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The Development of Competition Law in India: Post Independence to Competition Act, 2002

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Introduction

During the nineteenth century, both law and economics began to develop theories of competition. The Competition was not a theory about price/cost relationships, as it came to be in neoclassical economics, nor was it a theory about the "struggle of survival", as it was for some social Darwinists. Rather, a competition was a belief about the role of individual self-determination in directing the allocation of resources; it was a theory about the limits of state power to give privilege to one person or class at the expense of others.

The Competition was defined by the court as a process that required numerous participants and decentralization.[2] The Competition represents the reverse position of monopoly. It implies a large number of producers or suppliers in the market acting independently generally, here one eliminates the other or reduces much influence of the other depending on the extent and degree of impact on the market. On the other hand, monopoly is a type of market structure characterized by a single seller, selling a unique product in the market. Here the seller does not face any competition, as he is the sole seller of goods with no close substitute.

The degree or extent of competition in a market depends upon many factors such as the structure of the market, behaviour of the firms in it in the case of sellers' market and attitude of the customers in the buyer market. The structure of the market may be perfect one and workable or effective competition. Perfect competition doesn't exist in reality. It may exist only in case when there is the existence of numerous sellers and buyers acting without collusion in between them, having homogenous products, perfect communication about selling and buying prices and perfect mobility by the entry of new sellers. Perfect competition means no buyer or seller should be in a position to influence the market individually and everyone must have equal access to the market.

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[2] United States v. Philadelphia National Bank, 374 U.S. 321, 369 (1962)

Competition is the engine of free enterprise and the competition laws have been described as Magna Carta of free enterprise. They are important for the preservation of economic freedom and the free enterprise system.[3] The competition law seeks to maintain competition in the market by regulating anti-competitive conduct of business-men and enterprises. The law forces the market players to search for a better combination for providing greater profits through greater efficiency. The shuffling makes the output maximized because there is no further possibility of rearrangement of resources. This leads to the prosperous society because it permits consumers to determine their actions and by which they obtain the goods at the cheapest prices. The absence of competition may result in a monopoly in the market affecting adversely interests of both consumer and industry.

Legislative Measures in India

India got independence in 1947, after the independence the two major issues in front of the government were industrial and agricultural development in the nation for attaining self-reliance and to safeguard the social and economic justice with equal distribution of material resources to ensure that there is no concentration of wealth and means of production in the hands of few peoples or the common business houses or families of the country. The article 38 of the Constitution of India imposes a duty on the state to secure a social order for the promotion of the welfare of the people, and article 39 which makes a duty of the state to distribute the resources to sub serve the common good, etc. Since independence government has adopted many measures in this direction.

During the 1960's the government of India appointed about half a dozen committees and commissions to study the impact on the industrial sector of the nation by the various measures adopted by them.

Enactment of Monopolies and Restrictive Trade Practices Act

A Monopolies Inquiry Commission (MIC) was formed by the government of India in April 1964. It was formed under the chairmanship of Justice K.C Dasgupta a retired Supreme Court judge. The commission was formed to enquire into the extent and effect of concentration of economic power and prevalence of monopolistic and restrictive trade practices and to suggest the necessary legislative measures to protect the public interest. The committee founded large scale prevalence of shutting out of competitors to prevent the new

[3] United States v. Topco Associates Inc., 405 U.S. 596, 610 (1972)

entrepreneurs from entering into the market. Another practice was the charging of unfair prices in respect of certain goods of common use including drugs. The commission submitted the report in October 1965 in which it submitted that there is a high concentration of economic power in over 85 percent of industrial items in India.

The committee concluded that "*When a large number of concerns engaged in the production or distribution of different commodities are in the controlling hands of one individual or family or group of persons…. Concentration of economic power will also be clearly considered to exist*".

They submitted that dominant positions allowed firms to manipulate prices and output. They defined the monopoly power as the ability to dictate price and control the market.

Thereafter in 1966, the planning commission of India appointed R.K Hazari Committee to review the operation of the existent industrial licensing system under industries (Development and Regulation) Act 1951. The report concluded that the imperfect working of the licensing system had resulted in disproportionate growth of some of the bid business houses in India. After a heated parliamentary debate over this report, the government appointed the Industrial Licensing Policy Inquiry Committee (ILPIC) under the chairmanship of Mr. Subimal Dutt in July 1967. The committee was formed to follow up the reports of the MIC and Hazari Committee.

