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Private Enforcement of Competition Law: Tussle between Traditional & Alternative Forums and Reliefs

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ABSTRACT

Indian economy had traditionally been a closed economy and with the market majorly being under the control of government only, and disputes concerning competition in the market were regulated and dealt under the Monopolies and Restrictive Trade Practices Act, 1969. With the advent of liberalisation and the new economic policy in the year 1991, India liberalised its trade policy and brought the three pillars, i.e. Liberalisation, Globalisation, and privatisation into force. The new economic policy brought a paradigm shift and market was now made open for new private players as well. With the change introduced in the economic and trade policies, the market circumstances also changes and compelled the necessary change in law as well. Therefore, the existing Act i.e., Monopolies and Restrictive Trade practices Act was considered no more suitable to deal with the market circumstances. This led to the passing of a new enactment in the year 2002, i.e., the Competition Act, 2002 to deal with various problems related to anti-competitive practices, ensuring and promoting fair and healthy competition in the market, etc.

In the present times, claims relating to competition law have been on a rise. The concern no more just relates to regulating competition or curbing anti-competitive practices, but also ensuring effective deterrence by imposition of fines, and remedying the affected parties through compensation. Since the market and its scenario are continuously changing therefore the need of the hour is not only confined to just punish and create awareness but also to make good the losses suffered by the aggrieved party. This approach of compensating for the losses to the aggrieved party highlights the need to have private enforcement of competition law.

This paper will attempt to adjudge the ambit and scope of private enforcement of competition law and its applicability in India. Also, this article will focus on the various problems and lacunae present in the present legislation due to which the private enforcement is an underutilized aspect. Also, this article will focus on UK & EU jurisdiction and will try to compare and analyse the same with Indian Jurisdiction.

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I. INTRODUCTION

The private enforcement mechanisms for a competition regime aims to compensate claims raised by injured parties whereby they claim compensation for making good the losses suffered by them due to any anti-competitive practice engaged into by any entity in the market. Upon establishing an anti-trust infringement or violation, a litigation initiated by an individual, entity or organisation may allow a possibility for recovery of damages and imposition of reliefs such as injunctive reliefs.

An apparent approach of the Competition Act, 2002 in terms of enforcement is having a public enforcement approach rather than having a private enforcement approach. The concept of private enforcement of competition disputes arising in India is one of the unexplored arenas. It, however, is important to explore the possibility of litigation or alternative dispute resolution options as measures to resolve competition law related issues.[2] This becomes even more pertinent as there are certain provisions which clearly imply that the victims who have suffered due to anti- competitive practices by certain entities shall be entitled to receive their compensation. The prime reason because of which this law has been created is to promote healthy competition in the market and to stop crooked business practices, that are basically conducted by the entities with a dishonest intention, in order to cheat the consumer and to nimble the market according to their whims and fancies.[3] However, with the passage of time, there has been an increase in "anti-competitive agreements and exclusive arrangements" entered between parties, therefore the need to guard the private rights of the parties plays a significant role in the present time.

The prime manner of implementing competition law is largely solely through competition law regulations and authorities established in different jurisdictions. Private enforcement of issues related to competition law issues is a recognized, well-known and pulsating method of enforcement in United States constituting the majority of Department of Justice and Federal Trade Commission.[4] On the other hand in UK and EU Jurisdiction, earlier traditional techniques used to be followed and competition law enforcement was in the purview admin authorities, but with advent of time and with passage of Competition Act, 1998 and Enterprise

[2] Ayush Verma, *Private Enforcement of Competition Law in India*, Aug 14, 2020, Availavle at: https://blog.ipleaders.in/private-enforcement-competition-law-india/

[3] Shafique, *Competition Law to Relieve Consumers of Unhealthy Business Practice*, Available at: http://www.thefinancialexpress-bd.com/more.php?news_id=135247&date=2012-07-02

[4] S Calkins, *Perspectives on trade and Federal Anti-Trust Enforcement* (2003) 53 Duke L.J. 673, 699-700.

