



COMPETITION COMMISSION OF INDIA

Case No. 97 of 2015

In Re:

Southwest India Machine Trading Pvt. Ltd.

Informant

And

Case New Holland Construction Equipment (India) Pvt. Ltd.

Opposite Party

CORAM

**Mr. Devender Kumar Sikri
Chairperson**

**Mr. S. L. Bunker
Member**

**Mr. Sudhir Mital
Member**

**Mr. Augustine Peter
Member**

**Mr. U. C. Nahta
Member**

**Dr. M. S. Sahoo
Member**

**Justice G. P. Mittal
Member**



Appearances during the preliminary conference:

For the Informant: Mr. Anish Dayal, Advocate
Mr. Siddharth Vaid, Advocate
Mr. Sony Bhatt, Advocate
Mr. Umesh Shastri, DGM

For the Opposite Party: Mr. Rajshekar Rao, Advocate
Mr. Harman Singh Sandhu, Advocate
Mr. Yaman Verma, Advocate
Ms. Meherunissa Anand, Advocate
Mr. Toshit Smandilya, Advocate
Mr. Ravish Kumar, AGM

Order under Section 26(2) of the Competition Act, 2002

1. The present information has been filed by Southwest India Machine Trading Pvt. Ltd. (hereinafter referred to as the “**Informant**”) under Section 19(1)(a) of the Competition Act, 2002 (hereinafter referred to as the “**Act**”) against Case New Holland Construction Equipment (India) Pvt. Ltd. (hereinafter referred to as “**OP**”), *inter alia*, alleging contravention of the provisions of Sections 3 and 4 of the Act.
2. The Informant is a company incorporated under the Companies Act 1956 and is engaged in the business of trading industrial equipments.
3. It has been stated in the information that OP is a prominent equipment manufacturer in India. Further, OP is stated to be a leading player in the Vibratory Soil Compactor Segment and is also a top tier player in the Backhoe Loader Segment. It has been claimed that the market size of soil compactors in India is around 3500 units per annum and OP enjoys leadership in this business with about 40% market share. OP is stated to have an extensive distribution network of 67 dealers and nearly 250 customers touch points located across India.



4. Allegations raised by the Informant and the course of events leading to the filing of the present information are outlined as under:

4.1. The Informant had issued two purchase orders on 5th March 2014 for the purchase of the following equipments from OP:

- (a) 50 units of CASE 770EX Magnum Loader Backhoe Fitted with FPT S8000 Engine developing 86 HP @ 2200 RPM, with 4 Wheel Drive, 0.26 Cum Backhoe Bucket, 1.00 Cum Bottom Dump Loader Bucket with Standard Rear Tyres ('Backhoe Loader'); and
- (b) 10 units of CASE 1107 DX Standard Soil Vibratory Compactor fitted with KOEL Engine 4 R 1040, developing 105HP@2200 rpm ('Soil Vibratory Compactors').

These purchase orders were unconditionally accepted by OP, by signing on the same.

4.2. Subsequently, the Informant further issued Optional Purchase Orders on 18th May 2014 for purchase of 100 units of Backhoe Loader and 80 units of Soil Vibratory Compactors. These Optional Purchase Orders were also signed by the representative of OP. It has been averred by the Informant that as per the terms of the Optional Purchase Orders, only the Informant had the option to purchase or refrain from purchasing the said equipments; whereas, OP was under an obligation to sell to the Informant if it was to exercise the option to purchase.



- 4.3. After supplying 35 units out of the 50 units of the Backhoe Loaders, the Informant received an email from OP on 19th June 2014 *inter alia* informing that, “*we understand that some machines have been put in auction which is not a desirable situation for us*”. In the same e-mail, the Informant was also asked to disclose about its future deployment plans regarding the remaining machines to be supplied by OP, specifically with respect to the auctioning of the remaining units and the geographies where the units would be put to sale. The Informant asserted that it was free to deal with the equipments purchased in whichever way it liked to the best of its commercial abilities and the aforesaid stand taken by OP regarding auctioning of the equipments was completely against any discussion or agreement between the parties.
- 4.4. The Informant received another e-mail from OP on 2nd July 2014 informing that OP was not in a position to supply the remaining 15 units of Backhoe Loaders. In response, the Informant sent an e-mail to OP on 16th July 2014 *inter-alia* stating that if the Informant does not receive the remaining 15 units of Backhoe Loaders within a period of 14 days thereof, its management will be constrained to initiate appropriate legal proceedings. Thereafter, OP sent an e-mail to the Informant on 28th July 2014 *inter alia* stating the following:

“We have noted that you have been auctioning the equipments purchased by you in territories outside India, thereby adversely impacting our group companies in territories outside India, where machines and equipments manufactured in India are not allowed/ permitted to be



sold by other group companies. This has forced us to cancel the purchase Order with immediate effect...

