Supreme Court of India reaffirms competitive neutrality principle - holds that Government Companies are not outside the preview of the Competition Act

"Competitive neutrality" meaning creating a level playing field between public and private sector is a bedrock of modern competition laws across the Globe. For instance, in Europe, there are special provisions for scrutiny of "State Aid" in the form of Article 107 of the Treaty on the Functioning of the European Union (TFEU). Unfortunately, while redesigning our competition law, India did not opt for a similar specific provision in our Competition Act, 2002. (The Act).

But it is not as if the concept does not exist in India. The concept has been discreetly introduced in the Act in the wide definition of "enterprise " , which includes even departments of governments which may be engaged in any activity relating to production, storage, distribution, supply, acquisition or control of articles or goods or the provision of services, of any kind, or in investment or in business of acquiring, holding, underwriting shares, debentures etc. and excludes only four "sovereign" functions of the State relating to currency, defense, atomic energy and space from the ambit of the Act.

The jurisprudence on the interpretation of section 2(h) of the Act i.e., the definition of the term "enterprise" (which encompasses the concept of competitive neutrality as aforesaid in India) has matured over the years through the orders of the erstwhile Competition Appellate Tribunal (COMPAT) and the High Courts and the Supreme Court.

For a detailed analysis on how the above jurisprudence on the definition of the term "enterprise " evolved in India through the initial judgments of the writ Courts you may refer to my seminal article on "Role of Courts in Enforcement of Competition Law in India " published in the European Competition Law Review in July, 2019[1], and how in its latest order in October 2022, the fair market regulator, Competition Commission of India (CCI), reiterated this principle by directing investigation against Indian Rare Earth Limited, a Central Public Sector Undertaking (CPSU), for alleged abuse of dominant position.

As if furthering the same jurisprudence on the topic, the Hon'ble Supreme Court of India vide its Judgement dated 15 June 2023 assiduously examined the appeal brought forth by Coal India Limited ("CIL"), contesting the applicability of the Competition Act, 2002 ("Act") to Government Companies /Public Sector Undertakings governed by specific statutes.

The genesis of this case stems from a preceding order passed in 2014 by the Competition Commission of India ("CCI"), wherein CIL was found CIL engaging in abusive conduct by virtue of its dominant market position. This abusive behavior predominantly revolved around the imposition of inequitable and discriminatory stipulations within Fuel Supply Agreements pertaining to the procurement of non-coking coal for thermal power producers.

Subsequently, the COMPAT upheld the CCI's decision in the year 2016. Discontented with the verdict of the COMPAT, CIL approached the Supreme Court, interposing a preliminary objection postulating that the Act lacks jurisdiction over CIL, as the company's monopolistic authority was conferred upon it through the enactment of the Coal Mines (Nationalization) Act, 1973 ("**Nationalization Act"**).

Arguments of Appellant Coal India Ltd.

Shri K. K. Venugopal, a learned Senior Counsel, (former Attorney General of India) put forth a compelling argument on behalf of the appellants, asserting that their coal mines, operating under the provisions of the Coal Mines (Nationalization) Act, 1973, should be considered outside the purview of the Competition Act. The Nationalization Act, according to Venugopal, established a unique and protected monopoly of coal mining operations in the hands of the Central Government

and its affiliated entities, including the appellants. This monopoly, designed to secure the equitable distribution of the scarce resource of coal for the common good, was safeguarded by constitutional provisions and directives.

Further it was contended that the appellants, being part of this statutorily mandated monopoly, should be exempt from the Competition Act, as they represent a distinctive form of monopoly referred to as an "Article 39(b) monopoly." Unlike a regular monopoly, an Article 39(b) monopoly aligns with the State's duty to consider the principles of common good and the distribution of scarce resources. The Nationalization Act entrusted the appellants, as a State entity, with the responsibility of operating this monopoly while abiding by the Directive Principles enshrined in Article 39(b) of the Constitution.

The learned Senior Counsel highlighted that the Competition Act does not specifically address companies like the appellants. Although Section 19(4)(g) of the Act acknowledges the possibility of a statutory monopoly indicating a dominant position, there exists a subtle distinction. The appellants, as an Article 39(b) monopoly, fall outside the scope of the Act. Previous court decisions, such as Ashoka Smokeless Coal India (P) Ltd. and Others v. Union of India and Others, following the precedent set by Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd. and Another, were cited to reinforce this point.

Referring to Sections 3 and 11 of the Nationalization Act, Venugopal argued that the broadest interpretation should be given to the general superintendence, direction, control, and management of coal mines specified in the Act. To support this stance, the learned Senior Counsel drew parallels with judgments interpreting similar language in Article 324 of the Constitution, such as In Re Gujarat Assembly Election matter and Election Commission of India v. Ashok Kumar and Others. Furthermore, Venugopal invoked Article 31C of the Constitution, which states that laws giving effect to Article 39(b) or 39(c) cannot be challenged on grounds of inconsistency with Articles 14 and 19. Such laws are deemed reasonable, whereas actions contradicting Directive Principles may be viewed as prima facie unreasonable, as highlighted in Kasturi Lal Lakshmi Reddy and Others v. State of Jammu and Kashmir and Another.

