IPR through The Prism of Section 4 of The Indian Competition Act 2002

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ABSTRACT

In this paper the author attempts to critically analyze the concept of Abuse of dominance and the IPR under the Indian regime and its interpretation by the Commission and Courts respectively. The author has attempted to highlight the landmark judgment **Monsanto Holdings Pvt. Ltd. and Ors. vs. Competition Commission of India and Ors** *and its interpretation by the authorities. Through this, the author tries to deduce a broader understanding of the concept and outline how the concept is understood when seen through different lenses. Since Indian Competition Act is considered as unripe as it has been recently enacted as compared to the matured jurisdictions of the EU and US model, therefore, there is always a scope for improvement and varied exegesis could bring in panoramic understanding of the concept of Abuse of dominance and the IPR under Indian jurisprudence. Further, the author highlights the CCI prerogative and its role in building the concept.*

KEYWORDS: *Intellectual property Rights (IPR), Competition Law, Abuse of dominance, Monopoly, Exclusive Right and Dominant Right*

INTRODUCTION

The Indian Competition Act 2002 was recently enforced in 2009 due to the changing circumstances of the market by regulating anti-competitive acts, managing the position of the enterprise that is dominant in the market and abusing that dominant position by engaging in acts such as predatory pricing, or tie-in arrangements etc. The domain of the Indian Competition Act is not limited to the traditional markets but also extends to areas like

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Intellectual Property Rights i.e., IPR Laws.

Disjunction is reflected when one compares the Competition Law with the Intellectual Property Rights. As discussed above, the objective of Competition law is to ensure smooth functioning of the market by discarding anti-trust arrangements such as anti-competitive agreements or abusing dominant position whereas the Intellectual Property Rights Laws ensure protection of the inventors' rights on their invention by providing exclusive right to the inventor. This is against the objective of the Competition law as it restricts the market access to others.

These two areas are often seen to be in conflict as the objectives of both these domains are opposite in nature because the purpose of the antitrust laws was to prevent monopolies and constrain the exercise of monopoly power, whereas "the very object of the patent laws is monopoly"[1]. Thus, it seemed that these two domains of law were inherently in conflict. On the other hand, observing the larger picture, the Competition law and IP laws inherently maintain the smooth functioning of the market and protect the interest of consumers as IPR tries to facilitates competition in the market by maintaining the exclusivity or distinctive of products. Restricting the market of counterfeit products and ensuring competitiveness in business is also one of the basic objectives of antitrust laws[2].

The CCI (Competition Commission of India) ensures and promotes fair competition, freedom of trade & practices, restricts unfair trade practices and prohibits activities which are anti-competitive in nature. The Competition Act makes an exception for IPRs and as per Section 3(5)[3] of the Act which preserves the intellectual property holders' rights and allows them to impose reasonable restriction under the agreement to protect their rights. Here the term "***reasonable restrictions***" is not defined by the act. Thus, exception to Section 3(5) ensures that competition policy or objectives do not interfere with the reasonable use of IPRs

1 OCED (1997) Competition Policy and Intellectual property rights, DAFFE/CLP(98)18 https://www.oecd.org/competition/abuse/1920398.pdf accessed on 16 October 2022

2 Sanjana, "*India: Analyzing the Intersection of Competition Law And IPR*", Mondaq Blog. https://www.mondaq.com/india/trademark/1117244

3 S. 3(5), Competition Act 2002: Nothing contained in this section shall restrict— (i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under— (a) the Copyright Act, 1957 (14 of 1957); (b) the Patents Act, 1970 (39 of 1970); (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999); (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999); (e) the Designs Act, 2000 (16 of 2000); (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000); (ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

as act does not allow unreasonable conditions under the shadow of protecting intellectual property[4].

COMPETITION LAW: ABUSE OF DOMINANCE & IPR

The ultimate goal of Competition Act is to prohibit anti-competitive agreements as mentioned under Section 3[5], abuse of dominant positions by enterprises as mentioned under Section 4[6] and to regulate combinations (i.e., mergers, amalgamations or acquisitions) mentioned under Section 5[7] by the establishment of the Competition Commission of India under the Competition Act 2002.

This concept of Abuse of dominant positions mentioned under section 4 of the enactment is considered as one of its ultimate goals as "Act does not forbid enjoyment of market dominance, monopoly or a position of strength enjoyed by an enterprise, its aims to bring about a level playing field by restricting the abuse or rather misuse of such dominance to the prejudice of a non-dominant market player"[8].

1.1. Competition Commission of India (CCI) interpretation through case laws-

IPR i.e. Intellectual Property Rights which give an exclusive right to the owner or the creator to possess what is considered the opposite of the objectives of abuse of dominance as a single entity holds the right to rule the market which is against the principle mentioned under section 4 of the enactment. Therefore, to resolve such an issue CCI is considered as the sole authority to determine the situation as even mentioned in the case of *Monsanto Holdings Pvt. Ltd. and Ors. vs. Competition Commission of India and Ors*[9].

