

CRITICAL ANALYSIS OF COMPETITION LAW IN INDIA

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Abstract

Monopolies and restrictive trade practice (MRTP) act, 1969 was the act used before Competition Act 2002, to deal with the market monopolies, restrictive trade practices, and also unfair trade practice, but after the loopholes have been find in the MRTP act, the Competition Act 2002 has been bring to in the books. In this paper I will critically analyze the competition law in India, also how the new Act is better than the old one and what was the reasons, key difference between the MRTP Act and Competition Act 2002. Also how the Competition Law is being evolving in India after the MRTP Act and loopholes in the present law as well.

Keywords: *Critical Analysis, Competition Law*

INTRODUCTION

India is a very big country especially by its population, and in present India is having highest number of youth population at present, youth is the main reason today for rising startups, rising small scale industries, small business like opening food tucks, pan parlor etc. which eventually give rise to competition in India, so earlier for controlling monopolies, unfair trade practices the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969 was there, but because of some limitations the Competition Act, 2002 replaced the MRTP Act, 1969 the main focused was shifted from cutting monopolies to promote competition in India. The earlier Act was enacted before the liberalization period- the period from 1980-1990 these ten years have been very crucial for the Indian economy not just because of the introduction of the new economic policies but also of the opening of the Indian market to the world which gives a immense rise to the export and import, in 1991 the new economic policies introduced the liberalization, privatization & globalization which cut down the role of government in business and also in various economic sectors, so this in short shifted the focus of the government from cutting down of monopolies to giving a rise in the completion in Indian market for that a very high level committee was been appointed in 1999 to suggest a new competition law in India with focusing on international developments which was named The Competition Act,2002 also the Competition Commission was introduced, in the Act it is stated that – it is the duty of the commission to eliminate practices which is having an adverse effect on the competition, also to promote the competition ensure the freedom of doing trade in the market, the new law is giving many opportunities to the market players, The new competition enactment of India is a civil enactmentnothing's more, orders the Commission to comply with the standards of natural justice. Cartels and bid rigging are the most noxious anti-competition of focused practices, yet the law stipulates a rebuttable presumption routine in support of the respondents. Hence, respondents in cartel or then again offered gear claims are commanded to be managed chances of being heard by the DG and the CCI. These rights are given to protect the weak market players which are been thrashed by the monopolies of the old players, because the market is rising day by day and also the cartels are getting bigger and bigger so the players are deciding the price, areas etc. to survive and earn. Competition Act is a improvement over the MRTP Act in terms of increasing the competition in the market to give Indian economy a boom. In short, being punitive in nature rather than reformatory.

HISTORY OF COMPETITION LAW IN INDIA

Sovereigns, rulers and governments in various nations strove for quite a long time to manage competition markets by balancing out costs and supporting nearby preparations utilizing taxes which bit by bit prompts the cutting edge competition or antitrust laws around the globe. Laws identified with competition markets are found in more than two centuries of history. Basically the competition act, 2002 is a law so as to addresses the Anti-Trust issues. US Act, the Sherman Act, 1890 which prescribe the agreements in restraint of trade, appear to be the sooner Anti-Trust Statue in the globe. In India, the contract act 1872 was enact, and it is earlier than the Sherman Act. The contract Act contains a proviso declaring agreements, I ret, time of trade as void. The look restraint of trade has been explain by the- US Supreme Court in Business “Electronic Corporation V Sharp Electronics Corporation” (1988), mean not just a particular list of agreements but also a particular economic result that might be produced by special sorts of agreements in reliable time and conditions. During the liberalization period 80’s 90’s India has become a part of two agreements of the World Trade Organizations (WTO) which was – General Agreements on Trade and Tariff (GATT) and also- Trade Related Aspects of Intellectual Property Rights (TRIPS), which in a way gives a green signal to the Multinational Companies (MNC) to enter into the Indian market, so the MRTP Act was lacking on some of the points, the feel of the new laws was the need of the hour, then the central government hired a high level committee to make new policies for competition Law in India.

Authority of the creation of competition commission came to be challenge ahead of the supreme court of India in the case of “BrahmDutt V. Union of India” in 2005. In the while of the hearing the central government informs Supreme Court that they are making the amendments to the act. Thereafter the act has been amended considerably by the competition (Amendment) Act, 2007 under the amendment act the competition commission was to function only as a market regulator and an expert body performing adversary and regulatory functions. In the year 2009 there was yet another amendment.

