

ACTS TAKING PLACE OUTSIDE INDIA BUT HAVING AN EFFECT ON COMPETITION IN INDIA

Written by *Himanshu Rajpurohit*

One Year LL.M Student, Gandhinagar National Law University

INTRODUCTION

“We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution”

- By John Marshall

In normal course of time when the legislature of a state enacts a statute or law its main objective is to control, direct or shape the conduct of the society and its members. But in this modern era, the era of Globalisation where the world altogether appears to be a global village, there are instances where for the good and efficient governance & for the welfare of the people at large the state has to take initiatives for the regulation of conduct of things happening beyond the territorial border of a nation. This is because in this globalized world, none of the states are independent (relying solely on ourselves), we all here nowadays are inter-dependent. One of the biggest e.g. of it can be the Economic Recession. Hence the present paper seeks to discuss the importance of Sec-32 of The Competition Act, 2002 i.e. “Acts taking place outside India but having an impact on competition in India” and problems annexed with this issue and to suggest the reforms/steps (if any required & possible) to put an end to issues & criticalities related to the said topic.

But before coming to the core issues that will be discussed in this paper let us have an overview of the Act¹. The Competition Act, 2002 is the result of a shift from the ideology of curbing monopoly to promoting the competition in the market. The competition Law is flexible and

¹ The Competition Act, 2002.

behaviour oriented². It intends to ensure the free flow of the market forces. For the better understanding of it a comparative table is drawn below for the glimpse of the objectives of both the act-

The Competition Act, 2002	MRTTP Act, 1969
Prohibition of Anti-competitive Agreements	Prevention of Concentration of Economic Power to the common detriment
Prohibition of Abuse of Dominance	Control of Monopolies
Regulation of Combinations	Prohibition of Monopolistic Trade Practices
	Prohibition of Restrictive Trade Practices

The history of the Act³ is a good e.g. of the proverb that “Road to hell is paved with the good intentions”⁴. The Act aims, not only in ensuring the fair competition in India but also on curbing the negative aspects of the competition.

In modern times meaning of the term of ‘Market’ has under gone a radical change. Now it is not confined within a territory of physical boundaries of a nation, instead it is a global term and hence, we face the instances where the things happening outside India have their impacts on us. To effectively deal with such kind of situations the Competition Act very precisely provides the weapon to the Competition Commission U/S- 32.

The idea behind incorporating Section- 32 lies behind the judgment of Hon’ble Supreme Court in the case of *M/s Haridas Exports v. All India Float Glass Manufacturers Association & ors.*, wherein the Hon’ble Supreme Court reverted the two orders of the MRTPC, merely on the ground that the commission acted ultra-vires. It didn’t dwell upon the issue that whether the findings of the MRTPC were righteous or not. The Hon’ble Court held that “Formation of cartel which takes place outside India is outside the territorial jurisdiction of the MRTTP”⁵. Thereby tides the hands of the commission. This judgment raised the concern for the first time

² S M DUGAR, COMMENTARY ON MRTTP LAW COMPETITION LAW & CONSUMER PROTECTION LAW583 (4th ed., 2006).

³ Supra 1.

⁴ T. RAMAPPA, COMPETITION LAW IN INDIA.

⁵A.I.R. 2002 S.C. 2728 (India).

that what to do of instances where the acts taking place out of the territorial borders of India have a devastating effect on Indian market and competition. This incident led the drafting committee to give the said powers to the Competition Commission, so that they can effectively deal with the situation.

EVOLUTION OF THE EXTRA-TERRITORIAL APPLICATION OF COMPETITION LAW

❖ In United States

It is remarkable that the history of the extra-territorial application of the competition law originates from the case of “United States v. Aluminum Co. of America”⁶. In the present case Alcoa (Aluminum Co. of America) was part of an international cartel of which most activities were not in USA, Alcoa pleaded USA doesn’t has the jurisdiction. At this case was the first instance when the settled view was changed that Sherman Act has territorial application only. Justice Hand in the present case stated that “*if the effects of conspiracy were felt within the U.S., the U.S. courts had jurisdiction over such conspiracy and as long as the conspirators intended and foresaw the effects on U.S. markets, the jurisdictional test was satisfied*”⁷. This case is also known as the case for the evolution of the Effects Doctrine.

❖ In European Union

The development of extra-territorial application of the EU competition law can be devised into 2 phases:

Implementation Doctrine

⁶ 148 F.2d 416 (1945).

⁷ THE INTERNATIONAL LAW ON FOREIGN INVESTMENT. M. SORNARAJAH 155-156(2010).

