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"ANTI-COMPETITIVE AGREEMENT IN INDIAN MARKET" INSTEAD OF "INDIAN ECONOMY."

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Introduction: -

The ecosystem of the India market is well known for its dynamic and diverse nature and this dynamic structure of the market is responsible for the economic growth in the country. Because of this vast market structure it affects the competition of the market and also affects the freedom of trade in the market. But this competitive environment threatened the market when any individual business (dominated position in the market) or group of business tried to manipulate the entire market only for their own benefit. This ends up harming both fair competition and consumer. One of the major such problems in the Indian market comes from the Anti competitive agreement between the businesses because of this it affects the natural balance of and harm the economy of the entire country. To prevent such anti competitive practices in the Indian market The Competition act -2002 was introduced in the year 2002. This act restricts all type of anti-competitive practices which may have adverse effects on the freedom of trade in the market.

Research Question:-

1. What is the objective of the competition act?
2. what is Anti-competitive agreement?
3. How Anti-competitive agreement cause appreciable adverse effect on competition?
4. what is Effect of anti-competitive agreement in Indian economy?

Objective Of The Competition Act

The primary objective of the competition act is to prevent such practice which will have the adverse effect on the competition of the market by protecting the interest of the consumer as well as it protects the all producer businesses by establishing freedom of trade for everyone in the market. Competition law of India focused on three primary subject matter-

- 1- Anti- competitive agreement (section-3 of competition act)
- 2- Abuse of dominant position (section - 4 of competition act)

3- Regulation of combinations (section- 5 and 6 of competition act)

This article is going to deal with the first subject matter that is Anti-competitive agreement (section-3 of competition act). According to this act, anti-competitive agreement means any agreement which can “cause appreciable adverse effect in competition in market”. The purpose of the act is to prohibit such actions of parties which can affect the competition. Anti-competitive agreement includes price fixing, limiting the supply and creating artificial need in the market, restricting new players to come in the market, market allocation etc.

What is Anti-competitive agreement?

According to this law under section 3 of the competition act restricts the agreement which is anti-competitive in nature. Under section 3 of the act it “prohibits any enterprise or association of persons or enterprises or association of persons to 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 appreciable adverse effect on competition within India”. Any such kind of agreements entered into between the parties would be considered as void agreement.

In this act before understanding what anti-competitive agreement lets first discuss what exactly an agreement is. Under section 2(b) of this act defines the term “agreement” this section states that “agreement includes any arrangement or understanding or action in concert whether or not formal or in writing and it need not be enforceable by legal proceedings”.¹ It simply means agreement is said to be an agreement when two or more persons agree on something, even if it's officially written down or not and need not to be legally binding.

And the second term we have to understand is that “enterprise” and “person” as it has used in section 3 of sub-section(1) to prevent anti-competitive agreement between such entities. Sections 2(h) and 2(i) of the act have been used to describe these two terms.

According to the act's section 2(h), a "enterprise" is any individual or government agency involved in a variety of commercial endeavors pertaining to the manufacture, distribution, storage, acquisition, or control of products or services. Businesses in any industry are included,

¹ Indian Competition Act § 2(b) (2002)

regardless of whether they are privately held, publicly owned, owned by the government, or owned by foreign companies. But such activities which are carried out by the government related to the sovereign function of the government are excluded from the activities of enterprise.

Under section 2(1)² it defined wide range of entities both individual and legal entities. It include an individual, Hindu undivided family(HUF),company, firm, any association or body of individual, whether it incorporate or not, in India or outside India. It also encompasses any type of corporation established by or under government law, whether at the state or central level. This includes all government companies, cooperative societies, local authorities, and any other artificial legal entities that do not fall under the previous categories of this sub-clause.