The act as it stands today seeks to cover three anti-trust issues namely:-

- Anti-competitive agreement by an enterprise or association of enterprises or person or association of persons,
- Abuse of dominant position, and
- Combinations or mergers.

The anti-competitive agreements are dealt with by section 3. Abuse of dominant position is dealt by section 4 and combination by way of acquisition or merger or amalgamation is dealt by section 5 and section 6 of the act.

SALIENT FEATURES

Anti-Agreements-Enterprises, persons or associations of enterprises or persons, including cartels, shall not enter into agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or are likely to cause an “appreciable adverse impact” on competition in India. Such agreements would consequently be considered void. Agreement which would be considered to have an appreciable adverse impact would be those agreements which-

- Directly or indirectly determine sale or purchase prices,

- Limit or control production, supply, markets, technical development, investment or provision of services,
- Share the market or source of production or provision of services by allocation of inter alia geographical area of market, nature of goods or number of customers or any other similar way,
- Directly or indirectly result in bid rigging or collusive bidding.

Abuse of Dominance- There shall be an abuse of dominant position if an enterprise imposes directly or indirectly unfair or discriminatory conditions in purchase or sale of goods or services or restricts productions or technical development or create hindrance in entry of new operators to the prejudice of consumers. The provisions relating to abuse of dominant position require determination of dominance in the relevant market.

The Competition Act provides in section 4 for the prohibition of abuse of dominant position:

Section 4: Abuse of Dominant Position:

(1) No enterprise shall abuse its dominant position.

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise,—

(a) Directly or indirectly, imposes unfair or discriminatory— (i) condition in purchase or sale of goods or services; or

(ii) Price in purchase or sale (including predatory price) of goods or service; or

Explanation.—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services 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;

Types of Agreements-Competition law identify two types of agreements. Horizontal agreements which are among the enterprises that are or may compete within same business. Second is the vertical agreement which is among independent enterprises. Horizontal agreement is presumed to be illegal agreement but rule of reasons would be applicable for vertical agreements.

Combinations- The act is designed to regulate the operation and activities of combinations, a term which contemplates acquisition, mergers or amalgamations. Combination that exceeds the threshold limits specified in the act in terms of assets or turnover, which causes or is likely to cause adverse impact on competition within the relevant market in India, can be scrutinized by the commission.

COMPETITION COMMISSION OF INDIA

Competition commission of India is a body corporate and independent entity possessing a common seal with the power to enter into contracts and to sue in its name; it is to consist of a chairperson who is to be assisted by a minimum of two, and a maximum of six, other members. It is the duty of the commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interest of consumers and ensure freedom of trade in the markets of India. The commission is also required to give opinion on competition issues

on a reference received from a statutory authority established under any law and to undertake competition advocacy, create public awareness and impart training on competition issues.

Commission has the power to inquire into unfair agreements or abuse of dominant position or combinations taking place outside India having adverse effect on competition in India, if any of the circumstances exists:-

- An agreement has been executed outside India
- Any contracting party resides outside India
- Any enterprise abusing dominant position is outside India
- A combination has been established outside India
- A party to a combination is located abroad
- Any other matter or practice or action arising out of such agreement or dominant position or combination is outside India.

To deal with cross border issues commission is empowered to enter in to any memorandum of undertaking or arrangement with any foreign agency of any foreign country with the prior approval of central government.

REVIEW OF ORDER OF COMMISSION

Any person aggrieved by an order of the commission can apply to the commission for review of its order within thirty days from the date of the order. Commission may entertain a review application after the expiry of the thirty days, if it is satisfied that the applicant was prevented by the sufficient cause from preferring the application in time. No order shall be modified or set aside without giving an opportunity of being heard to the person in whose favour the order is given and the director general where he was a party to the proceedings.

APPEAL

Any person aggrieved by any decision or order of the commission may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the commission. No appeal shall lie against any decision or order of the commission made with the consent of the parties.

PENALTY

If any person fails to comply with the orders or directions of the commission shall be punishable with the fine which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore.

If any person does not comply with the orders or directions issued or fails to pay the fine imposed under the provisions of the act shall be punishable with imprisonment for a term which will extend to three years, or with fine which may extend to rupees 25 crores, or with both.

