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MONOPOLIES IN INDIAN ECONOMY: REASONS FOR SHIFT FROM MRTP TO COMPETITION ACT

Sangya Ranjan
Satyawati College (Eve)
University of Delhi, Delhi

ABSTRACT

Competition Law in India, is currently governed by the Competition Act, 2002. Prior to that, it was primarily governed by the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP). This paper encircles itself around the same to determine and discuss the reasons that lead to its failure and eventually, replacement. It traces the history behind the inception of the Act, provides a brief account and synopsis of the same, and critically analyses the drawbacks of it. Various drawbacks are identified, such as, vagueness and ambiguity, excessive government control; "per se" rule instead of "rule of reason", voluntary disclosure policy, excessive encouragement to exports, and so on. These drawbacks are analyzed with respect to the market and how they have an adverse effect on the market instead of serving the purpose of Competition Law. Furthermore, a few cases have been looked upon for the purpose of the same analysis and to provide a judicial account of the disabilities of the Act. It is concluded that the vague and potent nature of the Monopolies and Restrictive Trade Practices Act, 1969, lead to its failure.

I. RESEARCH METHODOLOGY

This research paper follows the doctrinal method of research. The research for this paper comprises of secondary data collected from various online journals and publications from authentic sources, and various Competition law books.

II. QUESTION RAISED

This paper seeks to determine that why the Monopolies and Restrictive Trade Practices Act, 1969, was insufficient in itself to combat anti-competitive practices, or, in other words what were the reasons that lead to the failure of the MRTP Act.

III. CHAPTERS

1. INTRODUCTION

Competition in the market is unavoidable in the contemporary global scenario. It is prevalent in almost every economy in the world, and same is the case for Indian markets. In post-independence India, while the focus of the government was to promote the public sector to boost economic development, the government failed to realize that this approach gave rise to engagement in monopolistic and restrictive trade practices by big corporations and business

entities. Consequently, with the advent of "License Raj", and the concentration of the economic power of the country in the hands of a few big corporations, the need of an anti-competitive legislation was felt, which is when the inception of Monopolies and Restrictive Trade Practices, 1969, happened, which was the first and foremost Competition Law statute in our country.

Competition law is that area of law that promotes and supports, or, endeavors to maintain a free and fair market competition by way of regulation of anti-competitive behavior by business entities. In India, before September 2009, this regulation was carried on by way of the MRTP, before it was replaced by the current legislation, i.e., the Competition Act, 2002.

The reason behind the laying down of the MRTP Act is also reflected in the Constitution of India, by way of Directive Principles of State Policy. Articles 38 and 39 of the Constitution enumerate that the State shall endeavor to foster the welfare of the people and protect their economic, social, and political interests; it shall strive that the resources of the nation are distributed evenly so as to avoid unfair advantage and secure the interests of all, and, should ensure that the economic system is not operating in a way so as to concentrate the wealth of the nation in the hands of a few affluent people, over-stepping the prosperity of all.

The objective of the MRTP as enshrined in the Act is to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto.

2. SYNOPSIS OF THE MRTP ACT

It is essential to have a small overview of the MRTP Act for the purpose of this paper, so as to lay down a basis for analysis of the same. Following concepts of the Act would help us understand the scope and applicability of the Act.

i. Command and Control Approach: It is enshrined in Chapter III of the MRTP Act that is on concentration of economic power, that it is mandatory for businesses owning assets worth more that Rs. 20 crores to obtain a sanction from the Central Government before getting into any kind of corporate restructuring agreement, including the setting up of new companies or substantial expansion as well, in other words, bolstering the system of industrial licensing. Additionally, a fixed criterion was set out for classifying a company as dominant, i.e., if a company has assets worth more than Rs. 1 crore, it falls into the category of dominant by default.

ii. Monopolistic Trade Practices: Monopolistic Trade Practices or MTPs are contained in Chapter IV of the Act and they are defined as the activities carried out by big business entities by abusing their dominant market position to as covered under the Chapter IV of the MRTP Act are the activities undertaken by Big Business Houses by abusing their market position to hinder or obstruct a free and fair market with healthy competition.

