INDIAN COMPETITION (AMENDMENT) ACT, 2007 HAS NOT MADE DIFFERENCE BETWEEN PER SE RULE AND RULE OF REASON.

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ABSTRACT:

Competition Agencies all across the world examine anti – competitive agreements by either per se rule or rule of reason. The competition laws of most countries had made the distinction because there was consensus about the hardcore activities like cartelization had pernicious effect and should be made illegal by the laws. In those cases the competition agencies are supposed to balance the pro-competitive benefits and anti-competitive effects in determining the allegation against alleged parties. The Indian law had not made any sharp distinction between the two and the liability is based on appreciable adverse effect on competition within India. The paper examines the stand of India in respect of per se rule and rule of reason.

I. INTRODUCTION:

Competition laws all across the world are over-burdened with determination of liability of alleged parties in respect of anti-competitive activities, abuse of domination and combinations. So the activities are broadly divided into two categories, per se rule and rule of reason. The reasons are obvious. The ones which have more pernicious effect are examined by per se rule. The competition agencies can directly and immediately prevent them. The other ones are examined by rule of reason, where the pro-competitive effects are balanced with the anti-competitive effects. The process is longer. Only when the anticompetitive effects outweigh the pro-competitive effects, the competition agencies give preventive orders.

II. PER SE RULE.

Under per se rule, the acts or practices specified by the Act as deemed or presumed to have an appreciable adverse effect on competition are by themselves prohibited. It is unnecessary, under the per se rule, if they limit or restrict competition. This is on the basis of established experience of their nature to produce anti-competitive effects. The US Supreme Court explained in the case *Northern Pacific Railway Co. v. United States*,[2] the basis of per se rule. It was said that there are certain agreements or practices which because of their pernicious effect on competition and lack of any

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[2] 356, US 1.

redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or business excuse for their use. The principle of per se unreasonableness avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable an inquiry so often wholly fruitless when undertaken.

In *State Oil Co. v Khan*,[3] the US Supreme Court held that vertical price fixing is no longer considered a per se violation of the Sherman Act, but horizontal price fixing is still considered a breach of the Sherman Act.[4] Also in 2008, the defendants of *United States v LG Display Co*.[5], *United States v. Chunghwa Picture Tubes*[6], and *United States v. Sharp Corporation*[7] heard in the Northern District of California, agreed to pay a total sum of $ 585 million to settle their prosecutions for conspiring to fix prices of liquid crystal display panels, which was the second largest amount awarded under the Sherman Act in history.

Elaborate enquiry is not made in respect of such activities. Only the involvements of the alleged parties in such activities are enough. In USA, price fixation, group boycotts, tying arrangements are considered per se bad.

The efficacy of having per se rule in place can be explained with an example. In a jurisdiction where tying arrangement is considered per se illegal, there only the question of the tied product being tied with another product and the compulsion of the consumers in buying both the products proves the allegation and accordingly the competition agency can take appropriate action. In another jurisdiction, where it is treated with rule of reason, the following things are supposed to be proved. First, the tying

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[3]State Oil Co. v. Khan, 522 U.S. 3 (1997).

[4] Horizontal agreements include agreements between independent undertakings operating and supplying to the same market to fix prices or apportion markets (by class or geographical region, for example), or restrict output with a view to controlling prices in a market. Perhaps the most striking example of an international cartel mechanism is the Organization of Petroleum Exporting Countries, commonly known as OPEC, but that is another story. Vertical agreements include agreements between independent undertakings at different stages of the production and distribution chain: between manufacturer, wholesaler, retailer and consumer, or agents or third parties standing in their shoes as such.

[5] Case No. CR 08-0803 SI, available at http://www.justice.gov/atr/cases/f239300/239375.pdf

[6] Case 3:08-cr-00804-SI Document 18 Filed 01/16/2009, available at http://www.justice.gov/atr/cases/f278500/278564.pdf

[7] CR 08 0802, available at http://www.justice.gov/atr/cases/f239300/239374.pdf

arrangement must involve two different products. Manufactured products and their component parts, such as an automobile and its engine, are not considered different products and may be tied together without violating the law.

Second, the purchase of one product must be conditioned on the purchase of another product. A buyer need not actually purchase a tied product in order to bring a claim. If a vendor refuses to sell a tying product unless a tied product is purchased, or agrees to sell a tying product separately only at an unreasonably high price, a court will declare the tying arrangement illegal. If a buyer can purchase a tying product separately on nondiscriminatory terms, however, there is no tie.

