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EXPLOITATION OF DOMINANCE IN THE REAL ESTATE SECTOR: A NEED TO ACKNOWLEDGE AFTERMARKET DOMINANCE

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INTRODUCTION

India's strong economic growth and urban migration led to high demand for housing, which in turn was often taken advantage of by real estate developers. Several prospective homeowners, having entered into agreements and given non-refundable 'token money,' find themselves bound by unfavorable conditions. Cases of the Competition Commission of India (CCI) initiated under Section 4 of the Competition Act, 2002, alleging abuse of dominant position, have met with limited success due to the CCI's narrow interpretive approach. In particular, the aftermarket dominance theory—wherein builders acquire dominance after the agreement—has taken acceptance in minority views only. This paper argues how there is a need for recognizing aftermarket dominance in real estate, stressing the vulnerability of consumers and greater protection under the Act.

In the paper Part I examines abuse of dominance under Section 4, Part II summarizes important CCI decisions, Part III addresses consumer lock-in and aftermarket theory, and Part IV suggests the application of this theory to real estate regulation.

HYPOTHESIS

The consumers in the real estate and housing industry are vulnerable to abuse of dominance by builders once they deposit token money. Therefore, to address this situation the concept of aftermarket dominance needs to be recognised by the CCI. The primary purpose of the “Competition Act, 2002”¹, i.e., to save the interest of consumers must be kept in mind while dealing with the cases of exploitation of market power in the real estate industry.

¹ Competition Act, 2002

OBJECTIVE

- To understand the threefold enquiry conducted in case of determining abuse of dominance;
- To trace the trend of abuse of dominance in real estate sector with the help of case laws;
- To study the concept of aftermarket and lock-in of consumers;
- To analyse the application of theory of aftermarket dominance in real estate sector;
- To examine the necessity of incorporating the theory of aftermarket dominance.

RESEARCH QUESTIONS

- **What is the** threefold enquiry conducted in case of determining abuse of dominance?
- **How has CCI treated the allegations of** abuse of dominance in real estate sector?
- What is ‘aftermarket’ and how is it related with ‘lock-in’ of consumers?
- How can the theory of aftermarket dominance be applied in the real estate sector? What problems can arise in its application?
- What is the necessity of incorporating the theory of aftermarket dominance and what purpose will it serve

I. ABUSE OF DOMINANCE UNDER COMPETITION ACT, 2002

Section 4(1) of the Act forbids entities to abuse their dominant market position. It focuses on behavior by powerful players that harm the market, production, sales, or the interests of consumers and purchasers. Such behavior may be of two wide categories: exploitative or exclusionary. Exploitative behavior consists of charging unfair or discriminatory prices and terms to consumers, or restricting the supply of goods and services. Exclusionary or anti-competitive behavior consists of actions that exclude or make it difficult for existing or potential competitors to enter or remain in the market”²

CCI undertakes a threefold enquiry to examine abuse of dominant position. It is—

- (a) Delineation of relevant market
- (b) Ascertaining dominance of the enterprise in the delineated relevant market; and
- (c) Checking for abuse under ss. 4(2)(a) to 4(2)(e) of the Act.

² D.P. Mittal, “*Competition Law & Practice*” (3rd ed, Taxmann Publications 2011) 284

A. MARKET RELEVANCE

Section 2(r)³ of the Act A relevant market is defined as one that includes both the relevant geographic and product markets. The dominant position is always established in relation to a specific market.

In simple words, relevant product market consists of all those goods or services which are considered substitutable or interchangeable by the consumer. For example, cars of two different brands having similar features and price range will most likely fall within same relevant product market. Section 19(7)⁴ of the Act lays down some illustrative factors to determine substitutability for the purpose of relevant product market.⁵ These factors include price of goods/services, characteristics, end use, consumer preference, ease of switching to other product etc.