iii. Restrictive Trade Practices:Restrictive Trade Practices or RTPs are defined as the activities that restrict the free flow of profit or capital in the economy. They were contained in Chapter V and VI of the Act and were based on the British Restrictive Trade Practices Act, 1956. They do that by way of controlling the supply of products in the market by meddling with production, delivery, etc. The Act also prohibits certain targeted restrictive trade practices in the form of inter-firm horizontal or vertical agreements, and the Commission set up under the Act would review them to judge their legitimacy.[1]

iv. Unfair Trade Practices:Unfair Trade Practices, or UTPs are essentially falsifying, deceiving, misleading or distorting the facts related to the goods and services by the firms. According to Section 36-A of the MRTP Act, firms are prohibited from engaging in UTPs.

v. MRTP Commission: The MRTP Act provides for setting up of the MRTP Commission which shall be the regulatory and adjudicatory body to decide the offences and defaults under MRTP Act.

3. THE FAILURE OF MRTP ACT

Due to the inherent non-dynamic nature and vagueness of these provisions coupled with the efflux of time and globalization, privatization, etc., the need of the hour was a better, more suitable legislation so as to cater to ever-changing economic and market scenario. Loopholes were being identified in the Act, and Amendments were being introduced to it. The 1984 Amendment came into effect on the recommendations of the Sachar Committee. The amendment added a new section the Act, namely 36A, which was aimed at protecting the interests of final consumers from unfair trade practices. The 1991 Amendment, was a major change in the legislation, as it made MRTP Act applicable to public sector undertakings and government companies. In effect, it meant that private companies did not have the requirement of getting a sanction from the Central Government in case of corporate reconstruction of any kind. It was implemented in the light of the New Economic Policy and broadened the horizons of the Indian economy, thereby effectively putting a stop on the “Licence Raj” which was a major hindrance in the growth and development of our economy.

There were several other amendments made to the Act, however, subsequently it was realised by the legislators that in the light of the multiple shortcomings that the Act still possessed, even after going through numerous amendments, suggests that a more significant change needs to be made in the area of Competition Law. The Act was unsuccessful in even providing certain essential definitions to anti-competitive law.[2] Therefore, to pave way for a more healthier, competitive market, the MRTP Act was replaced by the Competition Act, 2002, in September 2009.

[1]Bhattacharjea, Aditya, Of Omissions and Commissions: India's Competition Laws, Economic and Political Weekly, vol. 45, no. 35, pp. 31–37 (2010) JSTOR, www.jstor.org/stable/25742019.

[2] Monopolies and Restrictive Trade Practices Act 1969; MRTP Mechanism, its establishment, features and Functioning, Shodhganga, https://shodhganga.i nflibnet.ac.in/b itstrea m/10603/74926/6/chapter%203.pdf

IV. ANALYSIS

A. DRAWBACKS OF MRTP ACT

As mentioned earlier, even after numerous amendments were made to the MRTP Act, it still was not devoid of loopholes and shortcomings. Following are the drawbacks of the MRTP Act that needed to be eliminated to promote a free and fair market:

i. Extreme Government Control – The MRTP Act, subjected all businesses, be it small or large to excessive government control. Enterprises were under a mandate to obtain approvals from the Central Government before indulging into any type of corporate restructuring. It is a very complex and time consuming procedure, and many businesses found it arbitrary and therefore would not do it, thereby their business would not survive.Such a provision is an obstruction in the free flow of different members of the market, hence itself defeating the very purpose of the legislation and also affecting the final customer.

ii. Vague and AmbiguousLaw – The term 'restrictive trade practices' which was defined in Section 2(o) of the MRTP, included activities that restricted, obstructed, or prevented competition in any way whatsoever. However, it failed to give a definition which could help determine whether an activity would be restrictive, and hence would constitute an offence under the Act. Additionally, many important terms related to anti-competitive practices such as abuse of dominance, cartels, price fixing, collusion, predatory pricing, etc."Section 2(o) thus included all types of possible offences within its ambit thereby leading to a large variety of interpretations by various courts wherein the core essence of the law was lost."

iii. "Per se rule" in place of "Rule of Reason" – All the various offences in the MRTP Act were considered to be per se illegal. Rule of reason which was developed during the course of this Act was not applied in this statute, even though it was recognized by the Apex Court in the case of Telco v. Registrar of Restrictive Trade Agreements[3]. In light of the 1984 Amendment, the rule of reason was rendered ineffective and the per se rule resurfaced.

iv. Dominance considered per se bad –In the MRTP Act, dominance if established, was considered bad per se, regardless of whether a party had abused it or not. There used to be a strict mathematical criterion to determine the same, i.e., if an enterprise has more than 25% control over the market share, in either goods or services, it would be considered as dominant. However, this was faulty, because at the same time, if an enterprise would have, say, 24% control of the market, it would not be considered dominant. This was unfair, and an extraordinarily huge price to pay for the extra per cent.

