

CPI Antitrust Chronicle

April 2015 (1)

Competition Law Scrutiny of Vexatious Litigation in India: Recent Developments

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I. INTRODUCTION

In March 2014, the Competition Commission of India (“Commission”), for the first time, initiated an investigation into the conduct of a dominant enterprise based on an allegation of vexatious/bad faith litigation. This article provides a comparison to standards for a finding of vexatious litigation in other jurisdictions, outlines core features of the order passed by the Commission finding *prima facie* that the enterprise had abused its dominance, and discusses some key issues raised by the case.

II. VEXATIOUS LITIGATION AND COMPETITION LAW

The institution of legal proceedings can result in a competition law concern where a dominant enterprise misuses the adjudicatory process to strengthen its position in the market, thereby adversely affecting the market. Competition authorities and courts in different jurisdictions have developed tests to characterize the pursuit of legal proceedings as anticompetitive or abusive. Often, competition concerns in relation to litigation pertain not only to access to justice, but also to the enforcement of intellectual property rights (“IPRs”).

A. The Experience of the European Union

The seminal *ITT Promedia/Belgacom*² case laid down a test for determining whether the institution of legal proceedings by a dominant undertaking is abusive. The General Court, referring to the criteria laid down by the European Commission, stated that legal proceedings would be abusive where such legal action:

- (i) cannot reasonably be considered as an attempt to establish the rights of the undertaking concerned and can therefore only serve to harass the opposite party and
- (ii) it is conceived in the framework of a plan whose goal is to eliminate competition.”³ These cumulative criteria were originally set out by the European Commission, and as the General Court did not assess the correctness of these, the implication is that they are correct.⁴

The judgment demonstrates that vexatious litigation can be abusive, but only where the cumulative criteria, which constitute an exception to the right of access to courts, are fulfilled.

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² *ITT Promedia NV v. Commission* Case T-111/96 [1998].

³ *Id.* at ¶55.

⁴ ALISON JONES & BRENDA SUFRIN, *EC COMPETITION LAW* 528 (4th ed., 2011).

Although *ITT Promedia* did not concern IPRs, the European Union has recognized that cases involving anticompetitive litigation can also involve IPRs. The European Commission conducted an in-depth inquiry into the pharmaceutical sector, to examine, *inter alia*, the conduct of companies in creating artificial barriers of entry by vexatious litigation.⁵ In addition to the pharmaceutical sector, the conduct of IPR-owners in the telecommunications sector has been examined from a competition law perspective.⁶

B. The Experience of the United States

The contours of vexatious litigation have been drawn out in the United States in the *Noerr-Pennington* and the *Walker Process* doctrines. The extent to which communications to the government are amenable to assessment under antitrust laws is guided by the *Noerr-Pennington* doctrine, which extends immunity to private entities seeking to influence government action, even if the intent or effect of such efforts is anticompetitive.⁷

The landmark *PREI*⁸ case provides for a two-part test to qualify litigation/petitioning as sham:

1. the litigation is objectively baseless,⁹ and
2. the litigation conceals a subjective intent to directly interfere with the business of the competitor through the use of the government process.¹⁰

The *Walker Process* doctrine establishes that proof of the assertion that patent holders obtained such patents by “knowingly and willfully misrepresenting facts to the Patent Office” would not be exempt from the application of antitrust law.¹¹

Sham litigation as an exception to the *Noerr-Pennington* and the *Walker Process* doctrines are two ways in which a party’s conduct in obtaining an enforcing a patent is subject to antitrust scrutiny.¹² In addition to vexatious litigation concerning patents within the scheme of the *Walker*

⁵ European Commission, Antitrust: Commission launches sector inquiry into pharmaceuticals with unannounced inspections, Press Release, IP/08/49, available at http://europa.eu/rapid/press-release_IP-08-49_en.htm?locale=en.

⁶ Owing to the involvement of the authors of this article in a case involving the seeking of injunctive relief by an owner of Standard Essential Patents, no comments are offered on anticompetitive litigation in the context of Standard Essential Patents.

⁷ See generally: http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf; EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 1212 (2nd ed., 2011).

⁸ 508 U.S. 49 (1993).

⁹ *Id.* at 60.

¹⁰ *Id.* at 61.

¹¹ *Walker Process Equipment Inc. v. Food Machinery Corp.*, 382 U.S. 172 (1965) at 177.

¹² See generally Simonetta Vezzoso, *Towards an EU Doctrine of Anticompetitive IP-Related Litigation*, 3(6) J. EUR. COMPETITION L. & PRACTICE 521-535 (2012).