The famous case in context of this doctrine is the Wood Pulp Case⁸. In this case EC imposed fines on certain enterprise, which had their registered office outside EC, for violating the provisions of Art-81. Some of the appellants challenged the jurisdiction of commission. At this the court held that their conduct had two elements one relating to the formation of agreement, and the other related to the implementation and that the place of implementation was the decisive factor⁹

Economic Entity Doctrine

This Doctrine was evolved in the famous Dyestuffs¹⁰ case in which the issue was whether the EC has jurisdiction over such parent undertakings (which are not within their jurisdiction) but are engaged in the practice of price fixation via their subsidiaries in EU. To this the court stated that:

“The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company, especially where the subsidiary does not determine its market conduct independently but in all material respect carries out the instructions given to it by the parent company”¹¹

ACTS TAKING PLACE OUTSIDE INDIA BUT HAVING AN EFFECT ON COMPETITION IN INDIA

The Competition Act, 2002 lays down an extensive guideline in context of controlling mechanism of the Anti-competitive agreements & practices which is being continued by the different person within the territory of India. To put it in other words the act has been very helpful and effective in enforcing and ensuring free flow of market forces by keeping a check on those who are within its territorial jurisdiction and can misuse their power. But here lies an

⁸AhlströmOsakeyhtiö and Others v. Commission of the European Communities, Judgement of the European Court of Justice of 27 Septembr 1988.

⁹ T. RAMAPPA, COMPETITION LAW IN INDIA 277.

¹⁰ ICI v. Commission, Case 48-69, 1972.

¹¹ Ibid, para 132;

important consideration that in this modern era where this world appears to be a global village, there is high probability that someone though not physically present within Indian Territory or Indian market can also hinder the process of the competition/ Competitive market. It is to be always taken in consideration that such motives can be achieved by the cartels which are formed overseas by entering into any kind of Price-Fixing arrangement, Distribution agreement, Market allocation or exclusive dealing agreement. These overseas cartels pose a serious threat to the competitive atmosphere of a nation and its market and we are no stranger to that sort of threat. Hence, the complexity rises now that what to do in such kind of circumstances when we all are aware of the very fact that the domestic legislation has territorial effect. One of the very profound e.g. of it can be found in the case of 'Alkali Manufacturer's Association of India v. American Natural Soda Ash Corporation and ors'.¹² And in the case of 'M/s Haridas exports v. All India Float Glass Manufacturers Association &ors'.¹³ Which are discussed later in this project.

In regard of these issues only Section- 32 of the act lays down that

“The Commission shall, notwithstanding that-

- a) an agreement referred to in section 3 has been entered into outside India; or
- b) any party to such agreement is outside India; or
- c) any enterprise abusing the dominant position is outside India; or
- d) a combination has taken place outside India; or
- e) any party to combination is outside India; or
- f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India,

have power to inquire, into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India”¹⁴.

¹²(1998) 3 Comp.L.J. 152 M.R.T.P.C. (India).

¹³A.I.R. 2002 S.C. 2728 (India).

¹⁴ The Competition Act, 2002, Section 32.

The above-mentioned power of the Competition Commission of India is also coupled with the power to conduct an investigation and procedure for it U/S- 19, 20, 26, 29 & 30 of the Act¹⁵.

The question that whether the provision has been efficient enough to put a restraint on all kind of activities having outside India having an adverse effect on Indian market & competition can't be answered right now, as the practicality i.e. practical implementation of this provision is yet to be tested. There is no doubt according to the provision that the CCI has the power to investigate into instances of such matters but what about effectively carrying out the order, that what are the tools that CCI is equipped with. In the same context we can have a look at the provision of Section- 18, which lays down that:

“Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants, in markets in India:

Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement, with the prior approval of the Central Government, with any agency of any foreign country”¹⁶.

But the problem is not yet over, as the issue of the extra-territorial combination is not yet to be resolved, and up till now there have not been any rules or regulations notified in that context.

INSTANCES WHERE SECTION 32 WAS BROUGHT INTO ACTION AND JUDICIAL STAND ON IT

The Indian competition law regime has come into action in last few years only, and it has to learn a lot to keep the pace with the changing time and global scenario. Though there are

¹⁵ Supra 3.

¹⁶ The Competition Act, 2002, Section 18.

contentions that compared to the competition laws of US & UK, the Indian competition law is complete in nature, as it is equipped with every weaponry system needed to keep a check on the anti-competitive practices affecting its market, it is yet to be tested in context of its extra-territorial jurisdiction. Until now there have been no such instances where the efficacy of the commission in exercising its power beyond the territory of India can be examined. Up till now we have faced competition issues only by the enterprises having their presence in India. There have been only 18 cases on the provision of Section-32, which have been decided by the different courts including SC, different HC, Comp AT & CCI.

