COLLECTIVE BARGAINING UNDER COMPETITION LAW

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ABSTRACT

To promote the principles of a free or open market economy after the major 1991economic reforms in India and foster competition amongst a range of market players, the Competition Act came into being in 2002, having a mandate from the Preamble of the Indian Constitution which enshrines **economic justice** and Article 19 (1) (g), which guarantees citizens the fundamental right to freedom of trade. The Competition Act, 2002, is a socio-economic legislation which strives to prevent anti-competitive practices, protect the interests of consumers and ensure freedom of trade and has established the Competition Commission of India (CCI) for the same.

Today, as the Indian economy has big as well as small market players, an equal negotiating power is necessary for perfect competition in the market to prevail as envisaged by competition law. This can be achieved by allowing small and medium businesses to collectively bargain with bigger businesses to achieve economic goals in concurrence with one another and for public benefit. This power of collective bargaining does not refer to fixing a price but negotiating by setting upper and lower limits.

The paper seeks to delve into **„collective bargaining"** and put it forth as an exception to **anti-competitive horizontal agreements** under Section 3 of the Competition Act, 2002 while taking into consideration **public benefit** and **consumer interest**. Since competition law in our country is at a nascent stage, the paper has referred to jurisdictions like Australia wherein _collective bargaining' has been given due recognition.

COMPETITION LAW- BRIEF OVERVIEW

With the oncoming of market economies, where the allocation of resources is determined solely by demand and supply, the necessity of competition law came to be realised. Competition in market economies refers to a situation wherein sellers independently strive for the patronage of buyers in order to achieve business aims or objectives. A competitive environment, underpinned by sound competition law and policy, is a characteristic or trait of

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a successful market economy as it enables efficient allocation of resources, greater choice of goods and services at lower prices, dynamic innovation, technological advances, better consumer welfare along with other social benefits and economic progress.[1] Competition law refers to the framework of rules and regulations designed to foster such a competitive environment in an economy.[2]The principal purpose of competition law is to rectify a situation where the activities of a few firms lead to the breakdown of a market economy or prevent the same by laying down rules and regulations by which rival businesses can compete with one another.[3]

Over a period-of-time, various countries of the world have undertaken their own competition law regimes such as in USA through elaborate legislations going back as early as the Sherman Act, 1890, the Clayton Act, 1914, the Federal Trade Commission Act, 1914 and the Robinson-Patman Act, 1936. In the UK, legislations like the Restrictive Practices Act, 1956, Competition Act, 1998 and the Enterprise Act, 2002 are the governing competition law. In relation, competition law in India as codified under the Competition Act, 2002 is at a very nascent stage, although its' scope has been continuously expanded through amendments and judicial interpretation, rendering precedents.

HISTORICAL PERSPECTIVE

After the independence of the country in 1947, the drafters of the Constitution of India sought to reflect the dream of economic growth and development hand- in- hand with justice through its provisions. The Preamble, which is the edifice on which the Indian Constitution rests, puts the ideology of socio-economic justice on a pedestal. Article 38 and Article 39, which are a part of the Directive Principles of State Policy under Part IV, mandate, *inter alia*, that the state shall strive to promote the welfare and wellbeing of its citizens and ensure that the institutions and structures within the country are guided by the philosophy of socio-economic justice[4]. The policies and programmes undertaken by the government must be with the primary aim or objective of distributing the ownership and control of material resources as

[1]R.S. Khemani, *A Framework for the Design and Implementation of Competition Law and Policy* , World Bank Publications, 1999
[2]Republic of the Philippines, Tariff Commission , Competition Law and Policy
[3] *Competition Commission of India (CCI) v. Steel Authority of India Ltd. (SAIL),* (2010) 10 SCC 744
[4]Article 38, Constitution of India

best to subserve the common good [5] and securing that the operation of the economic system does not result in concentration of wealth and means of production to the common detriment [6].

Though the Government of India had adopted a mixed economic model, wherein both the public as well as the private sector existed, it was centrally planned with key strategic industries of public interest and benefit reserved for the government and others subject to industrial licensing under Industries (Development and Regulation) Act, 1951 [7].The aforesaid economic scenario was put to study by the Mahalanobis Committee [8], as appointed by the Indian Government, which noted that such a regime provided an impetus for a nexus of big businesses to emerge and led to concentration of economic power. This was also re-emphasized by the Monopolies Inquiry Commission[9].After much scrutiny by the Hazari Committee[10] and subsequently the Subimal Dutt Committee [11], the necessity of a proper and effective legislative framework was realised, paving the way for the Monopolies and Restrictive Trade Practices Act (hereinafter referred to as the MRTP Act), 1969[12], the first and foremost competition law legislation in the country.

