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ABUSE OF DOMINANCE: “AN ATTEMPT TO MONOPOLISE THE
COAL SECTOR”

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ABSTRACT
Dominance infers that an enterprise is free from the factors of the competitions and the consumer behaviours. There is a thin line between being dominant and being abusive of such a market power. Thus, in clear sense dominance is not bad perse rather certain amount of dominance is needed for ensuring a healthy competition, but competition act of 2002 does not support the idea of being abusive of such dominance through influencing market prices and attempting to swipe out other small enterprises from the market. Herein section 4 of the act deals with such abuse of dominance and the power to curb such situation is mentioned in section 19 of the act. Next step talking about the coal sector in particular in the last three decades the participation of the private sector has been limited and the relevant market has been monopolised by few public sector enterprises one being the “coal India”. The policies and frame work in such sector are self-discriminatory for which there is lack of fair play since the participation of the private entities are encouraged only in papers and when we look at the actual scene there is a lot of fuss in the system. Thus, coal being still the highest demanded fuels a lot of sectors are dependent on it, having limited participants first of all would not suffice the demand gap and also the price will be kept on being influenced by the public sectors.

Keywords: Abuse of dominance, competition, monopoly, Competition act, coal sector.
1. INTRODUCTION

Dominant position in a market can be ascertained when a position of strength has been established by an enterprise wherein, he is able to play independent of market forces. The competition act, 2002 does not prohibit dominance perse but definitely prohibits the abuse of such dominance. Section 4 of the act is the operative provision that deals with the abuse of dominance. Dominance perse is important to ensure a healthy competition among the competitors as it in a way promotes productivity and allocates efficiencies and optimizes consumer surplus but there is a need to draw the line as when an enterprise attempts to create entry barriers, influence pricing, drive out existing rivals it causes concerns. Determination of a dominant position depends on two factors - market share and the entry conditions.

The perspective of “abuse” is objective in nature as it sets an influence on the market structure, this results in weakening the degree of competition and nullifying the fair play. Thus, to regulate the market the provisions of the competition act interferes in the market situation where the size of the enterprise negatively affects the competition. To analyse this concept the best suited analysis would be the coal or energy sector in India.

The absence of competition in the coal industry in a way gave monopoly suppliers an opportunity to set prices without providing proportionate money value and disregarded the protection of the consumer interest. Lack of competition led to poor quality of services, operational inefficiencies and poor allocation of resources. There is persistent belief in India, that only the public sector could provide coal services efficiently, thus the entry of the private enterprises should be prevented altogether. As a result, the government plays a role of both service provider and policy maker in the coal sector. Thus, with time there is an urge for private participation in the energy sectors, but no such substantial progress has been noted. Issues related to regulation and pricing in the energy sectors is still haunting us.

The Coal India has been a dominant player in this sector as a result it has all the available geographical data, domain knowledge and vast experience and thus the CIL enjoys a close relationship with the ministry as well and in a way influences the pricing and distribution decisions. Thus, we need to identify the loopholes, examine the policies and take specific steps to merge the gaps therein and establish remedies.
1.1 ANALYZING ASPECTS OF DOMINANCE.

To actually understand what amounts to being abusive of a dominant position we must thoroughly first understand what amounts to a dominant position in the first place and what are its aspects. Being influential is what literally being dominant means thus considering the same applies to an enterprise, wherein an enterprise is said to be in a dominant position only when it is independent of the elements of the market, i.e. its consumers, competitors, suppliers etc. As a result, such a control over the market gives it a power to influence the price and produce or sell at a poor quality. In a dominant system the consumer usually has no say and is at loss.1

The aspects of a dominant position are broadly an enterprise possessing a market power enables it to operate independent of the market forces and secondly as explained in section 4(2) “There shall be an abuse of dominant position 4 [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."2

And being dominant or gaining a position through efforts made in producing quality product through different methodology is not bad perse but there is a very thin line between being dominant and being abusive of the same. One who crosses such line will amount to abuse of dominant position which won’t be tolerated by the competition act, as the very aim of the act is to ensure a fair play and maintain the sanity of the market through healthy competition. For example, when an undertaking has a dominant position in the market and has huge undertakings in that case such hugeness is required to a certain extent as it will promote market production and efficiency but, when such an entity will try pushing out the small businesses and will start influencing the price, section 4 of the act will interfere in the same. Thus, an enterprise will be tagged as being abusive of its dominant position when directly or indirectly such a body starts performing discriminatory market practices and indulgences in unfair play.

Coming down to the types of abuse of dominant position they can be broadly categorised as:

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1 Belaire Owner’s Association v. DLF Ltd., Case no. 19 of 2010. Decided on 12 August 2011
1) Predatory pricing- As explained in section 4(b) of the act, the practice of predatory pricing is to rate the goods and services lower than the actual cost of the same. This is done in order to diminish the competition in the market.