Third, a seller must have sufficient market power in a tying product to restrain competition in a tied product. Market power is measured by the number of buyers the seller has enticed to enter a particular tying arrangement. Sellers expand their market power by enticing additional buyers to purchase a tied product. However, sellers are prohibited from dominating a given market by locking up an unreasonably large share of prospective buyers in tying arrangements.

Fourth, a tying arrangement must be shown to appreciably restrain commerce. Evidence of anticompetitive effects includes unreasonably high prices for tied products and unreasonably low prices for competing products in a tied market.

So the example shows for establishing liability in cases relating to anticompetitive activity, while treating the activity with rule of reason, the procedure is longer, more elaborate, more expensive and more technical. If the competition agencies can identify certain activities as more harmful than the other ones, those activities can be broad under the per se rule scanner.

III. RULE OF REASON.

Under Rule of Reason the effect of competition is found on the facts of the case, the market, and the existing competition, the actual or probable restraint on competition. *Tata Engineering and Locomotive Co. Ltd v. Registrar of Restrictive Trade Agreement*,[8] was the case where Supreme Court of India interpreted rule of reason. It was held that to determine the question 3 matters are to be considered, (a) What facts are peculiar to the business to which the restraint is imposed, (b) what was the condition before and after the restraint is imposed, (c) what is the nature of the restraint and what is its actual and probable effect. In case of rule of reason test, the pro-competitive effects are balanced

[8] Tata Engineering and Locomotive Co. Ltd v. Registrar of Restrictive Trade Agreement, (1977) 47 Comp Cas 520 SC.

with the anti-competitive effects, and after that if the pernicious effect is considered higher the activity if prevented by the competitive agency of the respective jurisdiction.

In certain jurisdictions where criminal sanctions are there, the competition agencies try most of the cases with rule of reason approach because the criminal liability in cases like cartelization the evidence to be adduced is measured by proof beyond reasonable doubt. Where doubt is raised before the courts, the doubt goes in favour of the accused and the competition agencies don't want to take risk in losing cases before the respective courts for lack of collateral evidence.

IV. INDIAN POSITION.

India had devised the appreciable adverse effect on competition test to determine the liability of the alleged party. There are no separate categories of trade practices which are examined by per se rule. The factors that are weighed by the Competition Commission of India includes (a) creation of barriers to new entrants in the market, (b) driving existing competitors out of the market, (c) foreclosure of competition by hindering entry into the market, (d) accrual of benefits to consumers, (e) improvements in production or distribution of goods or provision of services, (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.[9] The anti-competitive activities like tying arrangements, refusal to deal, exclusive supply agreements, exclusive distribution agreements, resale price maintenance are defined in section 3 of the Competition Act. The factors to be weighed in case of liability are defined under section 19 of the Act. [10] The new Act had included effects doctrine, so Competition Commission of India can even investigate cases which occur outside India but the effect is felt within India.[11] The relevant provisions of the Indian Competition Act is mentioned below to show the treatment of anti-competitive agreements under the Indian law.

Section 3 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007 defines anti-competitive agreement. Under Clause (1) no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an AAEC within India. [12]

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[9] Section 19 (3) of the Indian Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

[10] Certain definitions like relevant product market, and relevant geographical market are defined in section 2 of the Indian Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007. But the factors that the Competition Commission of India are going to examine are mentioned in section 19 of the Act.

[11] Section 32 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

[12] Section 3 (1) of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.

(3) 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 decision 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–

(a) Directly or indirectly determines purchase or sale prices

(b) Limits or controls production, supply, markets, technical development, investment or provision of services;

(c) Shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) Directly or indirectly results in bid rigging or collusive bidding, Shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation -For the purposes of this sub-section, bid rigging means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including —

(a) Tie-in arrangement;

(b) Exclusive supply agreement;

(c) Exclusive distribution agreement;

(d) Refusal to deal;

(e) Resale price maintenance,

(f) Practice includes any practice relating to the carrying on of any trade by a person or an enterprise.

(g) price in relation to the sale of any goods or to the performance of any services, includes every valuable consideration, whether direct or indirect, or deferred, and includes any consideration which in effect relates to the sale of any goods or to the performance of any services although ostensibly relating to any other matter or thing.