...You have caused huge loss to our Group Companies and also to our reputation in India as well as outside India. Further, you have put us in a situation wherein we have been found to be adversely affecting our group companies' interests outside India. We are trying to assess the loss caused by your act of selling our products through auction in markets outside India, which shall be conveyed to you and you shall be liable to pay such damages."

The parties had further correspondence in the form of notices and replies.

- 4.5. By imposing and insisting on such restrictive conditions, OP was not only limiting and controlling the supply but also attempting to allocate geographic areas. According to the Informant, such conduct of OP amounts to entering into anti-competitive agreement in contravention of the provisions of Section 3 of the Act. It has been further alleged that through such conduct, OP had: (i) directly or indirectly imposed an unfair and discriminatory condition in the sale or purchase of goods; (ii) limited and restricted the market for goods and denied market access; (iii) sought to impose supplementary obligations which have no bearing with the subject matter of the contract; and (iv) used its dominant position in one relevant market to protect other relevant market. For these purported reasons, it has been alleged



by the Informant that the conduct of OP is in contravention of the provisions of Section 4 of the Act as well.

5. In connection with the matter, the Commission had a preliminary conference with the parties on 28th January 2016. During the preliminary conference, the Informant reiterated the submissions/allegations made in the information. In response to a clarification sought by the Commission regarding the market share and dominance of OP, the Informant submitted that JCB and OP are the leading players in 'Backhoe Loader Segment' and 'Vibratory Soil Compactor Segment' respectively. The Informant further averred that imposition of the condition that OP will not make further supplies because the Informant had auctioned the equipments in other geographies amounts to entering into an agreement of nature prohibited under Section 3(3) of the Act.
6. On the other hand, OP *inter alia*, submitted that: (a) it is not dominant in any of the relevant markets; (b) the Commission had already held JCB as the dominant player in the market for manufacturing and sale of Backhoe Loaders in India (in Case No. 105/2013); (c) as per the reports of Off-Highway Research (Issue No. 88 and 89 published in April 2015 and May 2015 respectively), OP had a market share of only about 20% in the Soil Compactors business; (d) the Informant had suppressed the fact that OP had issued a cheque towards settlement of the amount due to the Informant and the same was also encashed by the Informant on 5th June 2015; and (e) agreements between competitors or persons engaged in similar business alone could be subject to Section 3(3) of the Act and no such agreement exists in the present case. OP also argued that the Informant failed to demonstrate any conduct of OP that had or was likely to have an adverse effect on any of the relevant markets in India and therefore, no case of contravention is made out against it.



7. In response to the submission of OP, the Informant sought leave of the Commission to file additional information to substantiate its claim regarding the dominant position of OP. The Commission allowed both the parties to file their written submission latest by 11th February 2016.
8. Subsequently, OP filed its submission on 11th February 2016 summarising its arguments/submissions made during the preliminary conference. The Informant *vide* its submission dated 17th February 2016 requested the Commission that the information be taken as withdrawn with liberty to file detailed comprehensive information in future. The Commission declined the request of the Informant in its Ordinary Meeting held on 1st March 2016 as neither any of the provisions of the Act, nor of the Regulations made thereunder provide for withdrawal of information filed before the Commission. However, the Commission further noted that there is no prohibition on the Informant to file fresh information.
9. In the succeeding paragraphs, the Commission proceeds to examine the merits of the case on the basis of the materials available on record and the submissions/arguments advanced by the parties during the preliminary conference.
10. For the purpose of examining the allegations of the Informant under the provisions of Section 4 of the Act, at the first instance, it is necessary to determine the relevant market. The purpose of delineating the relevant market is to ascertain whether OP enjoys a position of strength required to operate independently of the market forces in the relevant market. Only when such a position is enjoyed by OP, it would be required to examine whether the impugned conduct amounts to abuse or not.



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11. The Informant has alluded that the relevant market in the present matter is the market for heavy, earth-moving and construction equipment. It is observed that the focal products in the instant case *i.e.* (a) Backhoe Loaders; and (b) Vibratory Soil Compactors, fall under the construction equipment industry. The Commission observes that there are different types of construction equipments such as earthmoving equipments, cranes, concrete equipments, road building equipments, *etc.* which can be distinguished from each other in terms of their attributes and utility. Therefore, all these products cannot be considered as part of one relevant product market. Accordingly, the Commission considers it appropriate to delineate the relevant product market in the backdrop of the characteristics and utility of the focal products in the instant case.