We shall now examine the operation of anti-competitive agreements. Any arrangement that "causes or is likely to cause an appreciable adverse effect on competition" is considered anti-competitive, as we have already covered. Now we will understand what appreciable adverse effect on competition and when it will be consider that any agreement is causing adverse effect on the competition. We must first comprehend section 19(3) of this act in order to comprehend this. In accordance with section 19(3) of the act, the Competition Commission of India (CCI) must take into account the following elements while evaluating any anti-competitive agreement to determine whether it is having a negative impact on competition, which is forbidden by section 3 of the act:

- 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; or
- f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services".³

The detrimental impacts on competition, such as erecting obstacles for new companies and hurting current rivals, are outlined in detail in clauses (a), (b), and (c) of this section. However, clauses (d), (e), and (f) draw attention to the possible advantages, such as better production or distribution, advantages for customers, and improvements in economic growth and technology.

² Indian Competition Act § 2(1) (2002)

³ Indian Competition Act § 19(3) (2002)

Horizontal agreement:-

We will now talk about many kinds of anti-competitive agreements. First, we shall learn what horizontal agreement is. Section 3(3) states that "any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or practices 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, shall be presumed to have appreciable adverse effect on competition.",⁴ which-

- a) "Directly or indirectly determines purchase or sale prices;
- b) (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 (effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding)".

The proviso of the section says that the rule and restriction in this section will not apply to agreements which are made for joint ventures and that joint venture agreement help improve efficiency in areas like production, supply, distribution, storage, acquisition or control of goods or services. Joint ventures means if two or more parties come together to work on specific project or business activity and making things more effective or efficient.

Here in this phrase "shall be presume to have an appreciable adverse effect on competition" it means that the court will presume the entire allegation to be true unless otherwise is proved. It is based on "per se rule," it means the does not need any additional proof to establish that any specific action or agreement of the parties can causes harm. This per se rule is given under section 2(1) of Bharatiya Sakshya Adhinyam "Whenever it is directed by this Adhinyam that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved".⁵ This means hear it is the responsibility of the accused to disprove the allegation and the burden of proof is on the accused unless it will be disprove it will be that agreement of the parties will automatically cause an **Appreciable adverse effect on competition(AAEC)**.

⁴ Indian Competition Act § 3(3) (2002)

⁵ Bharatiya Sakshya Adhinyam, § 2(1), 2023

The words “cartels” is also addressed under section 3(3) of this act, which are one type of horizontal agreement (any agreement in between the enterprises at the same stage of the production chain is called horizontal agreement). According to section 2(c) of the act “cartels includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services”. Because of restrict supply and limits consumer choice and preventing fair pricing in the market the cartels can cause harmful effect in the Indian market.

Vertical Agreements: -

Vertical agreement is type of agreement where its an agreement between various businesses or enterprises which operate at different level of the production or supply chain. The primary example of such kind of agreement can be an agreement between a manufacturer and a distributor or it can be in between a wholesaler and retailer. These businesses and enterprises are connected through the flow of goods and services. According to the section 3(4) of the act, any agreement of different levels of production or supply chain which must be related to production, supply, storage, sale price or trading of goods and services. Such agreement will be consider as anti-competitive if that agreement is causing adverse effect on the competition⁶ Vertical agreement includes various type of agreement such as tie-in arrangement, exclusive supply agreement, exclusive distribution agreement, refusal to deal, and resale price maintenance. Now we will understand all the type of agreement one by one.

Tie-in arrangement: - any agreement which put condition on the buyer, when buyer purchase a particular product the buyer needs to purchase any other specified product along with that primary product such kind of arrangement is called tie-in agreement. In simple words when seller put condition or force the buyer to purchase one product as a condition for buying another product.

Exclusive supply agreement: - Any agreement which restrict the buyer to purchase goods from only seller and not from any other supplier. It simply means that such agreement limits the buyer's to purchase product from any other alternative suppliers.

Exclusive distribution agreement: - Any agreement which restrict and limits specific distributor for a particular region or market and appoints them in any specific market and

⁶ Indian Competition Act § 3(4) (2002)

prohibits other distributors in that particular region or market such agreement is called exclusive distribution agreement.

Refusal to deal: - “Any agreement which restricts, or is likely to restrict, by any method, the persons or classes of persons to whom goods are sold or from whom goods are bought” such agreement are called refusal to deal agreement.