The term anti-competitive agreements as such has not been defined by the Act, however, Section 3 prescribes certain practices which will be anti-competitive and the Act has also provided a wide definition of agreement under section 2 (b). Section 3(1) is a general prohibition of an agreement relating to the production, supply, distribution, storage, acquisition or control of goods or provision of services by enterprises, which causes or is likely to cause an AAEC within India.[13]

Section 3(2) simply declares agreement under section 3(1) void. Section 3(3) deals with certain specific anti-competitive agreements, practices and decisions of those supplying identical or similar goods or services, acting in concert for example agreement between manufacturer and manufacturer or supplier and supplier, and also includes such action by cartels. Section 3(4) deal with restraints imposed through agreements among enterprises in different stages of production or supply etc. for example agreement amongst manufacturer and supplier. Section 3(5) provides for exceptions, it saves the rights of proprietor of any intellectual property right listed in it to restrain the infringement of any of those rights regardless of section 3.

Few references can be made in respect of cases tried by the Monopolies and Restrictive Trade Practices Commission, MRTPC, the Competition Agency which tried anti-competitive agreement under the name of restrictive trade practices before the Competition Commission of India came into existence.[14] In the case of *Hindustan Times Ltd*[15] the respondents were the publishers of leading newspapers namely Hindustan Times, Statesman, Times of India, National Herald, Indian Express and Patriot, and were members of an association of newspaper publishers (Indian and Eastern Newspaper Society). All the six undertakings increased the prices of their newspapers 3 or 4 times between 1971-1974, on or about the same time. The size of the newspaper were simultaneously reduced. It was alleged that these increases were done in concert either by informal consultation inter se by the six undertaking or through their association and these increases adversely affect competition among the publishers and the sellers of the newspaper and tended to bring about manipulation of prices of newspapers and so as to impose on the consumer's unjustified costs. All the respondents except the publishers of patriot submitted to the orders of the MRTP commission. The Commission accordingly

[13] AAEC means appreciable adverse effect on competition in India. That is the standard maintained in the Indian Competition Act to consider a respective anti-competitive agreement bad and steps are taken to stop the anti-competitive agreement by the Competition Commission of India.

[14] The Monopolies and Restrictive Trade Practices Act of 1969, gave birth to the MRTP Commission. The MRTPC addressed the restrictive trade practices and unfair trade practices and if proved stopped the alleged parties from continuing with those activities.

[15] In Re. Hindustan Times Ltd, 1979 Comp Cas 495 (MRTPC)

passed 'cease and digest' order against them. However, there were no evidence of collusion between 'Patriot' and other respondent and thus the concert was accordingly proved against Patriot.

In the case of *RRTA v Bombay Customs House Agents Association*[16], the custom house agent had formed a trade association by its Code of Conduct fixed the minimum rates to be charged by its members for various services rendered to their clients. The MRTP commission held it to be restrictive trade practice of fixing prices in concert. But all these cases were tried by rule of reason. The pro-competitive effect and anti-competitive effects were balanced to find out the pernicious effect of the alleged activity.

Recent cases handled by the Competition Commission of India under the Competition Act, 2002, as amended by the Competition (Amendment) Act, also show that India want to weigh the pro-competitive and anti-competitive effects of the alleged activity to ascertain the liability of the alleged party. In *Belaire Owner's Association vs. DLF Limited & Ors*,[17] the Competition Commission of India successfully dealt with a case of abuse of dominant position. The information in the instant case was filed under Section 19(1) (a) of the Competition Act, 2002 by Belaire Owners' Association against the three respondents which are DLF, Haryana Urban Development Authority ("HUDA") and Department of Town and Country Planning, Haryana ("DTCP"). It has been alleged by the Informant that DLF by imposing highly arbitrary, unfair and unreasonable conditions on the apartment allottees of the housing complex 'The Belaire', which has serious adverse effects and ramifications on the rights of the allottees, DLF has abused its dominant position. One of the main contentions was that that in place of 19 floors with 368 apartments, which was the basis of the Informant booking its respective apartments, now 29 floors have been constructed by DLF, unilaterally. Consequently, not only the areas and facilities originally earmarked for the apartment allottees were substantially compressed, but the project has also been abnormally delayed without providing any reasons to the Informants whatsoever. Pursuant to the complaint made by the informant, the Commission had directed the Office of the Director General to carry out investigations on the allegations leveled against DLF and submit a report on its findings.

