterprises or sale or service network of such enterprises.
- f)Dependence of consumers
- g)Monopoly or dominant position
- h)Entry barriers
- i)Countervailing buying power
- j)Market structure and size of market
- k)Social obligations and social costs
- l)Relative advantage by way of contribution to the economic development.
- m)Any other factor which the Commission may consider relevant.

On the basis of the above mentioned factors, CCI

concluded that BCCI is a dominant entity that has abused its dominant position.

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