Resale price maintenance: - In such kind of agreement the manufacturer or supplier controls the resale price of product by directing the retailers or seller not to sell below a specific price. It means that it restrict the retailers to offer discounts unless that is specified by the manufacture or supplier.

Effect of anti-competitive agreement in Indian economy: -

Now we will analysis that how such anti-competitive agreement cause adverse effect to competition as well as the economy of the country. In the year 2012 the competition commission of India found that 11 cement companies where engaging in cartelization practices such as fix cement prices and limit the production of cement in market and creating artificial scarcity in the market. In this case main players are ACC, Ambuja Cements, UltraTech, and shree cement these all main cement company were engaged in anti-competitive agreement in between them self to create manipulation in the Indian market. This case is well known as *Builders Ass’n of India v. Cement Mfrs. Ass’n & Ors.*,⁷ because of this anti-competitive agreement between the company it result in increasing of cement prices by approximately more than 40% from the year 2008 to 2011. It also affects the construction costs and it rose by 20-25%. This construction sector contributes about 8% to the Indian GDP. Disruption in this sector due to high cement costs slowed the GDP growth in India.⁸

In the case of *auto parts cartel*⁹ it was found by the CCI that several leading car manufacturers of India were engaging in anti-competitive agreement practices in the spare parts market. This agreement leads to manipulation of prices of spare parts of cars, and inflated costs for consumers. Because of this practices the cost of car parts increased by 25 % on average, which directly affected the consumers. It has also negative impact on the Indian consumer durable market the market its dropped by 4% in the year 2014. This shows that anti-competitive

⁷ Builders Ass’n of India v. Cement Mfrs. Ass’n & Ors., Case No. 29 of 2010, Competition Commission of India (2012)

⁸ <https://corporate.cyrilamarchandblogs.com/2016/11/curious-case-cement-cartel/>

⁹ Auto Parts Cartel, Case No. 27 of 2014, Competition Commission of India (2014)

agreement, could cause adverse effect throughout the economy.

In 2018, in the case of *Beer Market Cartel* was engaging in market allocation agreement which also involve fix prices and divided the market among themselves, it also eliminating the competition in market. By dividing the market it reduced consumer choice and quality. The direct effect of such anti-competitive practices was shows in 12% decline in sales of beer in urban market, primarily it is because of higher prices which was caused by the cartel. This indicates in which way such anti-competitive agreement effect the consumers and also reduce the overall market demand, which also affect the economy¹⁰.

Anti-competitive agreement between the parties in India have significant economic impact, as it is highlighted by reports from the world bank in 2021 and the competition commission of India annual report 2023. According to report of word bank 2021 because of cartelized market and price manipulation by cartel leads to harming affordability and reducing economic efficiency, it also result in inflated costs by an average of 30%¹¹. And according to CCI annual report in between 2010 to 2023, the CCI imposed 25,000 crore of penalties on the parties whose who are involving in anti-competitive agreement, cartels and abuse of dominance. Despite this penalties the consumer losses caused by the such practices during the same period exceeded 1.2 lakh crore¹².

Conclusion: -

Anti –competitive agreement is not just prevalent in India it is affecting the worldwide economy, it disrupt the Indian by undermining fair competition in the market, inflating product and service prices and it also restrict consumer choice, because of all there anti-competitive activities it harm the overall economy of the country. The competition act,2002 the primary act which prohibiting all such agreement which is anticompetitive in nature. Through section 3,4,5, and 6 of the targets anti-competitive agreement, abuse of dominance and anti-competitive combination. This act also create an enforcement mechanism through the competition commission of India, and play a vital role in identifying and penalizing anti-competitive behaviors. Increasing market transparency and promoting awareness are crucial in preserving competition in the market and also it help to fostering the economic growth in the country.

¹⁰ Beer Market Cartel, Suo Moto Case No. 6 of 2017, Competition Commission of India (2018)

¹¹ World Bank, *India: Competition and Economic Development* at 45 (2021), available at <https://www.worldbank.org>.

¹² Competition Commission of India, *Annual Report 2023*, at 12-15 (2023), available at <https://www.cci.gov.in>.