12. The Commission had the occasion to discuss about the construction equipment industry and the market for backhoe loaders in its order dated 11th March 2014 passed under Section 26(1) of the Act in Case No. 105/2013 (*In Re: Bull Machines Pvt Ltd. and JCB India Ltd. & Anr.*) wherein it was *inter-alia* observed that “*The sector of machines for construction appears to be divided into two sub-sectors: (a) heavy construction equipment, which includes the machines used for large construction and reclamation, as well as major infrastructure projects; and (b) light construction equipment, covering machines with similar characteristics to heavy construction equipment, but with lesser power, weight and ability to work, and generally intended for maintenance work. Such machines are generally used in urban areas or in restricted environments. The light construction equipments include five product groups: skid steer loaders, mini and midi excavators, small wheel loaders, backhoe loaders and telescopic handlers... ..The Commission observes that as no two equipments (construction and*



earthmoving)/products can perform exactly the same function, they cannot be substituted by the users/consumers for their end use. Thus, each equipment/product forms a distinct product market. Accordingly, the market for backhoe loader is a distinct product market which may be taken as the relevant product market in this case.”

13. It is observed that Backhoe Loader which is one of the products in the present case, is a mechanical excavator consisting of a tractor, front shovel/bucket and small backhoe in the rear. A Backhoe can perform the work of a bulldozer, front end loader and excavator. It can excavate, remove, level and displace stones and other heavy materials over a short distance. The Backhoe Loader also has the advantage of being driven directly to different sites/work locations as opposed to other specialised machines which need to be towed to the site and may require external power sources. The characteristics and utility of Backhoe Loader appear to be different from other construction equipments and therefore, the market for manufacture and supply of Backhoe Loaders would constitute a distinct relevant product market in itself.

14. As regards the Vibratory Soil Compactors, the Commission notes that, compaction is a process of increasing the density of soil by mechanical means by packing soil particles closer together with reduction of air voids to obtain a homogeneous soil mass having improved soil properties. Compactors are roller equipments deployed to compact soil, gravel, concrete, or asphalt that are used in construction of roads and foundations. The said machines/rollers can also be used at landfills and in agriculture. Although different equipments are available for compaction of soil, the type and moisture condition of the soil are the key considerations in deciding the type of equipment to be deployed. Some important compacting equipments are (a) light compacting



equipments (Rammers/Plate compactors); (ii) Smooth wheel rollers; (iii) Sheepsfoot rollers; (iv) Pneumatic tyred rollers; (v) Vibratory rollers; and (vi) Grid rollers. Out of these rollers, Vibratory Compactors are more often used in the construction of roads.

15. Further, Vibratory Soil Compactors are significantly different from other types of conventional rollers. Vibratory Soil Compactors are similar to smooth wheel rollers with the modification that the drum or drums are made to vibrate by employing rotating or reciprocating mass. The Commission notes that Vibratory Rollers are recommended in recent times for earthwork as they are efficient in many aspects like (i) achieving higher compaction level; (ii) soil compaction can be done upto greater depths; and (iii) outputs are larger than that of conventional rollers. Although, Vibratory Soil Compactors are relatively expensive than conventional rollers, they are economical in long run as they achieve higher outputs with improved performance. Considering the unique features of Vibratory Soil Compactors, the Commission is of the view that these machines are not substitutable with other types of compactors and thus, constitute a distinct relevant product market.
16. As regards the relevant geographic market, in respect of both the product markets, it appears that the conditions of competition are homogeneous across India. Further, no material has been brought on record by the parties to suggest any heterogeneity in the conditions of competition in different regions within India. Thus, the Commission opines that the relevant geographic market with regard to both the relevant product markets is the whole of India.
17. In view of the foregoing, the Commission is of the view that the instant case concerns the following two relevant markets: (a) *market for*



manufacture and sale of Backhoe Loaders in India; and (b) market for manufacture and sale of Vibratory Soil Compactors in India.

