
CASE ANALYSIS OF BHARTI AIRTEL LTD. V. RELIANCE INDUSTRIES LTD. AND RELIANCE JIO INFOCOM LTD.

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Brief background of the case

Bharati Airtel Limited filed a case against Reliance Industries Limited and Reliance Jio Infocom Limited alleging infringement of the provisions of *sections 3 and 4* of the **Competition Act, 2002**. The allegations made by Bharti Airtel (informant) are against the services offered by Reliance Jio Infocom Limited (OP 2). It was contended by the informant that OP2 was supported by Reliance Industries (OP1) in that all losses sustained by OP2 in its preliminary months of providing pro bono services to furnish to its subscriber base were sheltered by OP1, thereby executing an anti-competitive agreement and causing abuse of dominant position through predatory pricing.

Progressive History

The *Competition Commission of India* (CCI) acted upon receiving information under *section 19(1)(a)* of the **Competition Act 2002** and passed an order under *Section 26(2)* of the Act. Information was bequeathed by Bharati Airtel regarding occurrence of an anti-competitive agreement and abuse of dominant position through predatory pricing. The Commission examined the information provided by the informant in its ordinary meeting on 23-02-2017 and also conducted a preliminary conference with both the parties regarding the documents filed by the informant against OP1 and OP2.

Issues

Bharati Airtel has alleged three contentions against Reliance Industries Limited and Reliance Jio Infocom Limited. These are as follows:

1. “The resources amount to predatory pricing and is direct contravention to section 4 (2)(a)(ii) of the competition act of 2002.

2. Reliance industries Limited is in contravention of section 4 (2) (e) of the said act as it has offered financial strength in other markets to enter into the telecom market through OP2. OP2 has provided 4G LTE services of telecommunication in 20 telecommunication service areas, which can be referred to as the whole of India.
3. Reliance Industries and Reliance Jio Infocom Limited have entered into anti-competitive agreement between them, thereby contravening section 3(1) of the act whereby Reliance Jio had access to unfettered funds and resources of Reliance industries to have an adverse effect on other telecom competitors in the industry.”¹

Rules (Laws applied)

The judgment primarily refers to *section 3 and 4* of the **Competition Act of 2002** because the case deals with “*abuse of dominant position*” and “*anti-competitive agreement*” between Reliance Industries Limited and Reliance Jio Infocom Limited.

The term dominant position means when a company is in a superior position and has the power to dominate other firms in the market so as to eliminate or reduce its competition. When a firm which is in a dominant position misuses its power in order to suppress or discipline a competitor and any related activities in future, it is referred to as abuse of dominant position. At present, in India, **Competition Act, 2002** governs abuse of dominant position and situations related thereto. Before the introduction of the Competition Act, 2002, the **Monopolies and Restrictive Trade Practices Act (MRTP) of 1969** was in play. The provisions of this legislation mainly targeted dominant undertakings and were aimed to the reduction of concentration of economic power in the hands of few market players who would try to suppress or kill competition in the market.

Under the MRTP Act, *section 2(d)* defines the term dominant undertaking. The term was defined as any firm which enjoys a position of strength in the relevant market and operates unconventionally of the competitive force already abounding in the market zone or effects its competitors or consumers or the relevant market in its indulgence. The essence of this term is “circumstances of being in a position to be able to control of the firms or being in a prevailing position and competing for dominance in the market dominance over the rivals.” “The term abuse of dominant position hence refers to anti-competitive business practices where dominant firm may involve so to maintain or increase its position in the market. An act of directly or

¹ Bharti Airtel Ltd. v. Reliance Industries Ltd. and Reliance Jio Infocom Ltd. (2017 SCC OnLine CCI 25).

indirectly imposing unfair or discriminatory practices for limiting or restricting production of goods or any services in any kind of form are the examples of an enterprise acting in a dominant position.”² Thus, understanding the term in simple words it would mean form having a superiority as compared to others in the same market. Though not in respect to business, but the concept of dominant position has been long existing in the rich heritages of this country.

In the past few decades and still present in few places in India, there is the prominent caste system where the upper caste is given more preference controlling power and dominance over other castes. However, such caste dominance is abusive of its position. Even in terms of business and the Competition Act of 2002, eliminating competition through unfair means for a firm having unethical control over others is not considered to be a healthy competition and hence is an abuse of its dominant position. Factors that determine the dominant position of an enterprise largely depends upon its market share.

