Advanced Contracts, Tendering and Public Procurement
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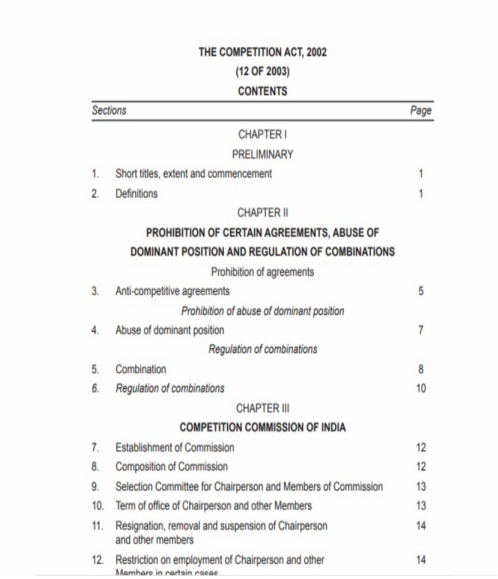
Formation of Contract: Legality of Object & Public Policy – Part 02



THE COMPETITION ACT, 2002
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In this part, the aspect of modern categorization of public policy and how courts have envisaged a right to intervene and decide whether a contract is to be enforceable or not would be looked into. While the general categorizations including the traditional continue to be there, under the modern categorization, one can view issues under the Competition Act of 2002. Prior to the Competition Act of 2002, India had a legislation called the Monopolistic Restrictive Trade Practices (MRTP) Act, 1969. Judicial pronouncements underscored that monopolies in a market and that definition of the market could be entire India, it could be one state or it could be one kind of territory those actions are not in favor of public interest. public policy clearly understands and says, if there is a monopoly player, it is going to exploit the market. This can be through creation of artificial scarcity of the commodity or artificial demand. The monopoly player can also rig the prices by determining the price, when to release the goods and at what price to release the goods.

It is not good for any kind of market situations to actually promote and have monopoly player. We did not understand this in India for a large number of years. In the years preceding liberalization, privatization and globalization, a lot of services from the government were actually the only services that are available to citizens. So, the government was a monopoly player. However, the government is of the people, by the people and for the people and we follow a socialistic pattern of governance where the government is not only going to govern,

it is also going to provide you essential goods and services. We adopted socialism in the Constitution, the government took over its role, or rather seriously viewed itself as not only a government of governance, but a government of business and providing essential goods and services to the citizens as well. This has probably changed post liberalization and globalization. This was probably the reason that there was a need to replace the MRTP Act with the Competition Act of 2002 which also replaced the MRTP Commission with the Competition Commission.

Contracts that make monopoly or create monopolies are also a problem. So, when two companies are given in the market, say with 55 percent and 45 per cent market share respectively, there are only two players. In India, there are a lot of these sectors or areas where there may be only just two players. If these two players decide to merge, amalgamate, and they create one entity, that would be an absolute monopoly. That is a very dangerous situation for not only the economy, but also consumer interest and national interest.

Therefore, you do not want monopoly contracts or contracts that create a monopoly. This is the first aspect, going by the MRTP Act of 1969. Secondly, Article 19(1) (g) of the Constitution of India says that every Indian citizen has a freedom of trade, occupation and business. Any contract that restricts these kinds of freedom would be violative of the Constitution principles. As the Constitution is a public document, any attempt to bring about such restrictive practices into effect will also be considered as void.

Market strategists of those who try to create market share for a product or for a company or for service come up with a lot of ideas of capturing the market. The higher the market share, higher would be the profitability, dominance and restrictive trade practice. It is not necessary that it should be 100 percent market share. It suffices if it is the dominant market share.

Section 3 of the Competition Act clearly states that anti-competitive agreements are void. It is the Competition Commission of India that can declare certain kinds of elements as being void because they violate the Competition Act of 2000. Section 3 one of the Competition Act says no enterprise or association of enterprises shall enter into any anti-competitive agreement. This is applicable for agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of any service, which may likely cause an appreciable adverse effect on competition within India. If you enter into any such agreement, that is likely to cause an adverse effect on competition in India, such agreement shall be void.

