

Critical Analysis of Competition Law in India

By- Mohammad Asad Mahmood

INTRODUCTION

Competition law has grown enormously in recent years, especially since the 1990s. The growth has been tremendous in terms of geographical regions that have adopted competition law, as well as in the increasing range of economic activities now subject to competition law. With an increasing number of countries that have undertaken economic reforms and embraced the market economy, many of them have also introduced competition law to promote competition culture and process and process in their markets. Thus there has been increasing reliance on competition law and policy to address to market failures and distortion in the form of anti- competitive practices, abuse of dominance, etc., The early implantation of a competition law is, as Joseph Stieglitz, has stressed, not a luxury but a real necessity.

In order to appreciate the immense importance and significance of competition law to the national economy, tracing the origin mots of such law are important as such process enables us in comprehending about the identities, relevancy and objectives apart from the factors that influence decisions. The original concept of competition, dating from the 18th century, and Adam Smith's Wealth of Nations (1776) merely meant the absence of legal restraint on trade. Modern economic theory, however, which stems from late 19th century, and led to the first anti- trust legislation, viz, the Sherman act in the USA in 1890 looking to the development in America many countries gained experience and today almost 90% countries across the globe have their own competition law.

HISTORY

In India the competition act 2002, was enacted to repeal the MRTP Act. Fundamentally the competition act, 2002 is a law that address Anti- Trust issues. The US Act, the Sherman Act, 1890 which prescribes agreements in restraint of trade, appears to be the earliest Anti- Trust Statue in the World. In India also the contract act was enacted which is earlier than the Sherman Act. The contract Act contains a provision declaring agreements I ret stint of trade as void. The expression restraint of trade was explained by the US Supreme Court in Business Electronic Corporation V Sharp Electronics Corporation (1988) to mean not merely

a particular list of agreements but also a particular economic consequence that may be produced by different sorts of agreements in varying time and circumstances.

Even before the advent of Glasnost and globalization which started in the early 1990's India had enacted an Anti- Trust act that was known as monopolies and restrictive trade practices Act, 1969. The preamble of the said act advocated a socialistic philosophy by declaring that the act was intend to ensure that the operation of the economic system did not result in the concentration of economic power to the common detriment. The act was intended to control monopolies and to provide for the prohibition of monopolistic and Restrictive Trade Practices.

The said MRTP Act was found to be very ineffective due to variety of reasons, one of which was the frequent shift in the industrial policy of the government. Chapter 3rd of the said act conferred power upon the central government to regulate the expansion of and the establishment of new undertaking by any undertaking falling under chapter 3rd of the Act. After the new industrial policy was introduced in 1991, the government removed some important regulatory provisions in the chapter 3rd of the MRTP Act. In other words, the pre-entry restriction on the investment by the corporate sector was removed.

With the process of liberalization, India became a party to two important agreements of the world trade organization namely General Agreement on Tariffs and Trade (GATT) and Trade related Aspects of intellectual property Rights (TRIPS). As a result many multinational companies could able to enter in the Indian Market. Therefore, realizing that there was no tooth for the MRTP Commission under the MRTP Act and that a new law was the need of the hour, the central government constituted a high level committee of competition policy and law. The committee undertook an exhaustive study of the government policies, their effect on the industrial structure in India, the deficiencies of the Indian industries to compete with multinational and then submitted its report. The major recommendations made by the committee were:-

- To repeal the MRTP Act and to enact a competition act for the regulation of Anti-Competitive agreements and to prevent the abuse of dominance and combinations including mergers.
- To eliminate reservation of products in a phased manner for the small scale industries and the handloom sector.

- To divest the shares and assets of the government in state monopolies and private them, and
- To bring all industries in the private as well as public sector within the proposed legislation.

Government on the basis of the recommendations of the committee passed the competition Act 2002. The competition Act received the assent of the president on 13-01-2003. The central government also notified rules for the selection of chairperson and other members of the competition commission within a few months.

Validity of the formation of competition commission came to be challenged before the supreme court of India in Brahm Dutt V. Union of India (2005). In the course of hearing the central government informed the Supreme Court that they intended to make the amendments to the act. Thereafter the act was amended substantially 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 adversosy 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 FEATURS

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.

TYPES OF AGREEMENT

Competition law identifies 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.

ABUSE OF DOMINANT POSITION

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.

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.

COPETITION 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 practises 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.

G. 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 vires and that it is open to the administrative authority to take corrective measures by annulling the palpably illegal order.

CONCLUSION

A perusal of MRTP Act shows that there is neither definition nor even a mention of certain offending trade practises 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.