

UBER INDIA SYSTEMS PVT. LTD.

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v.

COMPETITION COMMISSION OF INDIA & ORS.

(Civil Appeal No. 641 of 2017)

SEPTEMBER 03, 2019

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**[R. F. NARIMAN AND SURYA KANT, JJ.]**

*Competition Act, 2002: s. 4 – Abuse of dominant position – Allegation that appellant losing Rs. 204 per trip in respect of every trip made by cars of the fleet owners which does not make any economic sense other than pointing to appellant's intent to eliminate competition in the market – Held: There is prima facie case u/s. 26(1) as to infringement of s. 4 – Two ingredients for abuse of dominant position is, the dominant position itself and its abuse – From the allegation it is clear that if, in fact, a loss is made for trips made, Explanation (a)(ii) would prima facie be attracted as this would certainly affect the appellant's competitors in the appellant's favour or the relevant market in its favour – Under s. 4(2)(a), so long as this dominant position, whether directly or indirectly, imposes an unfair price in purchase or sale including predatory price of services, abuse of dominant position also gets attracted – Thus, the order passed by the appellate tribunal is upheld – Director General to complete investigation within the stipulated period.*

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 641 of 2017

From the Judgment and Order dated 07.12.2016 of the Competition Appellate Tribunal in Appeal No. 31 of 2016.

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With

Civil Appeal No. 7012 of 2019.

Dhruv Mehta, Kapil Sibal, Sr. Advs., Anuj Berry, Malak Bhatt, Aman Singh Sethi, P. S. S. Bhargava, S. S. Shroff, Advs. for the Appellant.

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Raju Ramchandran, Sr. Adv., Naveen R. Nath, Rahul Jain, Sonal Jain, Udayan Jain, Ms. Heena Sharma, Kamal Sharma, Ishkaran Singh, Shankar Naryanan, Advs. for the Respondents.

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A The Judgment of the Court was delivered by

**R. F. NARIMAN, J.**

B 1. Having heard lengthy arguments of Shri Dhruv Mehta, learned senior counsel appearing for the appellant, and Shri Raju Ramchandran, learned senior counsel appearing on behalf of the respondent, we are of the view that interference in these appeals is not called for.

2. The only reason we do so is because we were shown, as part of information that was provided, the following statement:

C “23. Uber’s discount and incentive offered to consumer pale in comparison with the fidelity inducing discounts offered to drivers to keep them attached on its network to the exclusion of other market players. Uber pays drivers/car owners attached on its network unreasonably high incentives over and above and in addition to the trip fare received from the passengers. A summary of the incentives provided to one fleet owner attached to Uber’s network, having 4 cars, which were driven by 9 drivers is reproduced below.

	Statement period		1 <sup>st</sup> June to 28 <sup>th</sup> June
E	Total Trips		1,135
	Billed to Consumer (Uber’s Collection from Consumer)		
	Fare		256,187
	Surge		18,621
F	Surcharges & tolls		23,499
			298,307
	Operates Earning [Car Owner’s Earning]		
G	Operator’s Share out of Consumer Revenue Service Tax	100%	274,808
	Surcharges & Tolls Reimbursed	4.94%	(12,946)
	Others		518
H	Incentives Received from Uber		230,464

Operator's net earning		516,343	A
Uber's Earning			
Revenue Share (Out of Fare and Surge)	0%	0	B
Incentives Paid to Drivers		(230,464)	
Other adjustments		(518)	
Net earning (loss)		515,346	
			C
Uber's Earning			
Revenue shares (out of Fare and Surge)	0%	0	
Incentives Paid to Drives		(230,464)	D
Other adjustments		(518)	
Net earning (Loss)		(230,982)	
Per trip Consumer revenue		242	E
Per trip Uber Net Loss		(204)	

3. In light of the abovementioned statement, it can be seen that Uber was losing Rs.204 per trip in respect of the every trip made by the cars of the fleet owners, which does not make any economic sense other than pointing to Uber's intent to eliminate competition in the market. Copies of the statements of aforesaid fleet owners' along with a summary for the period June 1 to June 28,2015 is annexed herewith as Annexure A-15 Colly."

4. Based on this information alone, we are of the view that it would be very difficult to say that there is no *prima facie* case under Section 26(1) as to infringement of Section 4 of the Competition Act, 2002.

5. Section 4 is set out hereinbelow:

6. Abuse of dominant position.-(1) No enterprise or group shall abuse its dominant position.

A (2) There shall be an abuse of dominant position 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

B (ii) price in purchase or sale (including predatory price) of goods or service.

C 7. Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition;

or

(b) limits or restricts—

D (i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

E (c) indulges in practice or practices resulting in denial of market access in any manner; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

F (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

8. Explanation.—For the purposes of this section, the expression—

G (a) “dominant position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

H (ii) affect its competitors or consumers or the relevant market in its favour;

(b) “predatory price” means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors. A

(c) “group” shall have the same meaning as assigned to it in clause (b) of the *Explanation* to section 5.” B

9. There are two important ingredients which section 4(1) itself refers to if there is to be an abuse of dominant position -

(1) the dominant position itself.

(2) its abuse. C

10. ‘Dominant position’ as defined in *Explanation* (a) refers to a position of strength, enjoyed by an enterprise, in the relevant market, which, in this case is the National Capital Region (NCR), which: (1) enables it to operate independently of the competitive forces prevailing; or (2) is something that would affect its competitors or the relevant market in its favour. D

11. Given the allegation made, as extracted above, it is clear that if, in fact, a loss is made for trips made, *Explanation* (a)(ii) would *prima facie* be attracted inasmuch as this would certainly affect the appellant’s competitors in the appellant’s favour or the relevant market in its favour. Insofar as ‘abuse’ of dominant position is concerned, under Section 4(2)(a), so long as this dominant position, whether directly or indirectly, imposes an unfair price in purchase or sale including predatory price of services, abuse of dominant position also gets attracted. *Explanation* (b) which defines ‘predatory price’ means sale of services at a price which is below cost. E F

12. This being the case, on the facts of this case, on this ground alone, we do not think it fit to interfere with the order made by the Appellate Tribunal.

13. The appeals are dismissed with no orders as to costs. G

14. The Director General is requested to complete investigation within a period of six months from today.