However, with the liberalization of the Indian economy and major reforms undertaken in 1991, the provisions of the MRTP Act were seen to have become *"obsolete"*[13] and inadequate to deal with the evolving realities with respect to the international and national economic milieu. The Finance Minister in his budget speech of February, 1999 highlighted the importance and significance of shifting the focus from curbing monopolies and restrictive trade practices to fostering competition. For this purpose, the Indian Government appointed a High Level Committee on Competition Policy and Law, also known as the Raghavan Committee, to recommend a suitable modern contemporary competition law, either entailing amendments to the MRTP Act or a new legislation altogether. Along the lines of the Raghavan Committee Report[14] which remarked that the MRTP Act had outlived its utility, the Parliament enacted the new Competition Act in 2002[15] and thus, repealed the MRTP Act,

[5] Article 39(b), Constitution of India
[6] Article 39(c), Constitution of India
[7] Industries (Development and Regulation) Act, 1951, Act 65 of 1951
[8] Mahalanobis Committee Report on the Distribution and Levels of Income, 1964
[9] Monopolies Inquiry Commission Report, 1965
[10] Report of the Hazari Committee, 1967
[11] Report of the Industrial Licensing Policy Inquiry Committee or the Subimal Dutt Committee, 1969
[12] Monopolies and Restrictive Trade Practices Act (MRTP Act), 1969
[13] Yashwant Sinha, Finance Minister, Budget Speech, February, 1999
[14] Raghavan Committee on Competition Policy and Law Report, 2000
[15] Govern ment of India, Ministry of Law and Justice, "The Competition Act, 2002", The Gazette of India, No.12, January 14, 2003

1969. The Competition Act, 2002 unlike the MRTP Act, 1969 has been classified and categorised into provisions dealing with- (1) abuse of dominant position (2) anti-competitive agreements and (3) combinations and has also established a quasi-judicial body to perform a range of different functions called the Competition Commission of India (hereinafter referred to as the CCI).

SECTION 3(3) (A) - ANTICOMPETITIVE AGREEMENTS

The Competition Act, 2002 under Section 3 expressly prohibits anti-competitive agreements which cause or are likely to cause an appreciable adverse effect (AAE) on competition in India. Particularly, Section 3(3)(a) prohibits any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decisio n taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which directly or indirectly determines purchase or sale prices. Thus, it refers to price fixing agreements when actions are taken by enterprises at the same level of production or consumption. The term ‗agreement' [16] has a broad connotation and refers to ‗meeting of minds'[17] or a consensus between the parties concerned, [18] gathered from a common motive[19]. A written agreement is not necessary[20] as it may include an informal understanding as well.

Price fixing within its folds refers toa wide variety of concerted actions taken by competitors, which have a direct effect on price or also may be defined as an agreement on the price or prices to be charged to some or all customers. [21] It may consist of any mutual agreement, arrangement or understanding between competitors to sell at a uniform, raised, lowered or stabilized prices[22], and may occur at demand side to enforce buying power. [23]

Although Section 3 has been given a broad ambit or purview and the standard of proof for establishing the existence of an ‗agreement' is ‗balance of probabilities' [24], to regard an

[16] Section 3(3)(a), The Competition Act, 2002
[17] *Commission v. Bayer AG*, (2004) 4 CMLR 15
[18] *Volkswagen AG v. Commission of the European Communities*, (2000) ECR II- 2707
[19] *All India Tyre Dealers' Federation Informant v. Tyre Manufacturers,* 2013 Comp LR 0092 (CCI)
[20] *Re: Aluminium Phosphide Tablets Manufacturers*, 2012 Comp LR 0753 (CCI)
[21] *Varca Druggist & Chemist & Others v. Chemists & Druggists Association, Goa,* 2012 Comp LR 838 (CCI)
[22] D.P.MITTAL, COMPETITION LAW AND PRACTICE 211 (Taxmann, 3rd ed. 2011)
[23] UNCTAD, Model Law on Competition, 2000
[24] *American Natural Soda Ash Corporation (ANSAC) v. Alkali Manufacturers Association of India (AMAI) and Others* (1998) 3 Comp LJ 152