 [ISSN 2581-5369]

Act, 2002, private enforcement of competition law disputes has been encouraged.[5]

II. THE COMPETITION ACT, 2002

Indian Competition law is based primarily on the findings and suggestions of a High Level Committee on "Competition Law and Policy". This committee was setup by the government in order to meet with the changing demands of market as well changing economic scenario. This Act was drafted in such a manner so that it can address various concerns and issues related to competition in the country as well as it can satisfy the global concerns. The main intention of the Act is to advance competition, protect the interest of consumers and also to ensure freedom of trade. Therefore, keeping this intent in mind, the Act established the Competition Commission of India and this commission was empowered to examine anti-competitive practices undertaken in the Indian market as well as taking place outside but having an effect on Indian Market .[6]

Furthermore, the act also has an overriding effect[7] with respect to other legislations present and is in addition to the provisions of any other law in force.[8] Therefore we can clearly infer that this Act applies the principle of "Harmonious Construction", i.e. when there is conflict between two existing laws the former will prevail and when there is no conflict than in that case both the law will apply in harmony. Also, this act prohibits the jurisdiction of civil courts to adjudge any matter within the purview of Competition Commission of India.[9]

III. INDIAN SCENARIO AND COMPETITION LAW

There are different types of market, and every market is based on a particular model. If we look into Indian market scenario, we will observe that Indian market is a unique blend of mixed economy, where private sector and public sector undertakings participate together in harmony. In addition to this, there are certain areas and sectors which are opened to foreign direct investment.

In order to curb out certain anti-competitive practices which causes appreciable adverse effect

[5] Professor Barry Rodger, Competition Law-Litigation in the UK Courts-Cases 2005-2008, part I (2009) G.C.L.R
[6] Section 32 of the Competition Act, 2002 empowers to take cognizance of ant act taking place outside India but having an adverse effect on Competition with in India.
[7] Section 60 of the Competition Act, 2002: Act to have an overriding effect: The provisions of this act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.
[8] Section 62 of the Competition Act, 2002: Application of other laws not barred: The provisions of this Act shall be in addition to and not in the derogation of, the provisions of any other law for the time being in force.
[9] Section 61 of the Competition Act, 2002: Exclusion of Jurisdiction of Civil Courts – No civil courts shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the commission is empowered by or under this Act to determine and no injunction shall be granted by a court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this act.

 [ISSN 2581-5369]

on competition, in the year 2002 Competition Act, was passed.[10] But overall, this Act was based on a public enforcement approach and hence there is a very limited scope of consumer welfare in the object of the Act. The object and scope of Competition Act, 2002, clearly states that it "intends to promote and sustain competition in the markets, to protect the interest of consumers and to ensure freedom of trade carried on by other participants in the market".[11]

With keeping this objective in mind, the Competition Commission of India (CCI) IS empowered with significant penal powers, but these penal provisions primarily focus on penalising the violators rather than providing compensation to those parties which are being affected by these violators who are indulged in these anti-competitive practices. Therefore, the need of the hour is not only confined just to create awareness in the society by only punishing those entities which are involved in anti-competitive activities or those who are being indulged in certain type anti-competitive activities or abuse of dominant positions but the motive is also to make good the losses to the party being injured. The effect of providing compensation to the aggrieved party leads to requirement of private enforcement of competition law claims.

Violation of competition law impacts public interest as it has direct implications on both i.e., proper functioning of the market and also on the economy.[12] The law does not emphasise more upon providing compensation to the parties but rather it focuses on deterring those entities and parties which entered into certain types of anti-competitive practices. So, one can say that the primary motive of the Act is to create a scenario in the market so as to promote healthy competition.

In keeping with this intent, the CCI is vested with certain powers to regulate and maintain a balance in the market. Also, according to section 32[13] of the Act, CCI is empowered with extra territorial jurisdiction but it is still in nascent stage. In addition to this, the Act has an overriding effect w.r.t other laws in force and is in addition to the provisions of any other law in force.[14] Therefore, applying the principle of harmonious construction, it can be clearly understood that if there is a conflict between provisions of Act and any other law, than the Act will prevail and, in the case, where there is no conflict than provision of both laws will be applicable simultaneously. In addition to this, the Act, bars the jurisdiction of any civil court if the matter falls under the domain of Competition Commission of India or appellate authority.[15]

[10] Recital 3, Statement of Objects and Reasons, Competition Act, 2002.
[11] The Competition Act, 2002.
[12] *Supra* note 3.
[13] The Monopolies and Restrictive Trade Practices Act, 1969.
[14] *Supra* note 7.
[15] *Supra* note 9.

