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An Introspective Study on the Anti-Competitive Agreements under the Competition Act, 2002

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ABSTRACT

Competition serves as the key element of success since it ensures efficiency, innovation, more creativity, more customer friendly pricing systems of the products, which give a boost to the nation's economy. Markets are vulnerable and susceptible to the wraths of the big powerful enterprises which by showcasing their dominant power in the market victimizes the customers and other entities in a market and only target at securing more and more benefits at the detriment of the consumers at every level. As a legal protective shield, The Competition Act was enacted which aims to churn out all Anticompetitive Practices through mainly preventing Anti-Competitive Agreements and Abuse of Dominance situations in the market. This project by analyzing the basics of development of the act gradually focuses on Section 3 and Section 4 with respect to the Anti-Competitive Agreements and the Abuse of Dominant powers and scrutinizes the various agreements, Arrangements and Conducts which pose a threat to the competitive spirit in the market. Such that the project can offer a clear view of the restrictive action as mentioned under the Competition Act so that an atmosphere of healthy competition can be encouraged in the markets to help the finance of a nation boom.

Keywords: Competition, Finance, Relevant Markets, Anti-Competitive Agreements, Dominant Positions, Power, Products and Goods, Trade and Commerce.

I. INTRODUCTION

Study of markets and the economy of different nations across the world witnessed the growing need of more establishments of Dynamic, Flexible and Competitive Private for boost of the economy and fostering a sustainable economic development in a nation. The presence of competition in the market is a blessing to Finance and Economy of a nation. Theories suggest that Competitive markets establish such an equilibrium between the products variety, quality and in the pricing that result in the effective efficient output. Competitions in the market offer greater variety of products, comparative analysis of the pricings such that the quality maintains but at a cheaper rate to appeal to the consumers. It offers more transparent

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market systems whereby increases more accountability and reduces abuse of the power by domination, disrupts monopolistic abusive control over the market.

Researches suggest that the markets are much vulnerable and are prone to profit maximizing tendencies of the manipulating and maneuvering manufacturers, producers and the sellers which ultimately aim at prospering at the detriment of the consumers. Many product and services in the market need special skill, knowledge or technology, which might be leading to the creation of dominant monopolists in the market which leaves the consumers helpless with no bargaining power. These consumers need protection for they are the key elements of the vicious financial cycles.

Aimed at the legal protection of these consumers and the customers against certain trade practices, the Competition Act, 2002 was enacted to ensure perfect competition in the markets for better outputs, homogeneity in products and the prices, ensure freedom of entry and exist in the market and eradicate Externalities hampering the trade.

The need for protection and securing positive competition in the market has transboundary application in all the nations. Thus, the most significant feature and areas of enforcement that are provided for in most competition laws are:

- (i) Anti-competitive agreements including Cartels
- (ii) Abuse of dominance, and
- (iii) Mergers which have potential for anti-competitive effect.

II. ANTI- COMPETITIVE AGREEMENTS UNDER THE COMPETITION ACT, 2002

(A) An Overview of the Competition Act, 2002:

Enacted in 2002, the Competition Act came into force on 13th January, 2003, as set out in its preamble states for the establishment of the Competition Commission of India aiming at preventing anti-competitive practices, promote sustainable competition in the market, secure the consumers, promote freedom of trade of other participants, abuse dominant positions and Mergers and Acquisitions such that these practices not cause Appreciable Adverse Effect on Competitions in India.

Section 3² of the Act enshrines that agreements in the nature of Horizontal or Vertical which can cause Adverse Effect on Competition are to be made void. Section 4³ deals with issues of

² The Competition Act, 2002, Act No. 12 of 2003, § 3, India Code (2003).

³ The Competition Act, 2002, Act No. 12 of 2003, § 4, India Code (2003).

abuse of dominant position. Further, section 5⁴ and 6⁵ explains aspects of combinations and also prescribe certain norms to regulate combinations.