agreement as anti-competitive, the appreciable adverse effect must be proven as per Section 19(3). Although the Competition Act, 2002 does not define AAEC and nor is there any thumb rule to determine when an agreement causes or is likely to cause Appreciable Adverse Effect on Competition, Section 19 (3) specifies factors for its determination. While agreements creating barriers to new entrants, driving existing entrants out and foreclosing competition are anti-competitive, the agreements accruing benefits to consumers, improving production or distribution of goods or provision of services or promoting technical, scientific and economic development by means of production or distribution of goods or provision of services have been held to be exceptions to the horizontal agreements that are prohibited. All those agreements made for social or economic benefit will not be anti-competitive in nature or have a negative impact on competition.

Being a progressive legislation, the Competition Act, 2002 must adapt to changing situations, arising from liberalization and globalization, and improve consumer welfare accordingly.[25] The Competition Act, 2002 is inspired from the US, European and Australian anti-trust laws. Though the American competition law is consumer-centric and the European revolves around the industry, the idea of avoiding concentration of economic power is common. Thus, they aim for the same objective, a perfectly competitive market condition that allows economic advancement of all without hampering consumer welfare or public benefit.

COLLECTIVE BARGAINING

The Supreme Court of India in the case of *TELCO* v. *Registrar of Restrictive Trade Agreements*[26], observed that competition law must not be construed in a vacuum or doctrinaire spirit. Competition law is intertwined with the concepts and notions under the field of economics which is why drawing parallels between the both becomes inevitable. The language of economics and the use of economic methodologies, both theoretical and empirical, have become commonplace in the laws of antitrust.[27]

Collective bargaining is rooted in economic theorisation pertaining to labour, trade unions and employer-employee relations in industrial establishments, and was put forth as a mechanism for dispute settlement and conflict resolution. It has been refe rred to by many economists, notably J.R. Hicks, who propounded the Collective Bargaining Theory, wherein

[25] Pradeep D Mehta (ed.), TOWARDS A FUNCTIONAL COMPETITION POLICY FOR INDIA AN OERVIEW, 2005, Academic Foundation, New Delhi, p. 126
[26] *TELCO v. Registrar of Trade Agreements*, (1977)2 SCC 55
[27] Dale Collins Wayne, Issues in Competition Law and Policy (2008), volume -I, pg. 1.

collective bargaining was used as a tool or mechanism of determining the wage rates of workers.

Collective bargaining has been given due recognition by the International Labour Organisation (ILO) which defines it as,

"Collective bargaining is the negotiation about working terms and conditions of employment between an employer and an employee in order to reach an agreement wherein the terms and conditions act as a code defining the rights and obligations of the parties in their employment/industrial relations with one another."[28]

The Report of the National Commission on Labour in1969 justified collective bargaining by stating that, *–it is a system based or found on bipartite agreements, as such superior to any agreement involving third-party intervention in matters which concern employers and workers."*[29]

According to the Encyclopaedia of Social Sciences,

"Collective bargaining is a process of discussion, deliberation and negotiation between two parties, one or both of whom is acting in concert."

Therefore, collective bargaining in itself is merely the activity or process leading to the conclusion of a collective agreement. [30]Collective bargaining involves two or more competitors agreeing to collectively negotiate terms and conditions (which can include price) with a supplier or a customer (the target or counter party). [31]

Collective agreements between competitors are often illegal under competition laws.[32] However, in some jurisdictions; collective bargaining has been exempted from those laws. For example, Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits horizontal agreements that prevent, restrict or distort competition. [33] However;

[28]Article 2, Convention 154, 1981, International Labour Organization (ILO)
[29]Report of the National Commission on Labour, Ministry of Labour and Employment and Rehabilitation, Govern ment of India, 1969, p.325
[30]Bernard Grenigon, Alberto Odero, Horacio Guido, *COLLECTIVE BARGAINING: ILO Standards And The Principles Of The Supervisory Bodies*, , ISBN 92-2-111888-6
[31] Australian Competition and Consumer Commission, Assessment: Collective Bargaining Notifications Lodged by Paint Right Ltd, Notification Nos CB00081– CB0013, 16 September 2009, [1.2].
[32] Peter C Carstensen, *'Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy'* (2010) 1 William & Mary Business Law Review 1, 14– 15.
[33] Treaty on the Functioning of the European Union opened for signature 25 March 1957, [2012] OJ C 326/ 47 (entered into force 1 January 1958).

collective agreements between buyers (referred to as _purchasing agreements‘) can be exempt from Article 101(1) by Article 101(3).[34]

Collective bargaining allows firms to share these costs, with improving the level of negotiation. It can also change businesses‘ incentives and how they deal with non-contractible decisions. This can lead to more nuanced contracts as they not only address the specific requirements of the firms in the bargaining group but also enable better dealing with future contingencies and encourage investment.