 [ISSN 2581-5369]

IV. ARBITRABILITY OF DISPUTES VS. ADJUDICATION BEFORE CCI: A CONFLICT OF MODERN VS TRADITIONAL APPROACH

Arbitration is the most common way to settle disputes when disputes are related to commercial nature. Only certain competition issues such that of anti-competitive agreements and abuse of dominant position arise in arbitration. The controversy related to arbitrability of competition issues is not new. The reason for controversy is very simple, since the arbitration is always used as a tool to tackle the issues between private parties, however competition law laid its foundation on the principle that disputes related to public at large need to be tackled, and thus applying rule of arbitrability may not server the purpose.

V. EU MODEL OF ARBITRABILITY AND PRIVATE ENFORCEMENT OF COMPETITION LAW

With the adoption of Modernisation Regulation in 2004[16], EU jurisdiction has laid down the foundation for the private enforcement of Competition law. Thus, it created a favourable scenario for EU competition dispute arbitration. In the landmark judgement of Eco Swiss[17], European court of justice highlighted the concept of arbitrability of competition law and stated that the arbitrators have full authority to apply to EC Competition law rules while dealing with any competition law matters. However, in this judgement it was mentioned that arbitrability of competition law issues can be done only in the case private claims and not related to public claims,[18] since public claims will be dealt in accordance with the competition law.[19] The same principle was adopted in the case of ET Plus SA v Welter[20], where the claims alleging the breach of Article 82 were held arbitrable.

The right to claim compensation against anti-competitive practices has been strengthened with the adoption of the 2014 Directive of the European Union which governs the rules concerning actions for compensation for the EU member states in cases of infringement of competition

[16] Council Regulation No.1/2003 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty [2003] OJ L1/1.
[17] *Eco Swiss* v. *Benetton* [1999] ECR 1 03055
[18] S. Dempegiotis, 'EC competition law and international arbitration in the light of EC Regulation 1/2003: Conceptual conflicts, Common grounds, and Corresponding legal issues', (forthcoming June 2008), 25(3) Journal of International Arbitration as cited in Sotiris I. Dempegiotis, EC competition law and international commercial arbitration: A new era in the interplay of these legal orders and a new challenge for the European Commission, available at http://www.icc.qmul.ac.uk/GAR/GAR2008/Dempegiotis.pdf.
[19] J.D. Lew, L. Mistelis, and S. Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p. 485 as cited in Sotiris I. Dempegiotis, EC competition law and international commercial arbitration: A new era in the interplay of these legal orders and a new challenge for the European Commission, available at: http://www.icc.qmul.ac.uk/GAR/GAR2008/Dempegiotis.pdf
[20] [2005] EWHC 2115 (Comm)

 [ISSN 2581-5369]

law. The directive provides for an extensive framework for adoption by member states to implement the right to seek private enforcement. The directive reaffirms the right to full compensation to a person who may be affected due to an anti-competitive practice.[21]

With respect to providing clarity on private enforcement of competition law, the European Union has laid down the relevant principle in a landmark judgement establishing that there should be a 'causal relationship' between the loss suffered by a party and the anti-competitive conduct of an entity in the market for claiming compensation for such a loss.[22]

VI. US MODEL OF ARBITRABILITY AND PRIVATE ENFORCEMENT OF COMPETITION LAW

In the initial stages in United states, according to "American Safety Doctrine" it was believed that applying rule of arbitrability on competition law issues is not a wise decision, since these issues are of complex nature. US Courts in the case of "Applied Digital technology Inc. V Continental Casualty Company"[23], held that the "*competition law claims are non-arbitrable in nature"*, also in Cobb v Lewis[24] it was held that these "*issues are only arbitrable if there is a separate arbitration agreement entered after dispute*". Later on, in the case Gemco Latino-America Inc, V Seiko Time Corp[25] , American safety Doctrine was rejected and it was held that arbitration of competition law issues was allowed.