A relevant geographic market is defined as a territorial or geographical limit within which the conditions of competition are distinctly similar. Section 19(6) of the Act lays out several elements that are used to determine relevant regional markets, such as transportation costs, language, regulatory trade obstacles, procurement regulations, etc.⁶

B. DOMINANCE

Determining a dominant position is a requirement for determining abuse. A dominant spot is a "position of strength or advantage enjoyed by an enterprise in the relevant market, which enables it to operate independently of competitive forces and affect its competitors, consumers, or the market in its favour." Section 19(4) establishes various factors that are utilized to define supremacy.⁷

C. ABUSE

Dominance is not penalised in the Act, rather abuse of such dominant position is considered as detrimental for competition. Sections 4(2)(a) to 4(2)(e) specify particular forms of abuse of dominant position. An explanation accompanying this provision clarifies that these actions are not deemed unfair if their imposition addresses a genuine competitive necessity. These provisions offer significant leeway for abuse to manifest

³ The Competition Act, 2002, s2(r)

⁴ The competition act 2002, s19(7)

⁵ The Competition Act 2002, s 19(7)

⁶ The Competition Act 2002, s 19(5)

⁷ The Competition Act 2002, s 19(4)

in diverse manners.

practices that deny market access or lead to entry barrier to competitors are considered as abusive. Similarly, using dominant position in one relevant market to enter into another relevant market is prohibited.⁸

II. TRACING THE TREND THROUGH CASE LAWS

The first cases where abuse of dominance was alleged in the housing market was “*Belaire Owner’s Association v. DLF Ltd*”⁹ The Information Provider (IP) accused DLF of engaging in anti-competitive agreements and abusing its dominating position, contravening sections 3 and 4 of the Act. The allegations were based on the promises made in the brochure by DLF for constructing a residential complex. The buyers became members of the housing complex ‘Belaire’. After considerable payments were made by them, they were asked to sign an agreement, the terms of which were one sided, highly biased in favour of the DLF. They had to sign the agreement as exiting was very costly and substantial sum of money paid by them would have become forfeit.

Following the investigation, the DG found no evidence of an anti-competitive agreement but determined that DLF had engaged in the misuse of its dominant position. The CCI designated the relevant market as "high-end multi-story apartments in Gurgaon" to assess the abuse of dominant position. The CCI determined DLF's dominance in this pertinent market based on multiple reasons outlined in section 19(4). The CCI said that the market share of DLF and its subsidiaries significantly exceeded that of DLF's competitors. Furthermore, its profit was exceedingly substantial.

In the case of “*Mr. Jagmohan Chhabra & Shalini Chhabra v M/s. Unitech Ltd.*”¹⁰, The conditions closely mirroring the DLF instances did not result in the majority conclusion designating Unitech as dominant. This was due to DLF being recognized as the most dominating company in the relevant industry, namely the market for services rendered by developers in providing residential units to customers in the Gurgaon area. Consistent with this viewpoint, the aftermarket, which denotes the market that arises subsequent to the fulfillment of buyers' agreements, was identified as the pertinent market.

⁸ The Competition Act 2002, s 4(2)(e)

⁹ “*Belaire Owner’s Association v. DLF Ltd.*” (2011) CompLR 0239 (CCI)

¹⁰ (2011) CompLR 31 (CCI)

In yet another case of “*Sunil Bansal v. Jayprakash Associates*”¹¹, it was alleged by the IP that Jayprakash Associates was abusing its dominance while constructing housing complexes in Noida. CCI defined relevant market as “*sale of integrated residential apartments in Noida*”. CCI considered several factors to hold Jayprakash Associates dominant in the market. This was held that the unfair and unambiguous terms in the Agreement, the delay in handing over the possession to buyers and duping the buyers by not including the advertised features in the apartments constituted abuse under section 4(2)(a)(i) of the Act.

III. AFTERMARKET AND LOCK-IN OF CONSUMERS

The notions of aftermarket and lock-in are relevant when examining anticompetitive issues in the real estate and housing sectors. The following principles are elaborated upon below.

*“Aftermarkets consist of markets for secondary products that complement related prime products. Typical instances can be observed in marketplaces for durable products (e.g., automotive repair parts and services) and consumables (e.g., ink cartridges for printers and photocopiers)”*¹²

An aftermarket may include a "intra-system market," where suppliers vie for the sale of items from a single brand, or a "inter-system market," where providers fight across many brands for sales and purchases. In the Indian context, this assessment is predicated on the considerations specified in Section 19(4) of the Act.¹³ In the “*Shri Shamsheer Kataria v HONDA SIEL Cars and Ors.*” case, The CCI classified 14 car businesses as dominating and subsequently involved in abusive tactics inside their respective 'aftermarkets' for spare parts and maintenance services, irrespective of their market position in the primary automobile sales market.¹⁴ The "lock-in" effect enables companies to stifle competition and exploit consumers in the post-sale market or aftermarket.¹⁵

A. LOCK-IN OF CONSUMERS

"The phenomenon of a 'lock-in', as argued in the Kodak case, also comes to be called 'installed-base opportunism'. It means that the dominant companies can impose very high prices on products or services in the aftermarket. It raises concerns of competition

¹¹ (2014) CompLR 225 (CCI)

¹² Gregory Gundlach & Albert Foer, “*The future of aftermarkets in systems competition: an overview of the American Antitrust Institute's invitational symposium*” (2007) 52 (1) Antitrust Bull. 1.