COMPETITION LAW AND COLLECTIVE BARGAINING- THE CROSSROAD

Consumer welfare stands to be one of the primary goals of the Competition Act, 2002, as can be seen from the Preamble which states that the statute has been enacted –*to prevent practices having an adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade."*

It has also been stated that in no market can there alone be a consumer or a producer and hence both by definition are a part of a relevant market.[35] The importance and significance of consumer welfare has also been highlighted as per Section 18 which lays down the duty/obligation of the CCI to eliminate practices having adverse effect on co mpetition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India.[36] This was also reiterated by the Supreme Court in *Competition Commission of India v Steel Authority of India Ltd*.[37]

Competition in a free market ensures the attainment of economic efficiency[38] which includes production and sale both at a lower rate. Adam Smith while propounding the Theory of Free Trade rejected not just the possibility of abuse of power but the existence of corporations as well.[39] But, in the wake of globalization and transnational networks of international trade, India was perceived not just as a profitable market but also a cheap production ground, due to which several foreign multi- nationals and big corporations have been establishing themselves in the country. In light of their economic power and availability of resources giving them an

[34] Guidelines on the Applicability of Artic le 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements [2011] OJ C 11/1
[35] *Consumer Online Foundation v. Tata Sky Limited & Ors.,* (2 of 2009) decided on 24th March 2011
[36] Section 18, Competition Act, 2002
[37] *Competition Commission of India v. Steel Authority of India Ltd* ., Civil Appeal No.7779 of 2010 decided on 9th September 2010
[38] *Competition Commission of India v. Steel Authority of India Ltd* ., (2010) 10 SCC 744
[39] Smith (1776) Book V, Chapter 1, para 107

upper hand, the suppliers of raw materials or service takers, who are relatively smaller players are often not in a position to negotiate with them individually. In such a scenario, these small to medium players must be allowed to come together and negotiate prices subject to the benefit accruing to the society or public benefit. This would, howe ver, not be analogous to price fixing, which has been defined to be –a crime against all consumers‖, and –a shocking disservice to the public at large‖[40]as it is done in order to achieve positive results for the benefit the public and hence, must be permitted.

Although Section 3 prohibits collusion, a joint venture agreement has been stated to be an exception if it increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. [41] This means that, even if there is an appreciable adverse effect on competition, a joint venture agreement shall not violate the provisions of the Competition Act, 2002 if the parties to the joint venture successfully show that there has been efficiency and gains due to the joint venture, the burden of proof of which is on the joint venture partners.

Collective bargaining emerging as a right of the labour, was granted in order to put them on an equal footing and enabling them to negotiate without pressure for reasonable terms and conditions of the employment contract. As in the industrial employment sector, this provides for an opportunity to the employer and the employee to participate in the decision making process, in the competition law sense , both the consumer and the producer are a part of the relevant market[42] and collective bargaining would allow both the participants to take mutually beneficial decisions together. This process has been regarded by the Apex Court as an amicable dispute resolution process and such a dispute resolution is not a result of coercion.[43] It has also held that the recognition of the right to collectively bargain lead to empowerment of the weaker sections of the employment i.e. the labour. A similar right under competition law would allow the smaller businesses to reasonable negotiate with the big corporations, empowering them in furtherance of economic justice. India, being a welfare state, must strive to eliminate inequalities in status, facilities and opportunities. [44]

The argument of collective bargaining has been accepted to be permissible when exercised against a dominant business partner in favour of consumer interest as mentioned in Section