Process doctrine, much like the European Union the use of litigation as an anticompetitive tool in relation to IPRs has arisen in the pharmaceutical and telecommunications sectors.¹³

It is pertinent to note that the consequence of satisfying the *ITT Promedia* test is that the conduct of the enterprise is deemed to be abusive, whereas the consequence of satisfying the *PREI* test is that the conduct of the enterprise is deemed to be subject to analysis under antitrust law; in the former case, the conduct is considered to be abuse, whereas in the latter case, abuse will have to be demonstrated.

In this manner, the scope of the tests laid down in both jurisdictions is markedly different.¹⁴ The existence of additional differences between the standards for finding litigation vexatious in both jurisdictions has been debated, such as whether vexatious litigation in the United States would apply to a pattern of litigation.¹⁵ The overarching theme, however, is that tests for determining when the pursuit of legal proceedings by an enterprise can lead to competition law concerns have been developed in other jurisdictions.

III. THE ORDER OF THE COMMISSION IN *BULL MACHINES V. JCB*¹⁶

Bull Machines Pvt. Ltd. (“Bull Machines”) and JCB Pvt. Ltd. (“JCB”) are competitors in the market for backhoe loaders, a particular type of light construction equipment. Bull Machines’ backhoe loader is styled as “Bull Smart.” Alleging that Bull Smart violated its designs and copyright, JCB sought, and consequently obtained, an interim injunction order from the High Court of Delhi (“High Court”), and served such order on Bull Machines during the formal launch of Bull Smart at an exhibition for earthmoving machinery. The consequences of the order included the removal of Bull Smart from the exhibition, the stalling of operations and production of Bull Smart, and the seizure and sealing of the documents, molds, and components for Bull Smart.¹⁷

Subsequently, Bull Machines filed an interim application in the High Court seeking vacation of the injunction order, and submitted evidence to demonstrate that JCB obtained such order on the basis of misrepresentations and by relying on fraudulent design registrations pre-existing in the public domain. They argued that there was no similarity in the designs of Bull Smart and those belonging to JCB. During the course of the High Court proceedings, a consent order was recorded by the High Court in December 2011, by virtue of which the interim order stood suspended, and included terms that JCB was to inspect Bull Smart in order to verify that its registered designs were not infringed. However, JCB voluntarily withdrew its application for *ex-parte* interim injunction within 10 months of filing its infringement suit, without submitting a reply or report based on its inspection of Bull Smart.¹⁸

¹³ For example, sham litigation in pharmaceuticals was considered in *In Re DDAVP Direct Purchaser Antitrust Litigation*, 585 F.3d 677 (2d Cir. 2009).

¹⁴ *Vezzoso*, *supra* note 12 at 533.

¹⁵ *Id.* at 534.

¹⁶ Case No. 105 of 2013.

¹⁷ Order, ¶2.

¹⁸ *Id.*

Based on the above facts, Bull Machines alleged that JCB had engaged in anticompetitive practices in contravention of the provisions of the Competition Act, 2002 (“Act”).¹⁹

A. The Analysis and Order of the Commission

The Commission employs a three-step process in its analysis of abuse of dominance. First, it defines the relevant market. Second, it assesses the dominance of the enterprise in the relevant market. And, third, it determines whether the conduct of the enterprise falls within one of the five types of conduct deemed to be abusive under the Act.

In defining the relevant market, it was noted that no two types of construction equipment perform the same function and are not substitutable. The Commission therefore defined the relevant product market as the market for backhoe loaders. Observing that the conditions of competition for supply of backhoe loaders are homogenous in India, the Commission defined the relevant geographic market as the whole of India.

In assessing dominance, the Commission considered several factors—including JCB’s network throughout the country, sales in 2011, and sunk costs contributing to entry barriers—and concluded that JCB was dominant in the market for backhoe loaders for India. It further noted that JCB, in possessing 75 percent market share, was “super dominant.”²⁰

In determining abuse, the Commission took note of the claims of the Informant,²¹ and stated that predation through abuse of judicial process is a threat to competition, and concluded *prima facie* that JCB abused its dominant position by denying market access and foreclosing the entry of Bull Smart.²² The Commission proceeded to pass an order under Section 26(1) of the Act (“Order”) directing the Office of the Director General (“DG”) to carry out an investigation and submit a report thereon.

B. Writ Proceedings Before the High Court

JCB challenged the Order *vide* writ proceedings²³ before the High Court, contending, *inter alia*, that the investigation interfered with the jurisdiction of the High Court. In response, Bull Machines, relying on the landmark judgment of the Supreme Court of India in *Competition Commission of India v. SAIL*,²⁴ averred that an order under Section 26(1) of the Act directing investigation is an administrative nature and is not determinative of any rights or obligations of the party, and as such should not be interfered with in writ proceedings.