With respect to private enforcement under the US regime, parties who have suffered directly out of an anti-trust practice may be compensated as compare to parties who are indirectly affected. This proposition was clarified in *Illinois Brick Co. v. Illinois*[26] wherein the court laid down three reasons for not allowing indirect consumers to claim compensation. These included reasons such as enabling more effective enforcement of competition laws, avoiding complicated damage calculations and eliminating multiple damages against anti-trust defendants.[27]

VII. INDIAN MECHANISM AND ARBITRABILITY OF COMPETITION LAW ISSUES

From the very inception of laws related to competition, "private right and its enforcement" have been an important part. The compensation to the public and recovery related to any loss

[21] Sarvada Legal, *Private Enforcement under Indian Competition Law, https://competitionlawsarvada.legal/2020/10/07/private-enforcement-under-indian-competition-law/#_ftn4*
[22] *Otis Gesellschaft m.b.H. and Others* v *Land Oberösterreich and Others.* OCL 297 (EU 2019)
[23] 576 F.2d 116 (7th Cir. 1978)
[24] 488 F.2d 41 (5th Cir. 1974)
[25] 623 F. Supp. 912 (1985)
[26] 431 US 720 (1977)
[27] *Supra* note 2.

 [ISSN 2581-5369]

and damage can also be traced to the older legislation i.e., "MRTP Act" but this Act did not acknowledge its significance after the commencement of Competition Act, 2002. In the landmark Judgement of Union of India v. CCI[28], Delhi High Court, held that investigation process of CCI is very different form the scope of an enquiry before an arbitral tribunal. Also, it was held that the Act, has an overriding effect over all other laws and hence maintainability of arbitral proceedings is not valid. But the situation is very tricky and need to be resolved in a harmonious manner since there are certain provisions in the new Act which talks about private enforcement and arbitrability and these are as 53N[29] to be read with 42A[30] & 53 Q[31] of the Act.

The legislative backing to provide support to the concept of private enforcement and competition law in India can be found in Section 53N of the Act where by the National Company Law Appellate Tribunal is empowered to award compensation to government, local bodies, enterprises or even persons who have suffered loss or damage owing to an established anti-competitive practice or contravention of the Competition Act provisions.

The year 2009 has a landmark significance under Indian competition regime because private damages came into practice. This lays down founding stone for all the consumers and competitors to bring action for damages in case they have suffered any due to anti-competitive conduct.

VIII. BACKGROUND TO THE PRIVATE DAMAGE'S LITIGATION IN INDIA

Prior to diving in the particulars of the case related to NSE case,[32] by way of back ground the privately damage regime is mostly enshrined within "Chapter VI and VIII-A of the Act".[33]

After the recent amendment that has taken place through which all the powers of competition Appellate tribunal (COMPAT) stand transferred to the National company Law Appellate Tribunal (NCLAT), now the paradigm has totally changed, earlier the power to hear and adjudge the matter was confined to COMPAT but now NCLAT has been authorised with the original jurisdiction to adjudge the matters and hear the applications either form the Central government, state government or any other person or enterprise, who has suffered any damage or any loss as result of contravention of sections such as 3, 4,5 and 6 of Competition Act.[34]

[28] W.P. (C) 993 of 2012 & C.M. Nos. 2178-79 of 2012
[29] Section 53 N : Awarding Compensation.
[30] Section 42 A : Compensation in Case of Contravention of order of Commission.
[31] Section 53 Q : Contravention of orders of Commission.
[32] 2011 SCC Online CCI 52
[33] Sections 53-N, 53-Q and 42-A of the Competition Act 2002.
[34] *With effect from 26-5-2017, the appellate authority for all matter relating to the Act is the NCLAT. Originally, this power was vested in the COMPAT.*

After analysing the Act, we can clearly find that, the concept of private litigation clearly mandates that in order to raise any claim a finding of violation of substantive provision of the act need to be established. In addition to this act also states for filing an application by applicant against the enterprise or persons the thing which need to be looked upon is the consequence of the enterprise violating any order or direction of the CCI or the appellate authority for seeking such compensation.[35]

The Act,[36] is drafted in such a manner so as to look forward in order to provide remedial measures, by providing "Class action Suits" and therefore we can say that the act is in equivalence with the global practice being adopted.