[40] *Director of Public Prosecutions v. Denis Manning* (Unreported, High Court, 9th February 2007).
[41] Proviso to Section 3, Competition Act, 2002
[42] *Consumer Online Foundation v Tata Sky Limited & Ors*, MANU/CO/0011/ 2011
[43] *Kamal Leather Karamchari Sangathan v. Liberty Footwear Company*, AIR 1990 SC 247
[44] *D.S. Nakara and Ors. v. Union of India*; (1983) 1 SCC 305

19(3) of the Act by the CCI in the *FICCI – Multiplex Association of India v. United Producers/ Distributors Forum.* The Commission held that,

> *"Collective bargaining may not be per se bad in law and may be resorted to for legitimate purposes in accordance with law. However, when the trade associations enter into agreements, as in the present case, in the garb of collective bargaining which are anti – competitive in nature, then no competition watchdog can countenance such act/agreement."*

Thus, the plea of collective bargaining in the aforesaid case was only rejected because it caused public detriment rather than causing public benefit. The CCI, while doing so, referred to the Australian competition laws which give due recognition to the concept or notion of collective bargaining.

THE AUSTRALIAN SCENARIO

Collective bargaining was introduced in Australia by the Australian Competition and Consumer Act (ACCC), 2010. The law states that certain conditions have to be fulfilled before collective bargaining is authorized. First, businesses can seek to have a collective bargaining agreement authorized by the ACCC. Alternatively, small businesses may make a collective bargaining notification to the ACCC under section 93AB of the CCA. [45] A collective bargaining notification is valid unless the ACCC objects. The test for objection is similar to the authorization test. Under section 93AC (1)-

> *"The Commission may, if it is satisfied that any benefit to the public that has resulted or is likely to result or would result or be likely to result from the provision does not or would not outweigh the detriment to the public that has resulted or is likely to result or would result or be likely to result from the provision, give the corporation a written notice (the objection notice) stating that it is so satisfied."*

The ACCC states that its approach to benefits and detriments is based on the 1994 decision of the Australian Trade Practices Tribunal (now the Australian Competition Tribunal) in *Re 7-Eleven Stores Pty Ltd*.[46] The Tribunal cited an earlier decision, which stated that a public benefit includes anything of value to the community generally, any contribution to the aims

[45] Trade Practices Legislation Amendment Act (No 1) 2006 (Cth).
[46] Re 7-Eleven Stores Pty Ltd [1994] ATPR ¶41-357.

pursued by the society including as one of its principle elements … the achievement of the economic goals of efficiency and progress'. [47]A public detriment includes _any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency'. [48] The Tribunal has noted that the benefit must be more than negligible for the power to grant authorization to be exercised.[49]

Therefore, the applicable test for present purposes is that articulated by the Tribunal in *Re 7-Eleven Stores Pty Ltd*[50]-

"The Tribunal must examine on one hand the anti-competitive aspects of the conduct ... and on the other hand the public benefits arising from it and weigh the two."

The detriment that must be taken into consideration is that caused to the public by any hampering of competition resulting from collective bargaining. This public detriment is still, however, to be broadly construed. The Tribunal in *Re 7-Eleven Stores Pty Ltd*[51]said that-

"As with the assessment of benefit we give the characterization of the `detriment to the public' a wide ambit, namely, any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency, in the sense we have adopted."

It is pertinent to assess whether there is a furtherance of the legitimate aims and objectives of the society in order to determine public detriment or benefit. [52] The Statement of Object and Reasons of Section 2 states the aim is to *–enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."*

In the *Re QIW Ltd*[53] case, the Tribunal stated that the test was that of the _future with or without' the collective bargaining rather than being a _before and after' test. The test must

[47] Re 7-Eleven Stores Pty Ltd [1994] ATPR ¶41-357, 42,677 (Lockhart P, Members Brunt and Aldrich)
[48] Re 7-Eleven Stores Pty Ltd [1994] ATPR ¶41-357, 42,683 (Lockhart J, Members Brunt and Aldrich)
[49] Re Application by Jools, President of the NSW Taxi Drivers Association (2006) 233 ALR 115, 121.
[50] Re 7-Eleven Stores Pty Ltd [1994] ATPR ¶41-357, 42,677 (Lockhart P, Members Brunt and Aldrich)
[51] Re 7-Eleven Stores Pty Ltd [1994] ATPR ¶41-357, 42,677 (Lockhart P, Members Brunt and Aldrich)
[52] Re Rural Traders Co -operative (WA) Ltd, (1979) ATPR 40-110
[53] Re QIW Ltd (1995) 132 ALR 225 at 276

also take into consideration _commercial likelihoods' and not merely a possibility or speculation.[54]