4 Jain, Sankalp, "*Competition and Intellectual Property Rights: Interface and Interdependence in Indian Context*" (July 26, 2020). Available at https://ssrn.com/abstract=3677720.

5 Anti competitive agreements are of such nature which adversely affects the market as these are of two types i.e. vertical agreement and horizontal agreement. As the name itself suggests the nature of these agreement as in case of horizontal, entities at same stage come into agreement which impact the market adversely such as cartelization whereas vertical agreement entities are at different stages such supplier or manufacturer and the nature of these agreement are like tie in arrangements

6 Abuse of dominant position where enterprises use its dominant position imposes unfair or discriminatory prices which affect the market as well as the consumers.

7 Regulate combination such as merger, amalgamation or joint venture where Commission will look into the objective of combination i.e. whether the objective is to expand business or to be dominating in the market which adversely impacts the competition.

8 Rizvi, Zisha, "*Decrypting the Concept of Abuse of Dominant Market Position: Trends in India and EU"* (February 26, 2020). Available at http://dx.doi.org/10.2139/ssrn.3578864

9 MANU/DE/1078/2020

Monsanto Holdings Pvt. Ltd. & Ors. Vs. Competition Commission of India & Ors[10]

***Facts Of the Case*:**

Monsanto group of companies filed a petition before the Delhi high court challenging the order of CCI for holding them liable under section 3 and section 4 of the competition act which deals with the Anti-Competitive Agreement and Abuse of dominant position. In CCI order, petitioners were the opposite party. Nuziveedu Seeds Ltd. ('NSL'), Prabhat Agri Biotech Ltd. ('PABL') and Pravardhan Seeds Pvt. Ltd. ('PSPL') were the informants. Petitioner developed technology for the production of genetically modified seeds and that technology is Bt. Cotton Technology and also patented under the Patents act 1970. Petitioner sub-licensed this technology to various seed manufactures including the informant. For sub-licensing petitioner charged two types of fees i.e.

> *"The first is a non-refundable fee, which is required to be paid upfront and the second part is a recurring fee, which is referred to as 'trait value' and is determined on the basis of the Maximum Retail Price (MRP) fixed for Bt. Cotton Seeds"*[11].

Royalty charge fee was in dispute and was challenged before the CCI as it was excessive and was considered to be unfair pricing. Since the informant's claim was that the technology of genetics cotton seeds is non-substitutable in nature and in-demand in the Indian market which makes the petitioner dominant in the market. Therefore, being the dominant entity, charging excessive royalty is considered to be an abuse of dominant position under section 4 and also put a restrictive condition in the sub-license agreement where the informant has to inform the petitioner 30 days in advance if they negotiate with any other competitor, otherwise license would be terminated. Through this arrangement, the petitioner foreclosed the competition in the market. Due to unique technology possession the petitioner acquired 99 % market share and imposed such restrictions which were considered to be prejudicial to the market.

Thus, CCI held the petitioner group to be in the dominant position in the relevant market and held it liable under sec 3 and 4 i.e. abuse of dominant position[12]. Petitioner filed the writ petition challenging the order of CCI on the grounds that CCI does not have jurisdiction over this issue as this is a matter of Patent Act i.e., protection of IPR.

10 MANU/DE/1078/2020; 2020 SCC Online Del 598

11 MANU/DE/1078/2020; 2020 SCC Online Del 598, Para 7

12 CCI, Case No. 03/2011, Para 27

Issues Raised:

Whether the CCI has the authority to determine the abuse of Patent Rights and the reasonableness of the royalty fee under the sub-license agreement?

Courts Observation:

1. Court referred to section 60 and section 62 of the competition act which states that the Competition Cct has the overriding effect and also mentioned the non-obstante clause which means competition Act 2002 are in addition to other acts not in derogation. Therefore, the CCI have jurisdiction to deal with Abuse of Patent Right as this also reflect the intention of the legislature while drafting the statute[13].

2. The court observed the provision of the Patent Act and the Competition Act 2002 were somewhat similar in nature as pointed out,

   "Instances listed out in Section 84(7) of the Patents Act can in certain circumstances be considered as an abuse of dominance if the patentee is dominant in the relevant market"[14]

   and the similar provisions were found under the Competition Act i.e., Sec. 4 abuse of dominance. In some circumstances wherein the remedies awarded are different ought not to be considered inconsistent. Therefore, both statutes move hand in hand for dealing with the same.