Others include:

- *“The size and assets of the undertaking*
- *The size and significance of contenders or competitors*
- *The financial intensity of the undertaking*
- *A vertical combination of integration*
- *Reliance on customers on the undertaking*
- *Degree of section and exit barriers in the market*
- *Countervailing purchasing power*
- *Market structure and size of the market*
- *Social expenses and commitments of big business getting a charge out of the prevailing situation financial improvement.”*

² Joji Thomas Philip, *Bharati Airtel v. Reliance Industries: Past, Present and Future of the Clash In broadband*, THE ECONOMIC TIMES, (Apr. 10,2012, 8:28am), See Available at: <<https://m.economictimes.com/industry/telecom/bharti-airtel-vs-reliance-industries-past-present-and-future-of-the-clash-in-broadband/articleshow/12604190.cms>>

However, the list is not exhaustive. “The competition commission of India is at liberty to consider whatever factors they might think about applicability for assurance of dominance”.³ *Explanation (a)* of *Section 4* of the **Competition Act, 2002** outlines the concept of dominant position. It articulates that “Dominant position has been defined as a position enjoyed by an enterprise whereby 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.”*

Section 4 of the Act also sets out what is abuse of dominant position. It provides a comprehensive list of actions which can make the dominant firm liable under section 4 of the Act. This includes:

- *“Directly or indirectly, imposes unfair or discriminatory practices*
- *Limits or restricts production of goods or provision of any services in any form*
- *Indulges in practice or practices resulting in denial of market access*
- *Makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which have no connection with the subject of such contracts; or*
- *Uses its dominant position in one relevant market to enter into, or protect, other relevant market.”*⁴

If the firm indulges in an activity whereby it reduces the price of a product below its cost as determined by the regulations, then it will be considered that the action has been done with a sight to diminish competition or disregard the competitors.

Section 27 of the Act expresses that “if after enquiry the competition commission finds that the action of an enterprise in a dominant position is in contravention to *Section 3 or 4* , then they may direct such enterprise involved in abuse of dominant position, to discontinue and not to re-enter such agreement with any other firms, or Impose penalty which shall not be more than 10% of the average turnover for the last three preceding financial years upon each of such

³ Prathit Sareen, *Competition Law and Telecom Sector*, LEGAL SERVICES INDIA, (May. 1, 2022, 10:45pm) See Available at <<https://www.legalserviceindia.com/legal/article-7320-competition-law-and-telecom-sector.html>>

⁴ Section 4 of Competition Act, 2002.

person or enterprises which are parties to the agreements or abuse. The commission can even impose penalty up to three times of the profits for each of the continuance of such abuse or 10% whichever is higher upon producer, seller, distributor, trader, or service provider, if involved.”⁵ The commission even has the power to direct the parties to the agreement to modify the agreement to the extent and manner as described by the commission.

Analysis

After the issues were framed, **Competition Commission of India** conducted a preliminary conference with both parties and subsequently to examine the allegations brought forward by both the parties.

The commission constrainedly interpreted the term “relevant market”. The commission observed that wireless telecom services are enough to be considered as “relevant geographical market” and thereby it absorbed on the dominance by Reliance Jio in its eccentricity. The informant aimed more at proving the dominance and the strength used by Reliance industries to enter in the telecom in the street in the Indian market. This allegation was supported by Jio’s simulated spectrum partaking linkups with Anil Ambani-led RCOM and their holdings on the 4G spectrum. It was pragmatic that Jio had a based station of around 2.43 lakhs which is nearly 18% of the total based station mounted by the industry and around 66% of the overall 4G LTE base stations. The informant noted an instance of *MCX Stock Exchange v. National Stock Exchange of India Ltd. & Ors.*⁶ where the commission arisen to the essentials for claiming predatory pricing. “The first one being demonstration that the scheme could actually drive the competitor out of the market the second one being that there must be evidence that the surviving monopolist could then raise prices to consumers long enough to recoup his cost without drawing new entrants to the market.”⁷

Analysing Reliance Jio’s position in the telecom industry, it is for a fact that in the initial years of launching Reliance Jio, Reliance Industries provided free telecom and internet services in order to gather benefactor base in the market including urban and rural areas, thereby driving out competitors. They provided pro bono services for a period of 6 months even though they

⁵ Section 27 of the Competition Act 2002.

⁶ *MCX Stock Exchange v. National stock exchange of India Ltd. & Ors.* (2011 SCC OnLine CCI 52).