18. The Informant had portrayed OP as a top-tier player in the Backhoe Loaders Segment. However, it could not provide any material which could establish dominance of OP in this relevant market. It is relevant to note that the Commission, in its order dated 11th March 2014 in Case No. 105/2013, had *prima facie* found JCB to be in a dominant position in the relevant market for manufacturing and sale of Backhoe Loaders in India. The relevant extracts of the said order are as follows: “12...*the Informant has stated that JCB is super dominant. In support of its claim the Informant stated that JCB’s market share in the relevant market is 75% and is the world leader. It has vast financial resources and in a position to curtail or curb competition in the relevant market and can operate independent of competitive forces. It is pointed out that JCB is a highly vertically integrated manufacturer and can make their own transmission systems, hydraulic cylinders and cabs in the plant. Further, JCB has a network of 54 dedicated dealers and over 450 sale and service outlets throughout the country, more than 3000 trained service engineers more than and 56 mobile service vans. Also, JCB India recorded 30% growth in sales in fiscal year 2011 compared to the year 2010. During 2011, the market size of backhoe loaders was 33,500 units in India, wherein JCB alone sold 24,500 units. It is submitted that being the market leader, the consumers are dependent on JCB and because of its global brand name. It is also stated that sunk costs contribute to high entry barriers in the relevant market because a new entrant would be required to set up complex and costly infrastructure and a distribution/dealership network and other systems to run the business and to incur expenditure on research and development, quality improvements and advertising to compete effectively in the relevant*



market.... 13. From the afore noted details about JCB on market share, size and resources, dependence of consumer on it, etc., prima facie, it appears that JCB is a dominant entity in the relevant market for manufacture and sale of backhoe loaders in India.”

19. During the preliminary conference, OP relied upon the aforesaid decision and submitted that JCB has been held to be the market leader in the Backhoe Loaders business in India. It had, therefore, asserted that OP cannot be regarded as a dominant player in the said market. During the preliminary conference, the Informant also admitted JCB as the market leader in Backhoe Loaders business in India. Given these facts and circumstances, the Commission is of the view that OP cannot be regarded as a dominant enterprise in the relevant market for manufacture and sale of Backhoe Loaders in India.

20. As regards the market for manufacture and sale of Vibratory Soil Compactors in India, the Commission observes that during the preliminary conference, OP had, *inter alia*, submitted that during 2014 it had a market share of only 20% and Hamm was the market leader with around 22% market share. In this regard, OP had submitted the research reports prepared by Off-Highway Research (Issue No. 88 and 89 published in April 2015 and May 2015 respectively). From these reports, the Commission observes the presence of other players such as JCB, Volvo, Escorts, Dynapac, Greaves, etc. in the soil compactors business in India, indicating availability of choice to consumers. When confronted with these facts, the Informant took the leave of the Commission to furnish additional information to substantiate its claim regarding the dominance of OP. This request was acceded to by the Commission with a direction to furnish the same latest by 11th February 2016. However, the Informant could not furnish any material regarding



the dominance of OP. Given the materials available on record, OP cannot be regarded as dominant in the relevant market for manufacture and sale of Vibratory Soil Compactors in India as well.

21. In view of the foregoing, it emerges that OP does not enjoy dominant position either in the market for manufacture and sale of Backhoe Loaders in India or in the market for manufacture and sale of Vibratory Soil Compactors in India.
22. In the absence of OP being dominant in any of the relevant markets as delineated *supra*, the Commission does not see a case of contravention under Section 4 of the Act. The Commission further notes that the case does not involve any agreement between persons engaged in similar/identical business. Thus, no case under Section 3 of the Act is also discernible from the facts presented in the information. Though contravention of Section 3(4) of the Act has also been alleged in the information, the Informant did not make any submission/argument during the preliminary conference in that regard. On the other hand, OP had submitted that no case of contravention is made out under Section 3(4) of the Act in view of the insignificant/limited presence of OP in the relevant market for manufacture and sale of Backhoe Loaders in India; and the presence of various other players in the relevant market for manufacture and sale of Vibratory Soil Compactors in India. OP had also pointed out that the Informant had failed to demonstrate any adverse effect on competition in any of the relevant markets in India. Taking into consideration the submissions of the parties and the materials available on record, the Commission is of the view that no case under Section 3(4) of the Act is also made out against OP.



23. In light of the above analysis, the matter is ordered to be closed in terms of the provisions of Section 26(2) of the Act.
24. The Secretary is directed to inform all concerned accordingly.

Sd/-

(Devender Kumar Sikri)
Chairperson

Sd/-

(S. L. Bunker)
Member

Sd/-

(Sudhir Mital)
Member

Sd/-

(Augustine Peter)
Member

Sd/-

(U. C. Nahta)
Member

Sd/-

(Dr. M. S. Sahoo)
Member

Sd/-

(Justice G. P. Mittal)
Member

New Delhi
Date: 03/05/2016