The appellants juxtaposed the Nationalization Act with the provisions of the Competition Act, emphasizing the divergences and resulting anomalies that would arise from subjecting the appellants to the latter. They drew attention to the contrasting long titles of both acts. While the object of the Competition Act is to ensure freedom of trade, the Nationalization Act demonstrates the intent to vest ownership and control of coal mines in the State for the optimal distribution serving the common good. It was argued that the Coal India Limited (CIL), as part of its constitutional obligations, engages in coal mines where it incurs substantial losses, employs a significant workforce, and operates with welfare policies that prohibit employee layoffs.

Arguments by CCI and other Respondents

The argument put forth by the Additional Solicitor General on behalf of the Competition Commission of India (CCI) emphasizes that the Act in question applies despite any conflicting provisions in the Nationalisation Act. The objective of the Act is to bring about a paradigm shift in the nation's economic policy, ensuring the best economic interest of the country. The argument highlighted that state monopolies should operate efficiently and within the framework of competition.

CCI asserted that there is no challenge to the validity of the Act itself and suggested that laws enacted by the state cannot claim immunity when engaging in commercial activities. The composition of the CCI is seen as a sufficient safeguard, with experts in various fields ensuring fair examination of complaints related to abuse of dominant position. The argument also discussed the filters in the Act for determining abuse of dominant position by enterprises and the objective criteria provided for arriving at such a finding.

Additionally, the argument addressed the changing status of coal as an essential commodity and the repeal of the Nationalisation Act. It highlighted the reduction in government shareholding in the first appellant (possibly a government company) and argued that it cannot claim immunity from scrutiny based on its placement in the Ninth Schedule. The argument draws on various legal precedents to support the contention that the immunity of laws placed in the Ninth Schedule is diluted and that fundamental rights are qualified.

Different counsels representing the respondents support the applicability of the Act, emphasizing the common good associated with coal supply and the regulation of power prices. They argue that the acts and omissions of the appellants affect not only private players but also public sector units. The Maharashtra Power Generation company is mentioned as an example.

Supreme Court Findings

The Supreme Court started its analysis of issue whether the Competition Act, 2002 is applicable on Coal India Limited (CIL) or not, by observing various provisions of erstwhile Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act"), Coal Mines Nationalization Act, 1973 ("Nationalization Act"), observations and recommendation of Raghavan Committee and scheme of the Competition Act, 2002 and noted that CIL cannot seek immunity from the operation of law, which otherwise bind them.

The Supreme Court started its analysis with the question where CIL falls within the definition of 'enterprise', as defined in Section 2(h) of the Act. The Supreme Court after analyzing the definition of enterprise and person under the Act held that there cannot be the slightest amount of doubt that the appellant is a person, which is engaged in activity relating to production, storage, supply, distribution, and control of goods, as defined in the Act. It may also be within the ambit of Section 2(h) in regard to services it may provide, having regard to the wide words used in Section 2(h) as CIL being a Government Company within the meaning of Section 617 of the Companies Act, 1956 is a "person" as defined under Section2 (l) of the Act and is engaged in economic activity relating to production, storage, distribution, and control of goods or services.

Further, the Apex Court outlined the scheme of the Competition Act the principle of enacting the and noted that that the Law-Giver has taken care to expressly include even Departments of the Government separately within the ambit of the word 'enterprise'. Things could not be more clear. The only activity of the Government, which has been excluded from the scope of Section 2(h) and therefore, the definition of the word 'enterprise' is any activity relatable to the sovereign functions of the Government. Sovereign functions would include, undoubtedly, all activities carried on by the Departments of the Central Government, dealing with atomic energy, currency, defense and space.

The Apex Court noted that Section 19(4)(g) of the Act, explicitly includes monopolies or dominant positions acquired through statutes or as government companies, public sector undertakings, or by any other means. Thus, the Court concluded that legislature intended to include the State Monopolies, Government Companies, Public Sector Units, and entities governed by statutes within the purview of the Act. Thus, CIL being a Monopoly under the Nationalisation Act, would fall within the realm of a dominant position as per Section 19(4)(g).

The Supreme Court while considering the argument of "common good" in Article 39(b) of the Constitution and acknowledging the aim of the Nationalization Act to achieve the goals outlined in Article 39(b) held that the content of common good is itself not a static concept and changes with the time and may depend upon the times, the felt necessities, the direction that the Nation wishes to take in the future, the socio-economic condition of the different classes, the legal and Fundamental Rights and also the Directive Principles themselves and therefore there is no reason to hold that a State Monopoly being run through the medium of a Government Company, even for attaining the goals in the Directive Principles, will go outside the purview of the Act.

Finally, the Supreme Court noted the wide power possessed by the CCI under the Act and held that though the action of the CIL can be challenged in judicial review and in other forums like Controller of Coal, however, this does not exempt it from the preview of the Competition Act.

Lastly the Supreme Court held that through a notification under Section 54 of the Act can exempt from the application of the Act or any provision and for any period on the ground security of the State and public interest. Therefore, if a genuine case made out by CIL for being taken outside the purview of the Act in public interest, the Government would be powerless.

COMMENT – *The Apex Court vide this latest order has further strengthened the concept of competitive neutrality in the Indian competition law by rejecting the defence on ground of the archaic Nationalization Act, put forth vehemently by the Ld. Shri KK Venugopal, former AGI. The Supreme Court has reiterated that except for the four well defined sovereign functions of the State under Section 2(h) of the Act, all other economic activities of the State are covered under the Act and amenable to CCI scrutiny for any violation of the enforcement provisions of the Act. This is a very positive and healthy development for competition law jurisprudence.*

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