Section 44 provides that if any person, being a party to a combination makes a statement which is false in any material particular or knowing it to be false or omits to state any material particular

knowing it to be material, such person shall be liable to a penalty which shall not be less than 50 lakhs but which may extend to 1 crore

CASES:-

Excel Crop Care Limited V. Competition Commission of India and Others

The enforcement of any new law can throw many issues. These become especially prominent in the case of law that is brought into force in phases- i.e. different provisions are made operational at different times. The competition act 2002 (competition Act) is one such legislation. Though the statute was passed in 2003, its phase-wise notification extended up till 2011. More importantly, the sections/provisions relating to anti-competitive agreements were notified and came into force from 20 may 2009. The Supreme Court of India has examined the same issue in the above case.

Veerappa Pillai V. Raman and Raman Limited

In this case the matter was related to the grant of a stage carriage permit. The writ petitioner therein was aggrieved by the proceedings of the regional transport authority. The High Court, after quashing the proceedings, directed the authority to grant to the petitioner, the permits. The Supreme Court observed that issue or refusal of permits is solely within the discretion of the transport authorities and it is not a matter of right and held that the direction given by the High Court to grant permits to the petitioner was clearly in excess of its power and jurisdiction.

State of Uttar Pradesh V. Raja Ram Jaiswal

In this case the High Court issued a mandamus to the statutory licencing authority to grant the license. The Supreme Court observed that where a statute confers a power and duty u [on a statutory authority to perform any function, the Court cannot, in exercise of writ jurisdiction, supplant the licensing authority and take upon itself its functions before the power is exercised or the function is performed. In that case the prayer was for a writ of certiorari. The Supreme Court also observed that if the order of the remand was erroneous, the High Court could have quashed the order of remand, but the jurisdiction of High Court came to an end with that and it could not proceed to take over the functions of the licensing authority by issuing a writ of mandamus.

Google Inc. and Others V. Competition Commission of India

In this case the Delhi High Court gives boost to the powers of the competition commission of India and held that Competition Commission of India has inherent powers to review or recall its order.

Vinod Kumar V. State of Haryana

In this case Supreme Court held that if a wrong and illegal administrative act can in the exercise of powers of judicial review be set aside by the Courts, the same mischief can be undone by the administrative authority by reviewing such an order if found to be ultra virus and that it is open to the administrative authority to take corrective measures by annulling the palpably illegal order.

LOOPHOLES IN PRESENT COMPETITION ACT

A loophole in the country's competition law can make a majority of the competition watchdog's orders null and void because it cannot close a case if the Director-General of investigation points out a contravention. The current Competition Act, 2002 does not have any provision for the

Competition Commission of India (CCINSE 0.00 %) to close a case if the Director-General's report recognizes a contravention of the Act. Though surprisingly, a majority of cases have been closed by the Commission despite DG stating otherwise. "Section 26 of the Act mentions various situations but does not provide for the case where the commission might disagree with the DG after it finds a contravention. It's as if such a situation wasn't envisaged at the time of drafting the current act," said a CCI official on the conditions of anonymity. On receiving a case, the Commission directs the Director-General to initiate an investigation into the allegations on which the DG needs to submit a report within a specified period of time. Based on the report, the Commission starts hearing the affected parties. Only after completing its own proceedings does the CCI pass a final order as it deems fit. However, nowhere does the Act facilitate the CCI to close a case if the DG has found a contravention in its report. The absence of such a crucial provision leads to a situation where the affected party is left with no power to appeal with the higher authorities such as the Competition Appellate Tribunal (COMPAT) or the Supreme Court once the case is struck down by the commission. "The whole situation is against *audi alteram partem* (the right to be heard)," the official added. As per official sources in the commission, out of the 125 cases sent to the director general for investigation by the CCI after it found *prima facie* contraventions, the DG has found violations against competition act on about 120 cases. "80 cases till date have been closed by the CCI post a contravention report by the DG despite the Act not allowing it," another CCI official clarified.

CONCLUSION

In short, the two acts are different in a number of contexts. MRTP Act has a number of loopholes and the Competition Act, covers all the areas which the MRTP Act lags. The MRTP Commission plays only advisory role. On the other side, Commission has a number of powers which promotes *suo moto* and levies punishment to those firms which affects the market in a negative way. A perusal of MRTP Act shows that there is neither definition nor even a mention of certain offending trade practices such as abuse of dominance, cartels, collusions and price fixing, bid rigging and predatory pricing. The MRTP Act became obsolete in certain areas in the light of international economic developments relating to competition laws. The competition act while replacing the MRTP Act shifts our focus from curbing monopolies to promoting competition. But the Indian competition Act should be strong enough and also try to match up with the international standards. For the Indian law to be effective, and for its contribution towards holistic development, such deliberations are essential. We hope that this colloquium would lead to such constructive dialogue!

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