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Evolving Competition Jurisprudence in India

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ABSTRACT: The modern Indian competition law (The Competition Act, 2002) which came into existence in 2003 (received President's assent on 13th January 2003), became fully operational in 2011 (enforced in phased manner, last notification was published on 31st May 2011) has changed the markets enormously. It deals with anti-competitive agreements, abuse of dominant position and combinations. The law challenged the prevalent practices in the market prevalent since time immemorial.
The quantum of penalty (cement cartel – Rs. 6317 Crores, bid rigging by public sector insurance companies – Rs. 671 crores, LPG Cylinder Case – Rs. 165 Crores, etc.) and the high profile corporate who were punished under the Act, (the Competition Commission of India has levied hefty penalties on infringement of provisions of law including DLF, cementauto companies, public sector insurance companies, IT conglomerate Google, etc.) invited attention of people. Apart from this, there were developments in this area of law. These developments in competition law jurisprudence in India have been discussed in this article.

Key words: Competition – Cartel – Rightsizing – Commission – Turnover - Leniency

I. INTRODUCTION

As a general proposition, competition law is a framework of legal provisions designed to maintain competitive market structures. It consists of rules intended to protect the process of competition in order to maximise consumer welfare. It is a branch of law that is concerned with the regulation of anti-competitive practices, restrictive trade practices, abuse of monopoly or dominant position and combinations.
India, being a relatively younger jurisdiction in competition law, it took benefits of adopting and incorporating elements of relatively *matured jurisdictions* [1], and framed a state of art competition law, i.e. the Competition Act, 2002 (hereinafter referred as 'Act'). The objectives contained in the Act are to discourage and stop anti-competitive practices and those who are perpetrators of such practices need to be indicted and suitably punished. The Act cast a duty on Competition Commission of India (hereinafter referred as 'the Commission') to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India [2].
The Commission has completed 14 years in existence, 8 years of anti-trust enforcement and 6 years of review of combinations. Competition jurisprudence is in evolving stage in India. Some of the recent developments in competition law as under:

A. Amendment in Competition Commission of India (Lesser Penalty) Regulations, 2009 [3]

The leniency schemes are considered one of the most successful methods to catch cartels, but, India is so far exception to it. Even after completion of 8 years of leniency regulations, so far the Commission solved only one case. To encourage individuals to approach the Commission in such infringement, the leniency regulations have been amended and are effective from 22 August, 2017.
The revised regulations permit an individual who has been involved in the cartel on behalf of an enterprise to be an applicant for lesser penalty. Where the applicant is an enterprise, it should also provide the names of individuals who have been involved in the cartel on its behalf and for whom lesser penalty is sought by such an enterprise. Earlier, only three applicants in the priority status were granted reduction of penalty upto or equal to thirty percent of the full penalty leviable; now every subsequent applicant also may be granted reduction of similar penalty available to third applicant. Now, the designated authority, who received the information of cartel from applicant, can put up the matter for consideration of the Commission within five working days instead of three working days earlier. The applicant has to submit a written application containing all the material information as specified, within a period of fifteen days from the date of communication of direction of the Commission in this behalf. Where the Director General deems it necessary to disclose the information,

documents and evidence furnished by the applicant, to any party for the purposes of investigation, and the applicant has not agreed to such disclosure, the Director General may disclose such information, documents and evidence to such party for reasons to be recorded in writing and after taking prior approval of the Commission. The non-confidential version of the information, documents and evidence furnished by the applicant shall be available for inspection, after the Commission forwards a copy of the report containing the findings of the Director General to the party(ies) concerned. However, such party(ies) should not disclose the information, documents and evidence so obtained other than for the proceedings under the Act. At last, the applicant has to inform the estimated volume of business affected in India by the alleged cartel.

B. Appeals shifted from Competition Appellate Tribunal to National Company Law Appellate Tribunal

The Hon'ble Finance Minister in his Budget speech of 2017-18 said that over the years, the number of tribunals have multiplied with overlapping functions and proposed to rationalise the number of tribunals and merge tribunals wherever appropriate.

In this direction, the Finance Act, 2017 amended the Competition Act, 2002 and, the COMPAT had ceased to exist effective 26 May, 2017. With this amendment, the appellate function under the Act conferred to the National Company Law Appellate Tribunal (NCLAT).

C. Reconsidering cases and passing of orders

The Commission while dealing with competition infringements has adopted different approaches in different cases/issues. It is observed that in some earlier cases, the principle of natural justice was not followed in letter and spirit. The Commission has imposed huge amount of fines in number of cases on enterprises for contraventions of the provisions of Competition Act. However, the erstwhile Competition Appellate Tribunal (COMPAT) had set aside or reversed the orders, or lowered the penalty, or remanded the matter back to the Commission to reconsider. The Commission has reconsidered the cases, like, cement cartel & fuel surcharge, heard the parties, as per the directions/orders of COMPAT, and passed appropriate orders.

D. Issue of Turnover

With time many issues get resolved, in Indian competition law, turnover is one of them. The definition of *'turnover'* as contained in Section 2(y) of the Act, which includes value of goods or services. However, the Act has not clarified the term '*turnover*', whether it is '*total turnover*' or '*relevant turnover*'. So far, Commission imposed penalties on contraventions of section 3 & 4 based on 'total turnover'. However, the erstwhile COMPAT had reversed the orders of Commission and opined that the basis of imposing penalty should be 'relevant turnover'. The matter came before the Supreme Court through appeals.