[3]*Telco v. Registrar of Restrictive Trade Agreements*, 1977 AIR 973, 1977 SCR (2) 685

v. Excessive Export Promotion – For facilitating increase in foreign exchange, Section 38 of the MRTP stipulated that if any business undertaking had to potential to yield high exports in the future, they had a pass from all the authorities and all the anti-competitive practices would be overseen. There was not any consideration for the drawbacks or issues it might bring to the market, just to earn in foreign exchange. The major problem was that more often than not, it would lead to more expenditure being done as opposed to foreign exchange earned.

vi. Voluntary Disclosure Policy – The basis on which the MRTP Act depended was actually voluntary disclosure made by enterprises, because there was not any authority who kept a check or regulated the same. This could be counter-productive at times as many companies would often get themselves registered later, or not registered at all, as there was essentially no way to keep a check on that. Companies would find it useful as well, because then they would not be under the radar of the authorities.

vii. Inefficient MRTP Commission – The Act provided for setting up of an MRTP Commission to be the administrative and judiciary body and regulate as well as adjudicate the anti-competitive practices in our country. However, despite of primarily being a judicial body, the members were assigned by the government itself, so there were several doubts about its independence, on top of other administrative defects adversely affecting the effectiveness and efficiency of the same, such as prolonged delays in appointment and replacement of members, lethargy and unwillingness in opening up of new branches, appointing new members, etc. Another peculiar point that came in the way of the smooth functioning of the Commission was that it was the Government which would finally decide if a particular matter should, or should not be referred to the Commission. The Government also used to unilaterally pass decisions about the same without even consulting the experts appointed to the Commission, hence defeating the very purpose of constituting it in the first place. The position of the MRTP Commission had become redundant.

viii. Obsolete Law – At has been mentioned earlier, the MRTP lacked the dynamic nature that was necessary in such a dynamic economic environment. Indian trade markets were moving towards a more global economy, and the MRTP was not able to keep up with the New Economic Policy. Hence, it was bound to become obsolete.

ix. No Extraterritorial Application – The MRTP Act had jurisdiction limited to only India, i.e., it had no extraterritorial application. Therefore, it had no control over enterprises operating outside of India, indulging into anti-competitive practices, which had the potential of having an adverse effect on the Indian market if such an enterprise had Indian origin, or got into negotiations with an Indian party. MRTP Act could not combat international cartels.

x. Penalties not laid down– Under Section 12 of MRPT Act, which defined the powers of the MRTP Commission, it mentions the various types of orders the Commission is authorised

to pass when any anti-competitive practice is discovered, however, it does not lay down any penalties for the same. This implies that the Commission did not really have any powers to impose fines or penalties on defaulters. If the harshest punishment given to defaulters could be a cease and desist order, it would not have any deterrent effect on the rest of the players. Hence, this provision was ineffective to an extent.

xi. Unclear Jurisdictionof the MRTP Commission– When Section 36A was inserted by way of Amendment of 1984, its purpose was the protect the final consumers from unscrupulous and unfair trade practices by businesses, which is concurrent with the aim of the Consumer Protection Act, or Consumer Court. This implied, that the customers had two authorities to approach in case their rights were being violated. On the other hand, though, the primary aim of Competition Law is to restrict anti-competitive practices, and essentially protect the market, protecting consumers is a secondary aim. Therefore, the MRTP Commission sometimes ended up dealing with cases which were supposed to be dealt by the Consumer Court, hence being an added burden on the Commission.

In light of the above drawbacks, it can be clearly seen that even after innumerable amendments, the MRTP Act did have its flaws and was essentially failing in fulfilling the objective it was set out to achieve.