2) Barriers to enter the market- wherein circumstances are created in order to swipe away the newcomers or the small enterprises.

3) Limiting the Supply- This practice is when the supply of certain products like the luxurious brands and services are made limited automatically due to its insufficiency there will be a raise in the pricing.

4) Refusal to Supply- This is a way of manipulating the prices by intentionally withholding the supply of a particular goods or services so that when the demand increases the customers have to pay a higher amount to get the same.

1.1.2- LEGAL REGULATORY FRAME WORK:

Coming down to keeping a check on such abuse in the first place a systematic regulatory frame work is set up through the competition act, 2002. Under section 19 of the Act the commission has the power in any such alleged contravention that has been made, the factors while determining whether an enterprise has an appreciable adverse effect on the market are the market share possessed by the company, entry barrier, dependence of the consumers, relevant geographical market etc. Once the commission comes down to a satisfactory note that there is a prima facie case of such abuse, it shall direct the Director general to investigate on the same and submit a report on it. Furthermore, the commission has same power as that of the code of civil procedure. The powers of the commission are discussed in section 27 of the act which considers dominance is not bad per se but its abuse sure is for example in case of Re Shamsher Kataria and Honda3, the parties were discouraged by the CCI to get into activities that amounted to abuse of dominance as explained in section 4 of the act. The powers particularly are: -

“(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;

(b) impose such penalty, as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such

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3 In Re Shri Shamsher Kataria and Honda siel and ors ,27.7.2015, case no.03/2011
person or enterprises which are parties to such agreements or abuse:[Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent. of its turnover for each year of the continuance of such agreement, whichever is higher.]

(d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

(e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;

(g) pass such other 45[order or issue such directions] as it may deem fit.4"

Apprehensions with respect to the penalties are not clear as the respective provision does not provide any such calculation or methodology as in how such penalties are decided upon rather just the upper limit for the same has been set. For now, the CCI has a complete say over the calculation and valuation of such penalties imposed for abusive of dominance. However, if a party has any concern with respect to the decision set by the commission such aggrieved party can appeal to the Competition Appellate Tribunal (COMPAT) under section 53 of the act. In that case the tenure for such an appeal to be filled is 60 days from the day of the decision passed.5

2- HINDERANCE IN COAL SECTOR-

The involvement of the private sector in the coal industry in India is quite limited, though their participation has been encouraged since the 90’s limited progress has been felt. The gap of demand and supply in our country is quite high which is a concern for the energy security. Recently, through the amendment made under the Coal Mines (Nationalization) Act, 1973 the participation of the private participation was encouraged in the coal sector but the limited participation of the private enterprise is due to lack of proper policy and regulations, structural failures, barrier to entry, abuse of dominant positions in the market etc.

4 The competition Act,2002, Section 27, Chapter IV-Duties, Powers and Functions of Commission.
2.1- ABUSE OF DOMINANCE IN THE COAL SECTOR-

The position of the CIL (Coal India Limited) is attributed to being at a dominant position and thus this enterprise has been abusing its powers of dominance and is influencing the price rates and is also creating scenarios for barrier to the market entry. Since the CIL is a one and one dominant player in this field thus taking an undue advantage of its position in supply-controlled situation by offering coal at first come first serve basis through e-booking at a premium of 30% of the declared price. Since it has limited transparency and influence on the price it is creating an unfair market. The abusive nature of the coal India can be better understood by the analysis of the Coal India case.

COAL INDIA CASE-

Since the participation of the private enterprises was quite limited in the coal sector the shortage of supply was a concern, thus in the year 1973 the Indian government felt that to handle such a shortage in the supply and production chain a completely state run coal mining industry was needed thus in order to manage the situations in the mines the coal India limited company was framed and all other existing entities were brought under its control. In the present times the company has secured an influential position in the market by swiping away the small entities as it alone produces 84% of overall coal production and has a huge hand in the supply as well particularly the number being 98 out of 101 thermal power plants are dependent on the coal India company for the supply of coal. Since it had a dominant hand thus started abusing the powers by entering into agreements which had anti-competitive clauses. For example, it would get into agreements with clauses which would expressly talk about the coal India having a upper hand thus is free to supply any quality of coal, wherein the consumer shall be bound to accept the same irrespective of the quality of coal being supplied. As a result, the companies dealing, being the purchaser of such coals were at huge loss, this in a way adversely affected the market. Hence, considering this behaviour various allegations were lodged against the Coal India at the CCI. At first ascertaining the prima facie position of the Coal India Ltd. the CCI found sufficient proof with respect to the undisputed dominance of the company in the relevant markets of supply of coal. Considering all the proofs and the agreements of the Coal India the CCI came to a conclusion that

7 Coal India Ltd v competition commission,2014.
8 ibid
agreements were partial in nature and the company was using its position in an abusive manner hence had violated section 4(2)(a)(i) of the act. Thus, a fine of Rs.1773.05 crore was imposed on the company as it had attempted an unfair practice which is against the whole notion of the competition act. Subsequently, this order was challenged by the company and an appeal was filled at COMPAT, though the penalty was reduced but they were penalised for their actions.