(B) Difference of Competition Act from The Monopolies and Restrictive Trade Practices Act (MRTP Act)

Before the enactment of the Competition Act, MRTP Act was enacted as the first Competition Law enactment in 1969, The main aim was to, *provide for the control of monopolies, and ensure economic system that do not result in the concentration of power also prohibit Restrictive Trade Practices*. The differences between these acts are:

1. **Meaning**- MRTP Act ensures rules and regulations against unfair trade practices. Whereas, Competition Act, is implemented to promote and keep up competition in the economy and ensure freedom of business.
2. **Nature and penalty provisions**- MRTP Act is reformatory but Competition Act is punitive in nature.
3. **Objective**- MRTP Act controlled monopoly but Competition Act is to promote competition.

(C) Anti- Competitive Agreements:

Anti – Competitive Agreements are the agreements between different persons involved in the business transaction or in trading in the market the terms of which result in the undue benefit of one group over the loss suffered by the other group. The Act prohibits the arrangements or agreements that control and dominate trade and commerce, exercise of power to eliminate competitors to a substantial level from the markets. *Section 3 of the Anti- Competition Act prohibits any such agreement with respect to production, supply, distribution, storage, acquisition, control of goods, or provisions of services which are likely to cause Appreciable Adverse Effect on the Competition in India*⁶.

(D) Determination of Appreciable Adverse Effect on Competition

As provided in the Act, any agreement including Cartels, that Directly or Indirectly Determine the sell or purchase prices; limits production, supply or development of products, results in bid rigging are all considered to be having Appreciable Adverse Effect on the Competition in the Market.

Exception: *Proviso to Section 3 of the Act provides that the aforesaid criteria shall*

⁴ The Competition Act, 2002, Act No. 12 of 2003, § 5, India Code (2003).

⁵ The Competition Act, 2002, Act No. 12 of 2003, § 6, India Code (2003).

⁶ The Competition Act, 2002, Act No. 12 of 2003, § 3(1), India Code (2003).

not apply to joint ventures entered with the aim to increase efficiency in production, supply, distribution, acquisition and control of goods or services.

Any agreement in the contravention of the general prohibitions is declared to be void⁷. The Act also enumerates certain kinds of agreements. The agreements⁸ or arrangements based upon the decision of group of persons or associations may be formal or informal including Cartels⁹.

The Agreements as mentioned under Section 3 can be broadly categorized into:

1. Horizontal Agreements;
2. Vertical Agreements.

III. HORIZONTAL AGREEMENTS

Horizontal Agreements are arrangements between the enterprises at the same stage of production i.e between the entities or enterprises standing in the same position in regards of production, distribution, supply in the same market. For Example, agreements between manufacturers of same commodities for fixing a price and not allowing any other variation by any other trader regarding the price is such kind of an Anti-Competitive Agreement. Section 3(3)¹⁰ of the Act, provides that such agreements includes cartels, engaged in identical or similar trade of goods or provision of services, which-

Directly or indirectly determines purchase or sale prices¹¹;

1. Limits or controls production, supply¹²;
2. Shares the market or source of production;
3. Directly or indirectly results in bid rigging or collusive bidding.
4. Agreements in the form of Cartels (***Meaning: A cartel is a group of independent market participants who collude with each other in order to improve their profits and dominate the market.***) between the powerful and mainly the business firms with the sole aim of price fixation and limitation of markets of supply also destroy the free trading spirit in the markets¹³.

⁷ The Competition Act, 2002, Act No. 12 of 2003, § 3(2), India Code (2003).

⁸ The Competition Act, 2002, Act No. 12 of 2003, § 2 (b), India Code (2003).

⁹ The Competition Act, 2002, Act No. 12 of 2003, § 3(3), India Code (2003).

¹⁰ The Competition Act, 2002, Act No. 12 of 2003, § 3(3), India Code (2003).

¹¹ The Competition Act, 2002, Act No. 12 of 2003, § 3(3)(a), India Code (2003).

¹² The Competition Act, 2002, Act No. 12 of 2003, § 3(3)(b), India Code (2003).

¹³ 106 Rajkumar S. Adukia, 'An overview of provisions relating to Competition laws & Consumer Protection Laws in India' Retrieved from <http://www.caaa.in> on 29/04/2016.