⁷ Harsh Saxena & Nishi Rathore, “*Challenging the Competition Precedent: A Critical Analysis of the Competition Commission Decision on Bharti Airtel Ltd. vs. Reliance Industries Ltd. & Anr.*”, Vol. 3 Iss 6; 103, INT.J MGMT & HUM, 103, 107-109, 2020.

incurred losses during this period as they had to pay a liaisoning charge of “14 Paise per minute for calls by its subscribers to customers of other networks and still, they were able to make a position in the telecom industry and became the biggest wireless telecom and ISP in India within a period of 3 years since their inception. Subsequently, in the year 2007 Reliance Jio had announced its first paid packages costing ₹309 and ₹399 for 84 GB data and unlimited calls on any network and by the end of April 2017 it had successfully grown subscriber base of 112 million in India.”⁸ This clearly shows that the key ingredients of dominant position of Reliance Jio in the telecom industry are fulfilled.

The commission noted that with the allegation made by the informant regarding the predatory pricing, they contradict themselves as the commission perceived that the informant had not given any credible explanation as how these services are the result of unilateral conduct of Reliance Industries or that Reliance Industries had entered into an anti-competitive agreement between Reliance Jio & itself. The commission opined that the fact that pro bono services were provided by Reliance Industries cannot by itself raise apprehensions regarding anti-competitive environment unless the same is accessible by a dominant enterprise for the sole purpose of abolishing competition. It was also observed that this was not the case in the prompt substance as a relevant market has other business clears with continuous business presence and fiscal forte. This indicates that the commission failed to acknowledge and thereby understand the contention of Bharti Airtel and thereby termed it as contradictory. The allegation made by the informants were that Reliance Jio is a subsidiary of Reliance Industries and therefore Reliance Industries is the entrance for Reliance Jio to arrive into the telecom market. The agreement made between the two was to control telecom charges in the market so that all other market enterprises would have to reduce their charges in order to sustain and preserve their position in the telecom industry. The losses sustained by Reliance Jio in the 6 months period was shielded up by Reliance Industries.⁹

The commission, however, disregarded this argument and stated that offering free services cannot be the main factor affecting competition unless it is supplemented by a dominant enterprise. The commission overlooked and disregarded the fact that other market players including the informant invested a substantial 8 to 10 years to build a base in this industry since its inception. In 2010 Reliance industries acquired Infotel Broadband Services and

⁸ Id.

⁹ Id.

subsequently rebranded it as Reliance Jio. “They allowed unfettered access of its funds to Reliance Jio so as to cause and adverse effect on competition within the relevant market and thereby Reliance jio was in a position to dominate the market and sustain the losses by providing free services as it had the backing of Reliance Industries.”¹⁰

In the matter of *Fast Track Call Cab Private Ltd. v. ANI Technologies Private Ltd.*,¹¹ the commission, in a similar way, had ignored vital facts while determining on predatory pricing. “In this case the informant alleged that the conduct of predatory pricing was evidence of dominance but on the contrary the commission observed that Ola was not in a dominant position in the market and thereby, it stated that the new entrants can only engage in such practices to have a footing in the market and if they are regarded to have a dominant position in the market might have chilling effects on the competition. In this case also, the commission quite conveniently ignored the essential facts when it came to deciding matters pertaining to dominant position and Predatory pricing.”¹²

The Competition Commission throughout the judgement has majorly focus on justifying whether Reliance Jio has a dominant position in the telecom industry. In this regard, the Competition Commission held that Reliance Jio was a new player in the market and that its acts were only to have a footing in the industry. It is for a fact that no business can be sustained after incurring losses for 6 months since its inception if it does not have a backing from a major player in the market. In this case it is was commonplace that Reliance Industries backed up Reliance Jio to provide free services for 6 months and to gather a subscriber base for its network. Bharti Airtel alleged that Reliance Industries and Reliance Jio have an anti-competitive agreement under *section 3(1)* of the **Competition Act, 2002** and because of this, Reliance Jio has an upper hand of having dominant position in the market. On this allegation, the commission noted that Reliance Industries has itself not involved or engaged in offering telecom services or any activities accompanying thereto. If such an act is considered to be anti-competitive in nature, then this would deter any enterprise in expanding their business. Thus, the commission denied any violation of *section 3(1)* or *section 4(2)(e)* of the Act. The

¹⁰ Ameya Garud, *Predatory Pricing or Price Penetration? The Dilemma in Bharti Airtel v. Reliance Jio*, CCL BLOG, (Apr. 29, 2022, 9.45pm) See Available at <<https://www.ccl.nluo.ac.in/post/predatory-pricing-or-price-penetration-the-dilemma-in-bharti-airtel-v-reliance-jio>>

¹¹ *Fast Track call cab (P) Ltd. v. ANI technologies (P) Ltd.* (2017 SCC Online CCI 36).