In the case of *Excel Crop Care Limited* v. *Competition Commission of India and others* [4], decided on May 8, 2017, the Hon'ble Supreme Court relied on the judgment of erstwhile COMPAT and opined that the Commission to consider the 'relevant turnover' while determining penalty on any anti-competitive agreement or abuse.

This judgement on turnover would lead to clarity in relation imposition of penalties under section 27 of the Act. Certain observations of the Supreme Court will also lay down grounds on how penalties are to be imposed under section 27 of the Act. For instance in its judgement, the Supreme Court has observed that where penal provisions have to be interpreted, the interpretation should not be absurd in nature. The Supreme Court applied a mix of 'purposive interpretation' and 'doctrine of proportionality' while deciding on the turnover.

The Supreme Court while deciding the case opined that adopting the criteria of *'relevant turnover'* for the purpose of imposition of penalty will be more in tune with ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties.

Supreme Court was of the view that the purpose and objective behind the Act is to discourage and stop anti-competitive practices. The aim of the penal provisions is to ensure that these acts as deterrent. However, at the same time, such a position cannot be countenanced which would deviate from 'teaching a lesson' to the violators and lead to the 'death of the entity' itself. Adoption of the criteria of total turnover of a company by including within its sweep the other products manufactured by the company, which were in no way connected with anti-competitive activity, it would bring about shocking results not comprehended in a country governed by Rule of Law.

Supreme Court was also of the view that there is a legislative link between the damage caused and the profits, which accrue from the cartel activity and once this co-relation is kept in mind, while imposing the penalty, it is the affected turnover, i.e., '*relevant turnover*' that becomes the yardstick for imposing such a penalty. It is also the purpose of the Act not to punish the violator even in respect of which there are no anti-competitive practices and the provisions of the Act are not attracted.

Participation in a cartel conspiracy may cynically count on retrieving more through fixed prices than the amount of fines in case of a possible disclosure. Only fines that are perceived as sufficiently severe to outweigh the gains from anti-competitive behaviour will have a deterrent impact on anti-competitive behaviour [5].

Hon'ble Justice N. V. Ramana in his supplementary and concurring judgment very beautifully wrote about the parameters of punishment, "*any penal law imposing punishment is made for general good of the society. As a part of equitable consideration, we should strive to only punish those who deserve it and to the extent of their guilt. Further it is well established by this Court that the principle of proportionality requires the fine imposed must not exceed what is appropriate and necessary for attaining the object pursued.*"
He also suggested two steps calculation while imposing penalty under section 27 of the Act, first on determination of relevant turnover and second is determination of appropriate penalty based on aggravating and mitigating circumstances.

E. Venturing the Information Technology Sector
The competition law is now days applied to many economic activities that once regarded as natural monopolies or the preserve of the state. In India the competition authorities so far majorly covered some of sectors where oligopoly is prevalent, like, the airline, cement, automobile, sugar, insurance, banking and pharmaceutical sectors, etc. India witnessed some public sector insurance companies were penalised for bid-rigging. The Commission penalised major cement companies in cartel cases. It had also penalised one of major real estate player for abuse of dominance during its initial period. The information technology sector is very much. In a recent judgement, the Commission imposed penalty on world's leading IT player for abuse of dominant position in online general web search and web search advertising services in India.

F. Rightsizing of the Commission
The rationale behind right sizing this proposal is that the Government had revised *de minimis* levels in 2017, which have been made applicable for all forms of combinations and the methodology for computing assets and turnover of the target involved in such combinations, has been spelt out. This has led to reduction in the notices that enterprises are mandated to submit to the Commission, while entering into combinations, thereby reducing the load on the Commission. It is expected that the government will move an amendment in this respect

Challenges before the Commission – way forward

The Government expects from the Commission faster turnaround in hearings to result in speedier approvals, thereby stimulating the business processes of corporates and resulting in greater employment opportunities in the country.
The Commission has taken various steps to further the competition culture in India; it is using various noble methods of detecting anti-competitive practices prevalent amongst Indian corporate. The time has come that the Commission should be equipped with resources, it should use various advanced methods to detect the anti-competitive practices.
The journey has just started, still miles to go. The competition law in India is venturing into new, different and wide areas, where consumer interest is kept at lower priority. With less number of members, dealing appropriately with competition issues would be a challenge for the Commission.
Necessity is the mother of invention, the commission may take help of experts from different fields who would work like amicus curiae to resolve the competition issues. The role of professionals like company secretaries arose, who can take the lead in further pursuing the expectations of the economy, the commission and the Nation in evolving the competition jurisprudence.

REFERENCES

[1]. United States of America, United Kingdom and European Union, etc.
[2]. The Preamble to the Competition Act, 2002.
[3]. For details, see Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017.
[4]. Excel Crop Care Limited v. Competition Commission of India and others 2017 (5) TMI 542.
[5]. Lennart Goranson, "The Efficient and Effective Competition Authority" 213 in Vinod Dhall (Ed.), Competition Law Today – Concepts, Issues and the Law in Practice (OXFORD University Press, New Delhi, 2007, Reprint 2015).