¹³ The Competition Act 2002, s 19(4)

¹⁴ (2014) Comp LR 001 (CCI)

¹⁵ Ravi Gangal, “*Aftermarket Abuse of Dominance in the Real Estate Sector: Negative Impact on Consumer Interests*” (Indian Law Journal) Vol 3 Issue 2

under the antitrust laws when consumers, having made initial investment in a primary product, find themselves unable to escape high prices for related aftermarket products or services. Since their initial investment constrains them to switch to new suppliers, they are in effect bound to the original provider. It was pointed out by the U.S. Supreme Court in the judgment in the Kodak case that there were issues of high switching cost and inaccessibility of information on the primary product and related aftermarket. Likewise, in the Indian scenario also, high switching cost and unequal availability of information were realized to be among the crucial determinants putting people in such lock-in positions, subjecting them to possible exploitation.”¹⁶

B. CCI AND AFTERMARKET

CCI has made efforts to integrate these theories into numerous claims across various market sectors. However, in most instances, these efforts have been confined primarily to dissenting opinions of R. Prasad. For example, in the “*Surinder Bhakoo v HDFC Bank Ltd.*”¹⁷ case, The implementation of pre-payment penalties on an automotive loan was recognized as an exploitative practice executed by the bank. This viewpoint was based on a prior dissenting case. “*Neeraj Malhotra v Deutsche Post Bank Home Finance Ltd.*”¹⁸ Penalties levied for the prepayment of housing loans were regarded as anticompetitive. The CCI initially determined that banks maintained a strong position in the aftermarket established following a customer's acquisition of a loan from a specific bank.¹⁹

In a similar case, CCI observed that—

*“Clause (g) of Section 19(4) of the Act indicates that a dominant position may be attained through statutory means, by being a Government firm, by being a public sector company, or by other means. In this instance, the banks attained a strong position due to the agreement signed by consumers while securing the home loan. Subsequently, the banks were able to influence their clientele to their advantage. Consequently, banks had a position of domination over their consumers due to the binding nature of their relationships, resulting in a state of lock-in.”*²⁰

It is to be noted that in majority of the cases where the “*theory of aftermarket abuse*”

¹⁶ Ibid [37]

¹⁷ (2011) CompLR 10 (CCI)

¹⁸ (2011) 106 SCL 108 (CCI)

¹⁹ Id.

²⁰ “*Gulshan Kumar Gupta v. ICICI Bank Ltd.*” [2011] CCI 43

has been implemented, the same has usually been coupled with the “locking-in” of the customers within the aftermarket.

IV. APPLICATION OF THEORY OF AFTERMARKET ABUSE IN REAL ESTATE SECTOR

One of the members of CCI, R. Prasad, has developed the concept of “aftermarket in building industry”, which makes every builder, who uses market-stifling terms, dominant. As every builder, whether initially dominant or not, would become dominant in the aftermarket, it is only the factor of ‘abuse’ that is to be seen. The application of this theory is discussed below.

A. AFTERMARKET AS RELEVANT MARKET

In the U.S. courts, questions have arisen as to considering “aftermarket as a relevant market” for the purpose of determining abuse of dominance under Section 2 of the Sherman Act, 1890. Answering the question, the court has noted that—

“A plaintiff who perceives the aftermarket as the pertinent market must present compelling evidence that distinguishes the competitive dynamics in the aftermarket from those in the primary market. A court may determine that the aftermarket is the pertinent market for antitrust evaluation solely if the evidence substantiates an inference of monopoly power in the aftermarket that competition in the primary market seems incapable of restraining. Consequently, when the “lock-in issue” pertains to the relevant market, a single-brand aftermarket differentiates itself from the primary market when switching and information costs are sufficiently elevated, thereby subjecting numerous buyers to potential exploitation. In that case, the aftermarket constitutes the pertinent market for the antitrust investigation.”²¹