B. JUDICIAL OPINIONS

Throwing light upon some of the cases related to MRTP Act would be useful for determining the judicial opinion with regards to MRTP, for the purpose of analysis.

In the landmark case of *Tata Engineering and Locomotive Co. Ltd vs. Registrar of Restrictive Trade Practices Agreement*[4], the petitioner entered into agreement with another party, which assigned them fixed territories within which they were empowered to sell their products. A challenge was made for this territorial restriction being an RTP. In this case, for the first time, rule of reason was applied in India by the Apex Court by holding that it was not an RTP because the basic purpose behind it was to ensure equal distribution, undermining the per se rule. However after the 1984 Amendment, this judgement was rendered ineffective.

In *Director General of Investigation and Registration [DG (IR)] vs. Modi Alkali and Chemicals Ltd*[5], the MRTP Commission got an anonymous complaint about the existence of a cartel aimed at creating scarcity of goods, and incidentally the price of chlorine gas and hydrochloric acid increased significantly. The DG reported that there was no such cartel. However, after further enquiry was conducted by the MRTP Commission, they laid down a definition for cartel as the Act lacked the same. Even though the petition was dismissed on the basis of lack of evidence, this case is important as a new category of anti-competitive agreements were prohibited, also highlighting the lack of the same in the MRTP Act.

[4]Id.
[5]*Director General of Investigation and Registration [DG (IR)] vs. Modi Alkali and Chemicals Ltd* 2002, CTJ 459 (MRTP)

In *Sirmur Truck Operator's Case*[6], higher rates were fixed by the company for truck operators who were not members, but lower rates were set for the members. This practice was challenged as an RTP. This was in fact held to be an RTP as defined under Section 2(o) of the Act, and a cease and desist order was issued. This case was important though because it highlighted the fact the commission does not have the power to order monetary damages such as penalties and fines to deter the parties indulging in such activities, which was another shortcoming of the MRTP Act.

Further, in *American Natural Soda Ash Corporation (ANSAC) vs. Alkali Manufacturers Association of India (AMAI) and others*[7], the petitioner were trying to export their products to India, which the MRTP Act is very friendly about. The defendant filed a complaint against the same stating that these consignments were the result of a cartel. It was held, however, that since the statute does not provide for any extraterritorial application, the Court's hands are tied and therefore any action cannot be taken. This was another case with highlighted a major loophole in the current legislation at that time.

Various shortcoming and loopholes were being readily identified by the judiciary as can be seen by the account of the cases above.

V. CONCLUSION

In the above sections, the paper provides a sufficient account of the Monopolies and Restrictive Trade Practices Act, 1969, and the analysis of the various shortcomings of the same. India has recently emerged as one of the biggest economies of the world. When the stakes are such, it is very essential to keep our legal regulation intact to keep up such an image. There is no need to stress upon the importance of anti-competitive laws, and the same was realized by our legislators when they decided to fully repeal the MRTP Act and replace it with the Competition Act, 2002.

In our analysis, we can clearly see that the drawbacks and the shortfalls of the Act were very much defeating the purpose of the Act, they were vague and they were rigid, and could not conform with the New Economic Policy that our country was undertaking. Having such a legislation in the time of globalization, when the growth and development of the economy should have the foremost priority, would have proved to be counter-productive. Our country needed a proper, more exhaustive legislation, which could cater to the needs of the new economy and have to ability and a potent nature to pander to the future needs as well, as the economy is ever changing.

[6] *Truck Operators Union vs. Mr. S.C. Gupta & Mr. Sardar*, AIR 1986 SC 991 (1995) 3 CTJ 70 (MRTPC)

[7] *American Natural Soda Ash Corporation (ANSAC) vs. Alkali Manufacturers Association of India (AMAI) and others*, (1998) 3 CompLJ 152 MRTPC

Therefore, to answer the question, the reason that led to the failure of MRTP Act was primarily it's vague and impotent nature, coupled with the other shortcomings as explained in the analysis. To conclude, we can say that the Competition Act, 2002, is a much more cogent legislation, which has been successful in catering to the needs of the current market and has also provided us with a competent regulatory authority to enforce the same. Hence, the decision of the legislature of introducing the Competition Act, 2002, was very practical.

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