3. Further, the Petitioner argued by referring to the case of ***Competition Commission of India v. Bharti Airtel Ltd. And Ors***[15] where Hon'ble Supreme Court discusses the conflict between the CCI and TRAI and states that both the authorities work in different domains and different structures. A similar argument was put forth by the petitioner that Patent Controller and the CCI are different authorities and CCI has no jurisdiction until and unless the controller is present there as it is a matter of protection of IPR.

   Thus, court examined the structure and held that TRAI and the controller's role is materially different in their domains as TRAI gives recommendations in the matters of license and regulates the telecom department whereas controller under the Patent Act examines the patent application, grant patents, issues compulsory license but

13 CI, Case No. 03/2011, Para 40

14 CCI, Case No. 03/2011 Para 41

15 (2019) 2 SCC 521

does not regulate the agreement of the patent with different parties. This proposes that the authority of the telecom department and the patent department is not alike and cannot be equated. Thus, Bharti Airtel case[16]would not be applicable in this case.

4. Court further observed that the Competition Act was enacted not to overrule any other act as it was enacted with the intention of being an additional act and thus there is no conflict between the jurisdiction of CCI and the Patent controller office.

5. Court further concludes the arguments by stating that there is no valid reason or substantive reason to interfere with the order of the Commission as this order is administrative in nature and it would interfere only when it was found to be arbitrary and unreasonable.

Order of the Court:

The writ petition was dismissed and the order of CCI prevailed whereby the Petitioner was held liable for the abuse of dominant position under section 4 of the enactment charging excessive royalty fee for the license requirement and further putting an unreasonable condition in the agreement which was considered to be in violation of forceful disclosure of official agreements secrets.

1.2. CCI jurisdiction in matters of interface between IPR and Abuse of dominant position-

Telefonaktiebolaget LM Ericsson (Publ) vs CCI & Anr[17]

A dispute arises between Ericsson, a Swedish telecom company and Micromax, an Indian electronics company, whereby Ericsson contended that Micromax infringed upon its Standard Essential Patent (SEP) and demanded compensation along with royalty on each phone sold. Thereafter, Micromax filed a complaint with the CCI against Ericsson for abusing its dominant position. In response to this, Ericsson filed writ petition in the Delhi High court challenging the authority of Competition Commission Of India in matter of Patent infringements. Delhi High court passed an order in this long battle by stating that the:

> *"If there were irreconcilable differences between Patents Act and Competition Act in so far as anti-abuse provisions were concerned, Patents Act being a special act shall prevail notwithstanding provision of Section 60 of Competition Act as Legislative intention is that,*

16 Ibid

17 2016 CompLR 497 (Delhi)

Competition Act and Patents Act be worked harmoniously"[18] .

So, looking at the broader perspective, the Operative width of both the acts as mentioned above i.e. the Patents Act and the Competition Act was different but when issue arose regarding the matter of condition imposed under agreement in matters of abusing the dominant position by the entity, then it could only be decided by CCI under the provisions of Competition Act. This tussle of jurisdiction between both enactments came to peace to some extent after Delhi high court's judgement was passed.

CRITICAL APPRAISAL

The objective of IPR is not to abuse the market but to protect the right of the one who puts its handwork to bring or invent or to create the concept i.e., protect the interest of the creator and use of IPRs lawfully such that it is not abusive in nature. Its sole motive is to stop the usage of pirated products, not their substitution[19].

> *"Therefore, refusal to license per se is not abusive in itself, because a private property right cannot be used effectively without exclusivity. A patent is not only a monopoly right to patentee but it is desired that patented invention is manufactured at commercial scale"*[20].

Legally, use of IPR is not abusive as stated above but putting an unreasonable restriction while granting a license or putting unfair conditions for the execution of the license agreement then is considered to be in violation of the act. So, in such a situation, where the market gets affected through unreasonable terms and conditions of IPR holders giving right for exclusive use, is detrimental to the interest of the consumer and the market. Then it is considered to be an abuse of dominant position under the enactment.

> *"If the IPR owner is a monopolist or dominant player holding infrastructure facility in the market, he has the duty to license the intellectual property to competitors. In that case, refusal to license will amount to an anti-competitive practice"*[21].

18 Telefonaktiebolaget Lm Ericsson v Competition Commission of India & Anr., (2016) W.P(C) No. 464 of 2014

19 Dr. Ravikant Bhardwaj, *"Working Paper on Enforcement of Competition Law on Refusal to License of Intellectual Property Rights"*, School of Competition Law & Market Regulation, IICA. 2015. Available at <https://iica.nic.in/images.pdf>

20 Section 83 (b) of Patent Act 1970

21 James B. Kobak, Jr., "*Intellectual Property, Refusals to Deal and The U.S. Antitrust Laws*", Intellectual Property Antitrust 2005; Aspen Skiing Co. v Aspen Highlands Skiing Corp., 472 U.S. 585 (1985); Oahu Gas

As in the case of ***MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd***[22] where the opposite party refused to share its technology of multiple trading through the same programs or trading terminal. Stock exchange business was considered a relevant market and the opposite party held the dominant position in this relevant market as it possessed efficient technology for trading & there are other related factors too. CCI observed that the opposite party violated its dominant position as it possesses exclusive right over the software and without software, trading cannot be done. Thus, it was held that such restrictions put the market on a halt.