¹² Varun Kannan, *Competition Law Issues in the Indian Telecom Sector: Analysis of Recent Developments*, IND. CORP. LAW. (Apr. 29, 2022, 9.29 pm) See Available at: <<https://indiacorplaw.in/2019/07/competition-law-issues-indian-telecom-sector-analysis-recent-developments.html>>

constricting interpretation of **Competition Act 2002** has left room for business players into relevant markets to exploit their dominance and indulge in anti-competitive activities as well as abuse their dominance to mark a place in the market.

Further, Competition Commission of India noted that Reliance Jio does not have a market share of more than 7 percent in the 22 telecom circles present in India and there are market players like Vodafone, Idea, MTNL and BSNL who have very similar technical and financial abilities. The commission noted that there was sufficient choice in the hands of the customers to choose whichever service provider they wanted and they were not dependent on a single service provider. For this reason, the commission held that Reliance Jio was not in the dominant position in the telecom industry and thus, it did not dominate other market players in the telecom sector. Therefore, Reliance Jio cannot also abuse the dominant position through predatory pricing in this sector.

The decision passed by the Competition Commission of India has been a metamorphosing point in the journey of digitalising India as well as in Indian telecom industry, as Reliance Jio has become a USD 26 billion company while being a subsidiary of Reliance Industries. Several reports show that with its low-price offers, Reliance Jio has affected other players in the telecom industry significantly, thereby causing them to incur huge losses. In the year of Reliance Jio's launch, Airtel had to incur a loss of about 54%. Even after 5 years of Jio's entry in telecom industry, the losses of other market players in the telecom industry have yet not stopped. In the year 2017, when Reliance Jio started its business in the telecom industry, there were 9 other private sector wireless telecom service providers but at present only three have survived, namely, Bharati Airtel, Reliance Jio and Vodafone. It is evident that Reliance Jio did not only enter into the market for business purposes or to make a place for itself in the telecom industry, but in the process, it monopolised the whole telecom industry thereby gifting India one of the cheapest accesses to internet across the globe.¹³

Conclusion

The decision in the present case adversely impacted market competition because it allowed the new entrant, ie, Reliance Jio to introduce cheaper offers to establish its stronghold against existing service providers in the telecom industry. The pro bono services provided by Reliance Jio in its initial 6 months period even after suffering the losses was the game-changer. Other

¹³ Ameya Garud, Supra note 10.

service providers could not provide no cost services to clients because of the deficits they would have suffered and they did not have any assistance from other businesses or industries. This led to a large subscriber base of Reliance Jio as they were able to sustain the losses because of the backup provided by Reliance Industries. It is quite evident that Reliance Industries used their financial strength to have a footing in the sector and this gave the status of dominant position to Reliance Jio because they had successfully created this subscriber base by providing free services in their initial six months.

The Competition Commission decides cases by a literal interpretation of the Competition Act, making it very restrictive. In the present case, there was an absence of clear and apparent boundary between promoting competition and anti-competitive practices and this led to the conflict. The Commission is of the view that the use of unfair means by a new entrant in the market is not inherently wrong or against the Competition Act. The decision of allowing a new entrant to continue in the market despite proven dominance and to let it be in control of the market indicates inefficiency on part of CCI and sets a bad and biased precedent. The Competition Commission of India must judiciously examine all facts, contentions and circumstances while resolving disputes so that competition in the market is not jeopardised and consumers always have the best options available at their disposal.

Notwithstanding the criticism of the decision of the CCI, it is impossible to ignore the fact that India would still have been in a primitive stage of cellular internet network even today, if Jio's induction in the market hadn't kicked-off the mobile internet boom in 2016. Reliance Jio provided cheap internet access which also helped the process of digitalising India to every rural and urban corner. We would also not have been able to survive the COVID-19 lockdown as comfortably as we did if it were not for the deep pervasion of internet in India at very low and ultra-competitive prices. The chain of events beginning from the induction of Jio's cheap internet in the Indian market helped many industries survive during the pandemic and saved the country's economy from being badly impaired.