The committee submitted the report two years later where they concluded that the industrial licensing was a negative instrument and it could play an only limited role in industrial development. They observed that due to license raj a very strong nexus has developed between the industrial houses, politicians, and bureaucrats and there was a need to harmonize the social interest with private interest. Therefore licensing was unable to check the concentration and suggested the Monopolies and Restrictive Trade Practices (MRTP) Bill for setting up an effective legislative regime.

Then in December 1969, after much debate over the bill, the MRTP Act was enacted and came into force in June 1970 and MRTP Commission was set up in August of the same year. The MRTP act contained detailed provisions to control anti-competitive trade practices which were divided into two categories: Monopolistic Trade Practices (MTP) and Restrictive Trade Practices (RTP). It owes its inspiration from the directive principles that guide the state in forming policies and include the concept that the economic system should function with the aim that it does not lead to the concentration of wealth in the hands of few. Further,

the policies formed must clearly favour the serving of the common good of society.[4] The provisions of RTPs and Unfair Trade practices were based on UK legislations. The anti-trust legislations of USA and also the Australian and Canadian legislation was used as a guide in framing the provisions relating to monopolistic, restrictive and unfair trade practices.[5]

The essence of monopoly is to dictate the price and control the market without being materially influenced by the competing concerns and it is also the major objective of any anti-monopoly legislation, which is to control the abuse of market power by the persons controlling the dominant position individually. It is very rightly said that power corrupts and absolute power corrupts absolutely. The provisions of these practices were clearly aimed to remove those practices which had an impact on competition.

Monopolistic Trade Practices (MTPs)

MTPs are defined under Section- 2(i) of MRTP act. A close look at the definition of MTPs says that it is any unreasonable act of a producer in order to affect the competition and making himself dominant and to dictate or control the market.

The MRTP Commission could initiate an inquiry into MTP suo-moto under section 10(b) or 37(4) of the act or in reference made to it by the central government under other provisions of the act. The role of the commission was however just to advise as the power to order in such MTP was in the hands of the central government. But the central government during the entire session of MRTP Commission just made three orders of inquiry in MTP where not a single one reached to finality.

Restrictive Trade Practices (RTPs)

The RTPs was defined under section- 2(o) of the MRTP Act, which defines as those practices which restrict the competition by obstructing the flow of capital, manipulating the prices or conditions of delivery or any other unreasonable act.

It is the settled principle that while deciding the anti-competitive nature of a trade practice the rule of reason must be applied otherwise every restrictive clause will be held as RTP. The rule of reason says that the effect of the provision is found on the facts of the case, the

[4] Indian Constitution, Ar.38, Ar.39

[5] 1 S.M Dugar, Commentary On The MRTP Law, Competition Law And Consumer Protection Law (Law Practice and Procedure) 05 (Wadhwa and Company, 4th ed. 2006)

market, and existing competition, etc. The rules tell about the legality that is whether the restraint imposed is merely regulating or promoting the competition or whether it is suppressing or destroying the competition.[6]

Sachar committee

With the passage of time, it was noticed that the MRTP act's objectives could not be achieved up to the desired extent. The government appointed the High-Powered Expert (Sachar) Committee to recommend the required changes. The committee looked into the practical difficulties of the operation of law for the 8 years of its existence and found that the role assigned to the MRTP Commission was limited and mostly advisory. The committee felt that apart from making changes in the law, specifically for the consumer protection against the UTPs, it was imperative to make MRTPC more effective and independent. The government undertakings were recommended to be the part of MRTPC except for expansions, setting up of new undertakings or mergers, since government and parliamentary control were deemed as the efficient to guard the interest of consumers. The committee's report recommended to withdrawal the exemption given to public enterprises and to allow, to check monopolistic, restrictive and unfair trade practices, to widen the scope of MRTP by including unfair trade practices and to enhance the power given to MRTP Commission.

MRTP Act to Competition Act

The need for a new law has its origin in Finance Minister's budget speech of February 1999, where the then minister Yashwant Sinha mentioned that "We need to shift our focus from curbing monopolies to promoting competition."