Even in cases of spare parts of the automobile market where companies and their authorized dealers only, have exclusive right to deal with spare parts of the automobile and this arrangement not only affects the private repairs or the accessories provider as they do not have the right to sell those products but also limit the market for consumers. This illustrates the circumstance where the defence of IPRs is given by the parties having exclusive rights. These exclusive rights restrict Commission to make them liable under section 4.

To resolve this issue or expand the jurisdiction of CCI in dealing with the case of IPR, Competition amendment Bill 2020[23] proposed to add section 4A which deals with the issue of IPR's specifically under the domain of abuse of dominance as it states that

> *"4A. Protection to holders of intellectual property rights, etc- Nothing contained in section 3 or section 4 shall restrict the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred under: (a) the Copyright Act, 1957 (14 of 1957); (b) the Patents Act, 1970 (39 of 1970); (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999); (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999); (e) the Designs Act, 2000 (16 of 2000); (f) the Semi-conductor and Integrated Circuits Layout-Design Act, 2000 (37 of 2000) (g) any other law for the time being in force relating to the protection of other intellectual property rights. (2) Nothing contained in section 3 shall restrict the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such*

Serv. Inc. v Pacific Resources, Inc., 838 F.2d 360, 368 (9th Cir. 1988)

22 2011CompLR0129(CCI)

23 Draft Competition (Amendment) Bill, 2020 12th February 2020

export"[24].

The specific entry of IPR under the domain of abuse of dominance not only protects the rights of IPR holders but also puts restrictions on unreasonable conditions put by the dominant enterprise in the relevant market of IPR's holders. Regarding CCI jurisdiction, in this case, as rightly observed by the author in the article "*Analysis of IPR and abuse of dominant position in light of the draft Competition (Amendment) Bill, 2020"*[25] that

> *"This proposed section does not provide adequate assessing tools to CCI to analyze abuse of dominance in cases of IPR as no subsequent amendment has been made to Section 19 of the Act. Section 19(3) and Section 19(4) empower the CCI to consider certain factors while ascertaining anti-competitive agreements and abuse of dominance, respectively. However, Section 19(4)(m) empowers the Commission to ponder 'any other factor' which causes abuse of dominant position. This will help the CCI to investigate cases falling under Sec 4A with the help of the rule of reason approach"*[26].

Thus, the IPR situation would be resolved under the domain of abuse of dominance once the proposed bill is enforced as it would not only protect the interest of IPR holders but also enlarge the jurisdiction of CCI and benefit consumers or other dealers of the relevant market.

CONCLUSION

Dominant position confers dominant entity a special responsibility that requires the dominant entity to restrict from any form of act which are not on the basis of 'merits' because as per antitrust law being dominant is not illegal per se but abusing that position is illegal under the same. The nebulous range of this concept "Abuse of dominance" creates a prospective wide list of future abuses. "*Distinguishing between anti-competitive exclusionary conduct and 'normal' reliance on the exclusionary rights conferred by IPRs can frequently raise substantial difficulties*"[27]. This junction creates chaotic situation where 'refusal to license'

24 Section 4A, Ibid

25 Vatsla Shrivastava and Ritvik Maheshwari, *"Exigency of Indian competition law: The concept of collective dominance"* NLUJ Law Review. May 29, 2020. Available at <http://www.nlujlawreview.in/exigency-of-indian-competition-law-the-concept-of-collective-dominance/>

26 Ibid

27 King Stubb & Kasiva , "*Balancing Intellectual Property and Competition Law: An Analysis of Abuse of Dominant Position",* Advocated & Attorneys Blog, June 27, 2023.

is considered to be lawful even if it is by a dominant entity and at the same time, refusal to license may potentially constitute an anti-competitive arrangement as discussed in the above cases. A similar position was seen in matters where the jurisdictional issue was raised before the authorities in matters of dispute between both the acts. It was concluded that the competent authority would be the one under which the issue has been raised, as the objective of both the enactments is the smooth functioning of the market keeping the interest of the people intact.

Harmonising the imbalance between the domain of IPR law and competition law, Section 4A was brought by the authorities to mitigate this chaotic situation and in this technological world, it is desirable too. As market moving from traditional to software based as it is the era of Artificial intelligence. Section 4A brought hope to channelize the competitive market.

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6. The Patents Act, 1970 (39 Of 1970);

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6. Aspen Skiing Co. v Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)

7. Oahu Gas Serv. Inc. v Pacific Resources, Inc., 838 F.2d 360.