IX. CURRENT SCENARIO

Although the Competition Act provides for private enforcement of competition Law, but still the private enforcement aspect of competition law is at very nascent stage and most these provisions remain underutilized. The NSE Case[37] being the biggest example of major abuse of dominance which was analysed by the CCI and COMPAT. In this case violation was upheld by CCI and COMPAT therefore a private damages claim was made permissible to be brought before the COMPAT and the same was done by MCX-SX. But the biggest problem related to private enforcement of the Act is that in the case of private litigation, the regime mandates that a claim can only rise after finding of the violation of the substantive provisions of the Act has been established by the regulator or the appellate authority. In addition to this, the Act also provides that for filing an application against any enterprise where ever any damage has been inflicted and suffered by the individual due to contravention of orders of the Commission or the Appellate Tribunal.[38]

(A) Position after CCI (Lesser Penalty) Regulations, 2009

After the enactment of these regulations, order passed under the regime are unique since the parties expressly admits their involvement in the anti -competitive practices and therefore the inquiry process is not there and this leads to prompt adjudication of compensation claims and therefore we can say that private enforcement of act comes into play.

(B) Who can file a compensation Claim?

This is one of the most important question which need to be answered that who all are entitled

[35] Sections 42-A and 53-Q(2) of the Competition Act, 2002.
[36] The Competition Act, 2002.
[37] *Supra* note 32.
[38] *Supra* note 35.

 [ISSN 2581-5369]

to file an compensation claim, whether that can be an individual, entity, persons, group of persons or only class suits are allowed.

In accordance with section 53N of the Competition Act, 2002, an applicant can file a compensation claim and the applicant is entitled to any loss or damages "shown to have been suffered". An obligation is placed on the applicant by the legislation to validate and enumerate the losses the applicant has suffered due to anti-competitive practices, even when there is a difficulty to clearly enumerate the loss. Due to these technicalities of the Act, these provisions of the Act need to be tested prior in a proper manner before applying it.

However, there are certain instances in which loss can be proved in a much easier manner. For example, a compensation claim arising out of an overcharge, which is related to price-fixing cartel can be much easily proved, if the following conditions are satisfied:

1. That the claimant/applicant has purchased the cartelized goods or utilised any such service either directly or indirectly.
2. The applicant has paid higher price for such purposes.

The simple approach which needs to be adopted in order to ascertain whether there is price fixation or not, is to check the prices without the presence of cartel and in presence of cartel. For example, there is a cartel existing in a particular market and it is found out that the prices of products are being continuously rising and prior to the presence of cartel the prices were not rising is a parameter to judge that there is anti-competitive practice.

The act also provides for a possibility of class action where the loss or damage is caused to or suffered by numerous persons having the same interest. The same has been provided under section 53N (4). This can serve as an effective tool to overcome practical difficulties in litigation.[39]

X. CONCLUSION

There is huge debate that the private enforcement of competition law can considerably improve the working of competition law regime. Also, the individuals who are suffering injury from anti-competitive conduct should be compensated reasonably. The jurisprudence in India related to alternative means as a remedy to competition issues is still at nascent stage. Though there are several instances in which government enforcement has taken place, but in reality, it rarely helps the persons suffering from anti-competitive practices, and thus they are compelled to look forward to seek private enforcement. Since they are not provided with any adequate

[39] *Supra* note 21.

 [ISSN 2581-5369]

remedy, they are left seeking relief from different forums, thereby creating problems such as multiplicity of suits before several forums.

The public authorities should ponder upon this fact that, it is the duty of the enforcement agencies to strike the balance between private and public enforcement. While developing an integrated policy system of public and private enforcement, numerous factors need to be taken into account such as deterrence and compensation. However, this scheme stands underutilized since this Act follows a pattern of follow-on compensation claim i.e., compensation claim can only be filled only after a finding by the CCI or the appellate tribunal that the provisions of the Act has been contravened. Since there is no proper recourse related to private enforcement and also civil courts are not allowed to adjudge these matters, there are many instances in which no proper recourse is left to the parties.

Since private enforcement is absent or is negligible, this prevent parties from being indemnified for the loss that had been caused to them since the fines levied by the authority is generally insufficient, and therefore new measures should be inculcated so that proper and due recourse to the aggrieved parties can be made available. The master key is to obtain the right balance between the tools and goals and thereby ensuring that there is no adverse effect of private enforcement on the public enforcement.

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