Raghavan Committee

In July 1994, the central government completely reversed its industrial policy to liberate the industry from licensing and other regulatory laws. After the announcement of the new industrial policy, the government also adopted many drastic measures, like the announced to scrap the MRTP Act as it was seen as the biggest obstacle for the industrial development of the country. With a view to meet the challenges and avail the opportunities offered by the globalization, the Raghavan Committee under the chairmanship of Shri SVS Raghavan was set up in 1999 to assess the need to evolve India's competitive system. The committee

[6] National Society of Professional Engineers v. United States, 435 U.S. 679 (1978)

highlighted that certain provisions of the act were creating hindrance in the private investment. They noticed that the term "competition" has been used minutely in the Act and the generic definition was provided under section-2(o) of the Act and the Act was lacking in the precise definitions of anti-competitive practices. The absence of the precise definition leads to different judicial interpretations which can also be contradictory to each other. Moreover, it was found that the existing laws were inadequate to deal with the WTO agreements and also the Act does not have merger control provisions since 1991. The committee advised to have new competition law. They focused that the new law must be for preventing anti-competitive practices that reduce welfare. According to them, the only legitimate goal is of the law must be the maximization of economic welfare. The committee suggested for a specialized agency to deal with the cases related to the competition law in spite of the regular courts.

Owing to the above and many more flaws, the MRTP Act was repealed and replaced by the Competition Act of 2002; the Act was further amended by Amendment Act of 2007 with the effect from September 1, 2009.

Competition Act, 2002

The Competition Act of 2002 was enacted "*to help in keeping the view of the economic development of the country, for establishment of authorities to have a control over the practices which can affect the competition, for promoting the competition in the markets, to protect the interest of consumers and to facilitate the free trade between the participants in the markets*". The Act seeks to establish Competition Commission of India (CCI) as the regulatory body with wide powers. The orders passed by the CCI are appealable before the appellate tribunal which is the National Company Law Tribunal (NCLT) as per Section 171 of the Finance Act, 2017. And the decisions passed by the appellate authority are appealable to the Supreme Court of India.

The three major components of the Competition Act of 2002 are:

Anti-Competitive Agreements

These types of agreements are defined under section-3(1) of the act as those agreements with respect to production, distribution, supply, or storage which restrict the competition in the market. The section -3(2) declares that any anti-competitive agreement defined under

section-3(1) shall be void. However, it also specifies the steps which must be taken by CCI in order to declare any agreement anti-competitive.

Section- 3(4) talks about the other types of agreements like

(i) Tie-in agreements
(ii) Exclusive supply agreement
(iii) Exclusive Sale agreement
(iv) Refusal to deal
(v) Resale Price Maintenance

Abuse of Dominance

Section-4 of the Act prohibits every enterprise or group from abusing its dominant position. The term abuse is also defined as the power of the firm to affect the price. The acts of the enterprises like to make discriminatory conditions on the purchase or sale, restricting the production or services in the markets, etc. can be termed as abusive use of the dominant position.

Merger, Amalgamations and Acquisitions Control

The section-6 of the Act prohibits the merger of the enterprises if it can have an adverse effect on the competition in the market. And all the approvals regarding the merger and amalgamations are given by the board of directors of the company.

The CCI is vested with the power to give a cease or desist order, to impose a monetary penalty on the culprit, an order to modify the agreement or any other order that CCI deems fit.

Conclusion

The replacement of the MRTP Act of 1969 by the Competition Act of 2002 was a natural corollary to economic liberalization and opening up of trade to the competition. The planners of the Indian Society aimed for a socialist society where every individual will get equal opportunities in the matter of education, occupation, etc. equal distribution of wealth and no concentration of economic power in the hands of few individuals or families. The MRTP Act of 1969 was the first legislative step toward such goal, also the same step was never enforced seriously and it was passed with leaving a large number of loopholes in it. With the passage of time it was clearly visible that the act was not efficient, the restrictive

power given to the MRTP Commission was one of the main reasons of such a failure and the same was highlighted by many committees. Then the year 1991 come with the financial crisis which made the government to make new laws to cope-up with the arising situations. Then with the suggestion of the Raghavan Committee, the new legislation was adopted as Competition Act of 2002. The Act seeks to prohibit anti-competitive agreements, prohibit the use of dominant position and regulate combinations. It only deals with the agreements having the potential of causing an appreciable adverse effect on the competition and not with the normal one. The area of question is that with what purpose the NCLAT is placed in the place of the Competition Appellate Authority in order to see the appealed matters of the competition law, which do not have any past experience of dealing with the competition laws of the country except the company law.

The new law was formed with the general perception that it is the replica of the MRTP Act, which is not. The new act was enacted to protect competition process and for the establishment of the authority to prevent anti-competitive practices.

Only time will prove that up to which extent the formed laws were able to aid in checking practices that are harmful to the competitive process and to protect and ensure consumers welfare.