What are these kinds of elements? How do they look like? Let us look at an example. There is this concept under competition law called the tie in sale agreements or tie in sales which is like this. Suppose you decide to buy MS Office. Many of these companies, do what is known as bundling of software. For a fast moving product in the market there is a lot of demand. But the company may also have another product, which is slow moving. The company may bundle these two and gives it to the consumer forcefully to buy. So the consumer has to not only buy MS Office, but he has to buy Internet Explorer as well. There is no choice you cannot divide it. So, once MS Office is installed in the system, it is only Internet Explorer that is possible to be installed along with it and any other option like Mozilla cannot be used because it is all bundled and given as a single package. Neither is it nor is it priced differently. This ensures that Mozilla will be out as it does not have a basic office software. It will kill competition. In case MS Office decides to bundle the software and sell it to customers, can such kinds of contracts be encouraged in the country? Does it defeat competition? There are small companies which should also have a space in the market. Everything in the software space cannot be dominated only by one or more companies like Intel or Microsoft or Google. So, these can be considered as anti-competitive acts.

Another interesting concept is that of refusal to deal. Let us take the case of automobile companies. For instance, Maruti comes up with Maruti genuine spare parts. There are component manufacturers who support Maruti by making smaller components, which go into a car following which it is assembled and given a deal. The component manufacturers would be individual companies, making small components including batteries or other things. Maruti interests into an agreement called exclusive supplier agreements with this component manufacturers making them agree that they would not sell this component to the external market. Manufacture, sale and purchase would be only for Maruti. This seems logical especially when intellectual property is there as well. If it is Maruti's design and that is what someone is manufacturing, they can give it back to Maruti and nobody else. This is the justification of these companies to make this agreement, but what is the impact on the market and the consumer?

The impact is, if one component in that Maruti car needs to be replaced, only Maruti will give the genuine spare parts. Otherwise, maybe some spare parts which are not authentic might be the only alternative which might affect the performance of the car. So, with this Maruti can force consumers to come back to the it for all kinds of services. Notably, sale of a car is a onetime contract. But servicing the car for 10 years or 15 years is a regular contract that is an

income that is a positive contribution to the company's profits. Can this be considered to be anti-competitive?

In the earlier days if an Ambassador car or Fiat car could be repaired with a local mechanic also without going to their authorized service station. But today with this action of Maruti, a Maruti car cannot be serviced by any other person. So, in the service of car industry, Maruti has killed its competition. These kinds of agreement are susceptible to the challenge of public policy and susceptible to the challenge of being anti-competitive.

This is where probably the Competition Act has a role to play. Competition gets the best service because this enables comparison between services. If there are two service providers it ensures better quality and better price. Competition gets the best from competitors in terms of price, in terms of goods and in terms of services. Competition is good for the market, consumer interests, citizens interests and national interest. So, it is India's public policy to have competition in the market.

It is to be understood and appreciated that anti-competitive agreements are void for the simple reason that they have an adverse effect on consumer choice. Consumers need choice, and unless the choice exists, citizens and national interest is not going to be promoted. And hence, such kinds of agreements are not to be increased, they have to be curbed. There are to be intervened, and such contracts are to be held to be void. Did such kind of a principle exist? If one evaluates Common Law cases, and some of the cases in India even before 1969, it is very clear that anti-competitive agreements were not enforceable.

There is a component called predatory pricing. It is a market behavior and a contract in which a commodity can be purchased below its cost price. Let us take one instance. Can an airline sell you air tickets at 2 rupees or 200 rupees? Why would airlines give you tickets well below cost price? Predatory pricing is a concept used typically by new entrants to the market to capture market share. Let us look into an example. There were quite a few companies in the telecom space, like Airtel, Vodafone, BSNL and Aircel before Jio entered into the market. When Jio entered in the market, it started giving free connections for 3 months, 6 months etc. and a free mobile handset. This is nothing but predatory behaviour. A company coming into a new market, can support that pricing where it can say that for the first 6 months, it can give services free of cost. After first 6 months once it gets all the consumers on board slowly it starts increasing the price. What it lost in the first 6 months will be recovered in the next one year, or two years.

Is it not desirable under public policy that people are getting below cost price? It is important to look into the intention and the long-term implications. This would reveal that it is not healthy for any economy and such agreement and contracts should very clearly be regulated.