The Swanson Report[55] stated that the rationale behind favouring competitive behaviour is the social benefits accruing out of it and not merely the trading parties involved. It also stated if restricted behaviour leads to public benefit, which in turn outweighs the detrimental effect on competition, then it must be permitted provided that such public benefit must be durable and of substance and not be ephemeral or illusory.[56]

UNDERLYING PHILOSOPHY

In a liberal market economy, small businesses are subject to exploitation as they are dependent on multi-national companies and other big market players for the sale of their goods or services or raw material for further production. Here an analogy can be made with the economic exploitation arose in the pre- independence era when the peasants were dependent on the East India Company (EIC) to buy their produce and in the absence of any real right to negotiate had to sell it at minimal rates. [57] Such economic dissatisfaction brought the peasants together for collective bargaining against the EIC, which in turn gave impetus to the freedom struggle, which stood for the idea of socio-economic justice as well. Today, due to the presence of big multi- national companies which are pre-dominant market players, the smaller businesses must be permitted to undertake collectively bargaining or negotiate with them in furtherance of economic justice. Collective bargaining would minimize inequality of opportunity and deterrence faced due to the same, while providing a level playing field or equal footing with respect to the right of negotiation.

The Chairman of the Drafting Committee, Dr. B.R. Ambedkar, while winding up the Constituent Assembly debates stated that the rationale behind Directive Principles of State Policy is to ensure that due regard is given to _*economic democracy*' which is an aspiration of the Indian Constitution[58] which can be attained only when the smaller businesses are given a equal chance and opportunity to negotiate. A welfare state exists for the greatest good and wellbeing of the greatest number, especially in India which under the Preamble of the

[54] Re Howard Smith Pty Ltd and Adelaide Steam Ship Pty Ltd, (1977) ATPR 17,324
[55] Swanson Report, 1976 at 238
[56] Re Rural Traders Co-operative (WA) Ltd at 262-263
[57] Tapan Raychaudhuri, Dharma Kumar, Irfan Habib, Meghnad Desai, The Cambridge Economic History Of India: Volume 2, C.1751-c.1970
[58] MurlidharDayandeo Kesekar v. Vishwanath Pandu Barde 1995 Supp (2) SCC 549

Constitution proclaims to be a socialist state. [59]In conclusion, collective bargaining where there is a likelihood of public benefit must be realised within the folds of the Indian competition law and embodied amidst the provisions of the Competition Act, 2002 as an exception to anti-competitive agreements under Section 3.

CONCLUSION

The provisions of the Indian Constitution in accordance with the Competition Act, 2002, envisage a competition law framework which promotes and fosters competition, while also ensuring freedom of trade as enshrined under Article 19(1) (g) and championing the welfare of the consumers. Competition law in our country also heralds interest of the public or public benefit, which is in consonance with socio-economic progress.

Though perfect competition is a utopian idea, in the modern contemporary market economy where multi- national companies are predominant players, sma ller businesses which do not have the resources, capital or the technology as their bigger counterparts do not have the requisite negotiating power and are faced with exploitation. This leads to unequal distribution of economic power and opportunities, which is contrary to the spirit of Indian competition law.

Therefore, in light of such a stark imbalance in the market with respect to negotiating power, which gives an edge to bigger businesses over the smaller ones rendering a rather predominant position to the former over the latter, an amendment must be made to the Competition Act, 2002, according due recognition to collective bargaining, which must be put forth as an exception to anti-competitive agreements as laid down under Section 3(3), especially when public benefit is a likelihood. The authors propose a test along the lines of Australian competition law, which not only lays down provisions for collective bargaining but also gives a barometer of weighing and adjudging the detriment to competition vis-à-vis public benefit, which in turn must be applied and moulded according to the facts and circumstances of cases. Such a test would be holistic in approach, as it not only lays down an objective criterion for determining wherein collective bargaining may be claimed as an exception to anti-competitive agreements but also is flexible to extent of taking into consideration the peculiarities on a case to case basis. This would be in better furtherance of the aim or objective of competition law in India, which is free and fair competition while also embracing the goal of consumer welfare within it.

[59]*Satna Power Co. P. Ltd. v. Union of India (UOI)and Anr.*, May 2, 2006.