Under the Act **horizontal agreements are placed in a special category and are subject to the adverse presumption of being anti-competitive.** This is also known as 'per se' rule. **This implies that if there exists a horizontal agreement under Section 3(3) of the Act, then it will be presumed that such an agreement is Anti-Competitive and has an Appreciable Adverse Effect on Competition.**

IV. VERTICAL AGREEMENTS

Another category of agreements that are prohibited by the Act are the Vertical Agreements between different entities in the market¹⁴. Vertical Agreements are the agreements made between entities or persons or enterprises at different levels of production in regards of Storage, Sell, Distribution, Production, Supply, Fixation of Prices etc., that has an adverse effect on the competition and free and fair trade practices in the market. ***Example: Agreement between the manufacturer and the wholesaler that of not allowing the sale of product of same kind and variety of any other company that would affect his business profits.***

Competition Act envisages various types of Vertical Agreements a detailed analysis are as follows:

1. **Tie- in Arrangement:** The agreement that requires the purchaser to purchase mandatorily other items and goods as a condition precedent of buying the items from the manufacturer. Such agreements are illegal since the manufacturers use their market power to dominate and increase their sales to earn more profits. Example: The manufacturer forces the wholesaler to buy the cooking oil products mandatorily if he wishes to buy sanitary products from them.

In the Case of **Sonam Sharma v. Apple and ors**¹⁵, the CCI held that, for the existence of a tying agreement there must be two products tied together, the seller must have sufficient market power and it must have substantial effect on the commerce.

2. **Exclusive Supply Agreement**¹⁶: Agreement restricting the purchaser from dealing in any other product or goods or services other than that of the seller or manufacturer. Example: ABC Company of Stationary makes the agreement that the purchaser can only sell his items and not of other companies even if it affects his economy.

¹⁴ THE COMPETITION ACT, 2002, ACT NO. 12 OF 2003, § 3(4), INDIA CODE (2003).

¹⁵ Sonam Sharma v. Apple and Ors., (Case No: 24/2011) (India).

¹⁶ THE COMPETITION ACT, 2002, ACT NO. 12 OF 2003, § 3(4)(b), INDIA CODE (2003).

However, arrangement between the buyers and sellers or manufacturers with regard to specifications, quality, size etc. are not illegal or anti-competitive.

3. Exclusive Distribution Agreement¹⁷: Agreement including the limitation, restriction, withholding of the output or supply or allocating specific areas or markets only, for the supply, disposal or sale of the goods by the purchaser.
4. Refusal To Deal¹⁸ : Agreements which by any method restrict the persons or class of persons to whom the ‘Goods are Sold or From Whom the Goods are Bought’ are also prohibited under the act for having anti-competitive nature.

Case Study: ***In the case of Shri Samsher Kataria v. Honda Seil Cars India Ltd. and Ors.***¹⁹, wherein the genuine parts of the automobiles were not made available to market but the OEMs i.e the Original Equipment suppliers and the dealers had mandatory clause for having original parts only, ***thereby the Competition Commission of India (CCL) determining the Appreciable Adverse Effect on the Competition declared such Agreements to be Anti-Competitive in nature and thus unenforceable and illegal.***

5. Resale Price Maintenance²⁰ : In such agreements the seller predetermines the resale price to be set by the purchaser while selling the goods. Thus it is the control of the supplier to maintain the minimum price of the goods that are to be resold by its consumer.

The concept was discussed in the famous case of ***Fx Enterprise Solutions India Pvt. Ltd. v. Hyundai Motor India Limited***²¹, here, the Informant had alleged that according to the agreement with Hyundai, dealers were mandated to procure all automobile parts and accessories from Hyundai or through their vendors only. While collaborating on alleged anti-competitive practices of Hyundai, the Informant stated that Hyundai imposed a “*Discount Control Mechanism*”, whereby dealers were only permitted to provide a maximum permissible discount and dealers were also not authorized to give discount beyond a recommended range, thereby amounting to “*resale price maintenance*” in contravention of Section 3(4)(e) of the Act²².

¹⁷ THE COMPETITION ACT, 2002, ACT NO. 12 OF 2003, § 3(4)(c), INDIA CODE (2003).

¹⁸ THE COMPETITION ACT, 2002, ACT NO. 12 OF 2003, § 3(4)(d), INDIA CODE (2003).

¹⁹ Shri Samsher Kataria v. Honda Seil Cars India Ltd. and Ors., Case No. 3 of 2011.