¹⁹ Order, ¶3.

²⁰ Order, ¶¶6-13.

²¹ Order, ¶14.

²² Order, ¶¶15-16.

²³ Article 226 of the Constitution of India provides for the power of High Courts to issue writs. Under writ jurisdiction, High Courts can pass writs in the nature of *mandamus*, *quo warranto*, *habeas corpus*, and *certiorari* in order to protect the rights of parties, whether granted by the Constitution of India or otherwise. Parties in competition proceedings have invoked writ jurisdiction of High Courts: for example, writ petitions have been filed before the High Courts of Delhi, Madras, Gauhati, Karnataka, Kerala, and Mizoram against certain orders passed by the Commission.

²⁴ (2010) 10 SCC 744.

The Single Judge of the High Court held that a substantial question of jurisdiction of the Commission had arisen, and made reference to an order of the Division Bench of the High Court in another case involving the jurisdiction of the Commission.²⁵ The Single Judge stated that no final order/report should be passed either by the Commission or by the DG, and that the DG required the permission of the party to be investigated prior to summoning officers stationed abroad.²⁶

It is pertinent to note that this case was the first in which the DG has conducted a dawn raid. The Single Judge of the High Court, noting that the DG took “drastic action” in conducting the raid, stayed the Commission proceedings, and directed that hardware seized during the raid be kept in safe custody.²⁷ Arguments of both parties on the aforementioned issues are presently being heard before the High Court.

C. Comments: Core Concerns Raised by the Case

The Commission, in *prima facie* condemning the conduct of JCB, does not specifically state the actions of JCB are deemed to be abusive. A *prima facie* finding of bad faith typically would consider: (i) that the timing of the injunction order coincided with the launch of the product in an exhibition, severely impacting its goodwill; (ii) the withdrawal of the injunction order; and (iii) the alleged misrepresentation of design rights and/or fraudulent obtaining of design rights. The Order does not make reference to which of these allegations led the Commission to arrive at the *prima facie* conclusion that JCB had abused its dominant position in the market by denying market access and foreclosing the entry of Bull Smart into the market for backhoe loaders.

Additionally, there is no indication as to the circumstances in which legal proceedings are likely to be abusive or anticompetitive. The yardstick that the Commission will use for determining whether litigation is vexatious remains to be seen.

Although the Commission is only required to provide a *prima facie* determination that conduct is abusive or anticompetitive in order to direct an investigation into the matter, neither the specific activity/activities of JCB leading to a finding of contravention, nor the criteria to be satisfied for the characterization of litigation as bad faith, have been expressly stated.

Bull Machines alleges, *inter alia*, that JCB fraudulently obtained such design rights. In this light, the lack of clarity relating both to the basis of the finding and the scope of investigation directed causes concern. The validity or otherwise of the design rights is an issue that, under the statutory framework for IPR in India, can only be decided by the High Court. The mandate of the Commission may extend to the conduct of an enterprise in exercising its IPRs, but does not envision scrutiny of the IPR itself.

Even where the DG does not determine the validity of the design rights, there are several important questions that arise. Assuming the existence of the IPR, the ability of a dominant

²⁵ *Telefonaktiebolaget LM Ericsson (Publ.) v. Competition Commission of India*, order available at http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=44339&yr=2014.

²⁶ Available at http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=73033&yr=2014.

²⁷ Available at http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=197360&yr=2014

entity to seek injunctive relief to protect its IPRs is one of the key issues that the Commission will have to contend with. If the design rights are indeed valid, what are the actions that JCB can take without being subject to competition scrutiny? Given that the primary right conferred by an IPR is the right to exclude, this question is to be examined against the larger issue of when it is permissible under competition law for a dominant enterprise possessing an IPR to seek injunctive relief, without such conduct being characterized as market foreclosure. Larger still is the issue of when competition intervention in the exercise of IPRs by a dominant entity is warranted.

IV. CONCLUSION

Section 4(2)(c) of the Act prohibits dominant enterprises from indulging “in practice or practices resulting in denial of market access in any manner.” This case, in condemning the use of litigation in denying market access to Bull Smart, is an effort at highlighting one of the ways in which market access may be denied. However, the Order passed by the Commission does not prescribe a *prima facie* legal standard for the characterization of pursuit of legal action as abusive or anticompetitive.

The issues to be decided in the writ proceedings before the High Court, as well as the Commission’s findings, will have a significant impact on the development of the relatively new Indian competition jurisprudence as the case brings to the fore important issues pertaining, *inter alia*, to the jurisdiction of the Commission, the relationship between IPR and competition, and bad faith litigation as a new theory of harm.