B. DOMINANCE IN THE AFTERMARKET

If a firm aims to establish dominance in an aftermarket, it can achieve this by locking in consumers within that market. Various factors can contribute to such a lock-in. In the Indian context, Section 19(4) of the statute outlines specific factors to assess an enterprise’s dominance. However, this list is not exhaustive. Sections 19(4)(g) and 19(4)(m) grant CCI the discretion to consider any relevant factor in determining

²¹ Abir Roy, “Competition Law in India: A Practical Guide” (Wolters Kluwer, 2017)

dominance. Through this provision, the CCI has effectively incorporated elements like high “switching costs” and “information asymmetry” into Indian jurisprudence when establishing the dominant nature of firms in various cases. Notably, in R. Prasad’s dissent in the *Belaire* case, he observed that—

“The term 'otherwise' referenced in Section 19(4)(g) is highly relevant. In this instance, supremacy is attained by the agreement. Moreover, the stipulations of Section 19(4) delineate the reasons that the CCI must contemplate in its ruling. The Section is comprehensive and so requires broad interpretation. Section 19(4)(m) addresses any additional circumstance that the CCI may deem pertinent for the inquiry. Consequently, in assessing abuse of dominance, the CCI is authorized to consider any additional factors that demonstrate the enterprise's dominating position to influence its competitors, consumers, or the relevant market to its advantage. Consequently, in this instance, the presence of significant switching costs and knowledge asymmetry in the aftermarket confirms the existence of abuse of power. The U.S. Supreme Court's ruling in the Eastman Kodak case has been integrated into the interpretation of Section 4 in conjunction with Section 19(4) of the Act”²²

C. ABUSE OF DOMINANCE IN THE AFTERMARKET

The abuse could lead to limiting competition or completely eradicating effective competition. Additionally, Sections 4(2)(a) to 4(2)(e) specify particular forms of abuse of dominant position. An explanation accompanying this provision clarifies that these actions are not deemed unfair if their imposition addresses a genuine competitive necessity. These provisions offer significant leeway for abuse to manifest in diverse manners.

Examples such as "linking services to the purchase of spare parts in the spare parts market," "forfeiting a token amount due to the cancellation of an apartment booking," or "failing to specify a completion date for the project in the buyers' agreement" exemplify the imposition of "unfair conditions" on the purchaser, as outlined in Section 4(2)(a) of the Act.

V. NEED TO RECOGNISE AFTERMARKET DOMINANCE

The Competition Act, 2002 enshrines the principle of consumer welfare. Harboring the

²² Supra, note 8

'theory of the aftermarket abuse in the Indian competition law would allow the CCI to deal with real world problems like the disproportionate influence of real estate agents who, although lacking dominance in the overall market, exercise considerable leverage over residential consumers. Its not the question of picking law over consumers protection—it's a matter of honoring the Act's mandate of consumer welfare. Consumer law provides individual, remedial relief, while competition law can bring across-the-board, preventive solutions. Identifying aftermarket abuse as abuse of dominance under Section 4 leads to better, market-wide protection.

CONCLUSION AND SUGGESTIONS

The residential real estate sector in India stands apart for two important reasons: housing is a basic human need, and the demand for it far outweighs the available supply. This leaves most homebuyers with little real choice. While the Competition Commission of India (CCI) has recognized this unusual market dynamic, it hasn't responded with the kind of legal approach that the situation demands. In most cases against builders, the CCI's focus has been too narrow—overlooking key ideas like parallel conduct and the theory of aftermarket abuse—ultimately failing to address how consumers are actually being harmed.

Globally, the theory of aftermarket abuse has proven useful in correcting such imbalances. In the Indian housing market, even builders who don't dominate the primary market can still wield enormous influence. Buyers, faced with a housing crunch and sky-high prices, often get locked into unfair agreements. Clauses like non-refundable booking amounts and harsh penalties make it hard for them to walk away, while limited information keeps them from making informed choices—all of which stifle fair competition.

To truly uphold the spirit of the Competition Act, the CCI needs to recognize that builders do exercise dominance in the aftermarket. Doing so would reflect the reality that many consumers are vulnerable and stuck with no way out. Acknowledging this is not just a legal necessity—it's a step toward protecting people from ongoing exploitation in one of life's most essential markets.

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