

## **Saurabh Tripathy v. Great Eastern Energy Corporation Ltd. (MANU/CO/0013/2017)**

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**Decision Date:** 16.02.2017

**Key words:** *Locus standi; abuse of dominance*

**Issue:** Whether there is abuse of dominant position through unconscionable terms and conditions in sale and purchase agreements?

**Rule:** Sec. 4(2)(a)(i) read with Sec. 4(1) of the Competition Act, 2002

The Opposite Party is engaged in exploration, development, distribution and sale of Coal Bed Methane (CBM) in India. It is alleged by the informant (an employee of SRMB Srijan Ltd.) that OP is in a dominant position in the market of supply and distribution of CBM gas in Asansol-Raniganj- Durgapur belt and further that the OP is abusing this dominant position by putting unconscionable terms and conditions in its Gas Sale and Purchase Agreement (GSPA) executed with buyers such as SRMB Srijan Ltd. Further the OP is also allegedly charging unfair and discriminatory prices.

According to the investigation conducted by the DG pursuant to Sec. 26(1), it was submitted that certain clauses appeared to be unfair/ discriminatory and one-sided in favour of the OP in contravention of sec. 4(2)(a)(i) read with Sec. 4(1) of the Act. These include power of OP to unilaterally revise the terms and conditions, lack of liability on OP, powering OP to terminate GSPA etc.

However the DG found no evidence regarding the allegation of discriminatory pricing.

Before discussing the merits of the case, the Commission notes that the DG in investigating the case has considered SRMB and the informant as interchangeable and relied on the Informant for information regarding proceedings between SRMB and the OP, when the same would not have had the complete information. Further in the present case SRMB has not authorized the informant to file the present case nor have they raised any complaint against the OP subsequently.

The Commission further discusses the issue of locus of the informant to file the present case. In this case, the informant is not alleging the OP generally imposes abusive terms in the market, instead has raised a purely private grievance qua a single private party which he has no locus to raise. Further the Commission quotes COMPAT in the case of *Hiranandani Hospital v. CCI*, where it is noted that “the Commission is expected to act with caution where the Informant is a busy body, who may be espousing the cause of someone else with ulterior motive.” However given the advanced stage of the proceedings, the Commission decided to consider the merits of the case.

The relevant market in the present case was delineated as market for supply of CBM to industrial customers in Asansol-Raniganj-Durgapur Area. According to the DGs report, the OP enjoyed a dominant position in the same. However, this was challenged by the OP who argued that the DG failed to satisfy the definition of ‘dominance’ under the Act since the OP is not able to act independently of its customers as evidenced by the fact that even smaller customers are able to negotiate terms and conditions with the OP.

However the Commission, agreed with the DG’s report holding that given the high market share of the OP (almost monopoly position) and other factors such as size and resources of the enterprise, economic power of the enterprise etc, the OP enjoyed a dominant position in the relevant market.

Finally the analysis turned towards whether the identified clauses in the agreement amounted to abuse of dominant position.

However, the Commission disagreed with the DG on the fact that the clauses in the agreement were abusive. For instance, with respect to power of OP to facilitate unilateral change in the contract, the Commission held that the DG had misread the contract since there was another specific clause, which clarified that both parties had to mutually agree to any amendment in the clause. In another instance, the DG found the clause to be discriminatory for it gave the OP the exclusive right to appoint a third party inspector in case of suspected tampering. However the commission disagreed with this analysis for the OP could only appoint a third party inspector accredited by the relevant body. Thus ensuring that the inspector would be independent and competent.

Similarly, after perusing the various clauses the Commission to the conclusion that there was no unfairness and thus no violation under Sec. 4 of the Act.

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