It is at this juncture will be appropriate to quote the decision of CCI in 'Dhanraj Pillay and Others Vs .M/s. Hockey India'¹⁷ where the one of the several issues before the commission was that, whether they have the jurisdiction over the national and international federations? On which it was held by the commission that it has jurisdiction on such bodies and held liable to them.

ISSUES INVOLVED & REFORMS NEEDED IN INDIAN COMPETITION LAW REGIME

To start with the issues involved at the first hand in effective implementation of Section 32 of the act or commission exercising its power beyond the territories of India, we have to first realize that there are two facets of this coin. On one side of which lies the public welfare motive of a nation i.e. a competitive market, while on the other side of it lies, the economic benefit accruing in a nation.

For e.g. consider two nations "A" & "B". Presuming that there is a dominant enterprise to be termed 'X' in country 'A', which is misusing its dominant power to derive benefit from the market of country 'B'. Here the interest of country 'B' will be to deter Company 'X' from destroying its competitive market, on the other hand country 'A' will benefit only if 'X' can

¹⁷2013Comp.L.R. 543 C.C.I. (India).

make more money, no matter what's the way it opts for until 'X' is not breaking its ('A') municipal law of the land. This kind of scenario can be termed as Conflict of Interest.

We can look for the instance of such kind of conflict of interest at the International level. The case study of General Electric & Honeywell could serve as one of the best e.g. possible to illustrate such kind of conflict of interest. "After the world's largest proposed merger between GE and Honeywell was cleared by the US, the EC blocked the merger as it would result in the creation of dominant positions in various markets (including the supply of avionics and corporate jet engines), within the EC, as well as to the strengthening of GE's existing dominant position in the market for jet engines, for large commercial and regional jets. Although GE proposed a number of undertakings to address the Commission's concerns, they were considered insufficient and rejected"¹⁸. The same kind of problem can also be illustrated with the case study of the Boeing & McDonnell Douglas where the Competition Authorities of USA gave a green signal to the merger deal, although in its way it was halted by the EC. In relation to such kind of issues only, "Mario Monti, former EU Commissioner for Competition said that it is unfortunate that the EC and DoJ reached different conclusions. The risk of dissenting views, although regrettable, can never be totally excluded"¹⁹.

After making a thorough analysis of the provisions of the Competition Act in context of its extra-territorial application and the powers vested with the CCI we can conclude that unlike the powers of the competition authorities of EU & USA in context of extra-territorial jurisdiction, which was a judicial expounding, the powers of the CCI comes from the legislative enactment. The code is complete in itself, but still in its nascent stage. The jurisprudence of the Indian Competition Law is still evolving. In the meantime, what is more important is that by utilising the power of Section 18 of the Act, the commission shall endeavour to enter into several bilateral & multilateral agreements with the competition authorities of the different

¹⁸Tatjana Sachse, *Extraterritorial Application of Competition Laws in the US and the European Union*, CUTS CENTRE FOR COMPETITION, INVESTMENT & ECONOMIC REGULATION (No. 4/2006), [http://www.cuts-ccier.org/pdf/Extraterritorial Application of Competition Laws in the US and the European Union.pdf](http://www.cuts-ccier.org/pdf/Extraterritorial_Application_of_Competition_Laws_in_the_US_and_the_European_Union.pdf)

¹⁹ Ibid.

jurisdiction, for giving the effective implementation to the wordings of Section 32, instead of making it a 'Tiger without Teeth'.

CONCLUSION

So, when John Marshall said, "*We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution*", he might not have understood the far-reaching consequence of his own philosophy. Though his view tends to be in conformity with our practice, but so is not the case with the UK & US. In modern times when the far-reaching dimensions of the legal sphere is merging with the dimensions of various other fields, which can't be foreseen, there is a need to keep a void to be filled from time to time.

In context of Indian scenario, we can conclude that the Indian Competition Law is self-sustaining & self-reliant, all that is needed now is a well-equipped commission to keep pace with the changing times. As stated before also, in this era of inter-dependency what now is required is the mutual co-operation of different jurisdictions for an effective competition regime and a pro-competitive global market. The CCI is needed to enter into several bilateral & multilateral agreements with the different nations for the effective implementation and achieving the object of the Competition Act.

There are several other ways of solving the problem of competitive market in global scenario like adoption of a role model on global competition policy like TRIPS in the case of IPR & GATT in matters of trade by the WTO or any other international organizations. But that's not the concern over here because as far as this paper is concerned its objective was to look within the scope of extra-territorial jurisdiction of the Competition Law of India and reforms needed in them.

Last but not the least, is to be remembered that unlike the MRTP Act of 1969, the Competition Act, 2002 sees the problem of competition as an economic activity. It is to be always pondered

in mind that the reputation and the efficiency of a commission will also be judged on the basis of economic capacity of a nation and its participation in the global market. Hence there is a need for strive towards excellence by nation as a whole.