²⁰ THE COMPETITION ACT, 2002, ACT NO. 12 OF 2003, § 3(4)(e), INDIA CODE (2003).

²¹ Fx Enterprise Solutions India Pvt. Ltd. v. Hyundai Motor India Limited, Case Nos. 36 & 82 of 2014 (India).

²² Fx Enterprise Solutions India Pvt. Ltd. v. Hyundai Motor India Limited, Case Nos. 36 & 82 of 2014 (India).

V. PERMITTED AGREEMENTS

Competition Act provides for an Exception to the rule of Prohibiting Anti-Competitive Agreements as enshrined under Section of the Act. Section 3(5) envisages that nothing in the section shall affect the right on any person to restrain any infringement of, or to impose reasonable conditions as may be necessary for protecting, his Intellectual Property Rights²³.

Elaborately dealing with the exemption of Intellectual Property Rights, from the ambit of Section 3 of the Act, the Case of **Shri Samsher Kataria v. Honda Seil Cars India Ltd. and Ors.**²⁴, held that Restrictions imposed by the Original Equipments Supplier(OEMs)for the sale of their proprietary parts, would fall under the reasonable restriction and condition to prevent the infringement of their Intellectual Property Rights, thus such agreement are not Anti-Competitive in nature.

VI. ABUSE OF DOMINANT POSITION

A person or an entity is said to be in a Dominant Position when it can operate independently of competitive forces operating in the market including customers, suppliers and finally the consumers. Study of the Financial Markets show that the Persons or Entities or Enterprises acquiring this Dominant Position in the market has the tendency to abuse the power and create several arrangements that hamper the smooth functioning of the trade in any market. Section 4 of the Act provides for control of such abuse. It states that no enterprise or group abuse its dominant position. It also provides for instances as to what acts amounts to abuse of Dominant position. The acts which amount to 'abuse of dominant position' are enshrined below:

- (i) Direct or Indirect imposition of unfair or discriminatory condition in purchase or sale of goods or services or prices in purchase or sale (including predatory price) of goods and services;

'Predatory price' means selling of goods at a price which is below the cost of production of goods or provisions of service in order to eliminate competitors or to reduce competition. The Competition Commission of India (Determination of Cost of Production) Regulations, 2009 have been enacted for the determination of predatory pricing cost.

- (ii) Limiting or restricting the production of goods or services or putting restrictions on technical or scientific development relating to goods or services to the prejudice of consumers;

²³ THE COMPETITION ACT, 2002, ACT NO. 12 OF 2003, § 3(5), INDIA CODE (2003).

²⁴ Shri Samsher Kataria v. Honda Seil Cars India Ltd. and Ors., Case No. 3 of 2011.

- (iii) Indulging in practices which result in denial of market access in any manner;
- (iv) Using Dominant position in one relevant market to protect or to enter into another relevant market.

VII. REGULATION OF COMBINATIONS

Another area of focus of the Competition Act is the Restrictions on Combinations, the main types of combinations restricted by the act are:

1. Acquisition of shares, voting rights or assets of an between persons, associations or enterprises ;
2. Acquiring control over an enterprise;
3. Merger or Amalgamation between enterprises.

As enshrined under Section 5²⁵ of the act, below a certain threshold, the combinations between entities or enterprises are not invalidated under the Competition Act since small scale mergers and combinationbs do not affect the entire economy of a market.

VIII. CONCLUSION

he critical Analysis of the different provisions of the Competition Act, 2002 showcases that it not only churns out the Anti-Competitive Agreements and the restriction on Abusive Dominance of the powerful but the act also inculcates the concept of “Competition Advocacy” such that it encourages more competition in the market, create awareness and help in the steady growth opf the market economy. Penalizing Anti-Competitive practices have ultimately benifitted the Consumers at various levels in a market who now enjoys an atmosphere of healthy competition and freedom of trade practices to maintain the cheap price, quality and varieties of options in the goods and services in a market. However, certain modifications if can be made in the act like determining the powers of the commission etc, the Competition Act of India, would further evolve out as one of the best models of Competition Laws Enactment across the globe.

²⁵ The Competition Act, 2002, Act No. 12 of 2003, § 5, India Code (2003).