The Commission observed that a relevant market is delineated on the basis of a distinct product or service market and a distinct geographic market. These terms have been defined in Section 2(r) of the Act read with Section 2(s) and Section 2(t). As per the Commission, the promotional brochures of the

[16] RTPE 14 of 1979, decision on 13-10-1960 (MRTPC)

[17] Belaire Owners' Association v. DLF, HUDA & Ors; Case No. 19 of 2010

property by DLF provided for innumerable additional facilities, like, schools, shops and commercial spaces within the complex, club, dispensary, health centre, sports and recreational facilities, and such features, along with the cost-range mentioned earlier, may be broadly considered to define the characteristics of "high-end residential accommodation".

The Commission noted that in the present case, Gurgaon is seen to be the relevant geographic market as a decision to purchase a high-end apartment in Gurgaon is not easily substitutable by a decision to purchase a similar apartment in any other geographical location. As per the Commission, Gurgaon is known to possess certain unique geographical characteristics such as its proximity to Delhi, proximity to airports and a distinct brand image as a destination for upwardly mobile families. Thus the Commission was of the view that the relevant market in the instant case is the market for services of developer / builder in respect of high-end residential accommodation in Gurgaon.

The CCI successfully decided another case on abuse of dominant position in *UPSE v. National Stock Exchange Limited*[18]. In the present case, CCI has dealt in detail with the concepts of "dominant position", relevant market, predatory pricing and abuse of dominant position in one market to enter another market in the context of the stock market services. CCI relying on the host of factors provided under the Act has attempted to determine whether NSE's activities amounted to indulgence in abusing of its dominant position and violation of the provisions of the Act. MCX, operating as an exchange platform for trading in currency derivatives alleged NSE of indulging in wrongful and abusive exercise of market power eliminating competition from the currency derivative segment and discouraging potential entrants from entering the relevant market through leveraging, waiver of transaction fees, annual subscription charges, data feed fees and adopting exclusionary devices to kill competition.

The major issue for analysis before the CCI was whether NSE merely occupying a position of strength in the other markets, could be considered a dominant players. It may be pertinent to note that the market share of MCX in comparison was higher in the said market player in the currency derivative market wherein it occupied only 33.17% of the market share with the entry of several other market

In discussing the issue related to "relevant market", in the case at hand, the CCI assessed all the segments of the stock exchange market including equity, futures and options, WDM segment dealing with government securities alongside the currency derivative market. It effectively delineated different sectors of the stock market and interestingly did not club the other sectors of the stock market

[18] UPSE Securities Ltd. V. National Stock Exchange of India Limited; Case No. 67 of 2012.

in arriving at its determination. The CCI was of the opinion that the other segments of the stock market were not ‘adequate substitutable or interchangeable products’ for the currency derivative (“CD”) segment. Since the CD segment was ‘distinctly different’ from other segments requiring separate approvals, it was considered an independent and distinct relevant market. The boundaries of relevant market freeze when the products involved cease being practically interchangeable or substitutable; thereby the CD segment in India was found to clearly be an independent and distinct market. In all these cases factors under section 19 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, were examined. Per se rule was not used at all.

Competition laws in all over the world usually places anti-competitive agreements in two categories namely – horizontal agreements and vertical agreements. Horizontal agreements are generally viewed more seriously than the vertical agreements. Firms enter into agreements, which may have the potential of restricting competition. A scan of the competition laws in the world will show that they make a distinction between horizontal and vertical agreements between firms.

The former, namely the horizontal agreements are those among competitors and the latter, namely the vertical agreements are those relating to an actual or potential relationship of purchasing or selling to each other. A particularly pernicious type of horizontal agreements is the cartel. Vertical agreements are pernicious, if they are between firms in a position of dominance. Most competition laws view vertical agreements generally more leniently than horizontal agreements, as, prima facie, horizontal agreements are more likely to reduce competition than agreements between firms in a purchaser seller relationship. the Act have not used the term horizontal agreements and vertical agreements, however the language used in the Act suggests that agreements referred to in section 3(3) and section 3 (4) are horizontal and vertical agreements respectively. It is to be noted that section 3(3) and section 3(4) are the main provisions which are mainly attracted to prove the existence of any anti-competitive agreements.

V. CONCLUSION.

In conclusion it can be said that Indian Competition Act could have identified certain categories of anti-competitive activities like bid-rigging or price-fixing, which could be considered to be per-se bad. In that case the time of CCI would have been saved in the process of enquiry. Also expense of investigation and complicated procedure could be reduced. Only the impugned practice would have been required to be established, not the anti-competitive effect.

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