At present there is absence of independent regulatory authorities with concern to the coal sector, till date there is a separate line of ministry acting up for the coal industry further there is lack of formal understanding between the CCI and the coal regulators. Also, there is a lack of proper monitoring and coordination apparatus. Secondly, a competitive market should have well-organized fuel choices and suitable substitutions of fuels, so that the substitution between gas and coal can be effectively used for generating electricity, which is absent in this case.

2.1.1- **LEGAL AND REGULATORY STRUCTURES**

Coal in India has been a prime source for the commercial energy, most being utilized by the power zone. Other industries involved in the demand and supply chain are industries involved in steel, fertilizers, chemicals and cement business. The Indian constitution has specified the regulatory bodies of coalmines and minerals to be in the hands of both the central and state governments. Talking about the regulation of the exploitative behaviour and development the responsibility majorly lies on the Ministry of Coal. Broadly the ministry has two sectors namely the CIL (Coal India Ltd.) and the NLC (Neyeli lignite Corporation Ltd). Since there is a limited participation of enterprises in the coal industries and these are the only ones on whom the other sectors are dependent thus these public sectors have proved to have sustained a dominant position in the relevant market. On top of all these since the Indian coal sectors are managed by mainly the public sectors and there is limited participation of the private entities thus this amounts to the role of the CCI being limited as well as the provisions like the regulation and combination and the anti-competitive agreements are not applicable on this sector considering the inappropriate private participants in the mining areas.

2.1.2- **STRUCTURAL BARRIERS**

Cost of planning and implementation of coal mining projects are in itself high in cost. Being considerate about the present practice in the coal sector, the public sector enterprises being the sole participants in this sector have acquired a place through their operations which is
negatively affecting the potential private player. Though, the participation of the private players are said to be encouraged by the government through the coal mines (nationalisation) amendment bill, still it seems quite impractical as the public sectors are having an upper hand in this sector since decades thus certain benefits such as the knowledge of the geographical data, they have a better say over the clients as they are the established once, the CIL has a benefit of close relationship with the ministry thus CIL is guided in its pricing and distribution process. These benefits are vast in number thus even though the participation of private bodies is encouraged in papers practically it is not possible for a new player to compete in a natural set up of monopoly.

2.2.2 - POLICY BARRIERS-

Absence of specific legal provisions and lack of awareness and implementation of the attempts made by the government to ensure a fair play in the coal sector has to be noted.

Firstly, the policies in itself are making it difficult for the private sectors to join hands as in considering the participation of the public sector has been huge and the supply has been managed by the public sectors since ages they have all the geographical information, which on the other hand is with the government and a private participant has to purchase the information with respect to the coalmines from the government. This policy in itself is creating an unfair practice. Secondly, as mentioned in the Coal bearing Areas (Acquisition and development) Act, 1957 which has provisions for acquisition of coal bearing land and this provisions implies that the public sectors are in merits and they do not have to obtain coal mining lease for land acquisition and non the less on the other hand there is no such provisions concerned with that of the private sectors participation, hence clearly the coal sector is lacking behind in providing adequate means to eradicate the ongoing monopoly in the market. Also considering the tenancy acquisition through the Land Acquisition act, 1894 it indicates that the land should be acquired for public purpose and also restricts the private entities to acquire lands only purpose being for the use of the employees, but there are no such restrictions mentioned on the part of the public sector. These policies are in itself self-discriminatory and are not providing any scope for the potential private players.

10 Supra, 4
3. SUGGESTIONS-

- Since the authorities of regulation is completely with the Ministry it is being biased, thus there is a need for an independent regulatory body.

- Secondly, there needs to be a reformation made in terms of the policies so that the participation of the private players and also certain benefits should be provided the private players in order to encourage their participation so that the monopoly can be curbed.

- Lastly, a complete restructuring has to be done in the legal frameworks as they have certain provisions that are self-discriminatory.

- Scope of the role of the CCI should be enhanced.

4. CONCLUSION-

Considering the above analysis, it is quite evident that the monopoly set in the coal sector is an extensive. Since there is lack of independent regulatory body the favouritism in this stream has been streamlined. Though as per the idea set forth by the competition act, 2002 itself, dominance is not bad per se but being abusive of such position will definitely adversely affect the sanity of the market. And by deeply understanding the case of Coal India Ltd. it has been in an abusive behaviour as it is trying completely trying to influence the rates and the quality check of the sector. Also, the policy and the lack of proper provisions and implementation are acting up as a barrier for the private participation, thus the government should take an initiative to set up systematic laws for this sector wherein the discriminatory set up and provisions will be completely cut off and the private players will get an equal space in this market.
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