RULES APPLIED IN INTERPRETATION OF ANTI-COMPETITIVE AGREEMENTS

After taking all the relevant factors into account in a given statute, there should be still some principles on which one can arrive at a conclusion on the effect of the anti-competitive conduct or practice on competition. The courts all over the world including India have come to judge violations of anti-competitive agreements by the following three main approaches namely:

a) Rule of reason[1]

The '*rule of reason'* approach weighs the reasons of a certain action taken and the economic benefits and costs of that action before coming to a judgment. Under the rule of reason, the effect on competition is found on the facts of a particular case, and its effect on the market condition, and existing competition including the actual or probable limiting of competition in the relevant market.

The *rule of reason* is a legal approach where an attempt is made to evaluate the pro-competition features of the restrictive business practice against its anti-competitive effect in order to decide whether or not the practice should be prohibited[2]. Blacks' law dictionary defines the law of reason in anti-trust law as a judicial doctrine holding that trade practice violates the Sherman Act only if the practice is unreasonable restraint of trade, based on economic factors[3].

In the US, the rule of reason is applied in a more specific way. The principle question is whether the agreement will increase market power; if there is no significant indication to this effect, there is no case. On the other hand, if the indication is very strong and there are no obvious efficiencies from the agreement and no good explanation that the agreement is the response of market or is helping to deliver something better or at lower prices, there is a presumption of anti-competitive effects and the defendant must come forward to show that there is no market harm. If there is no presumption, the plaintiff must produce more evidence of market power or its increase. Supreme Court, in ***Tata Engineering and locomotive co. Ltd.* V. *Registrar of restrictive trade agreements***[4]observed that, "*to determine whether the restrain promoted or suppressed competition, it was necessary to consider three matters: first, what facts are peculiar to the business to which the restraint is applied. Second, what was the condition before and after the restraint was imposed. Third, what is the nature of restraint and what is its actual and probable effect".*

Agreements under section 3(4) are subjected to test of this *rule of reason*.

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[1] Research article published by CCI, submitted by Pratima Singh Parihar on " Anti-competitive Agreements -Underlying concepts & Principles under the Competition Act, 2002" available at: "***http://cci.gov.in/images/media/ResearchReports/Pratima31jan2012.pdf***"

[2] World Bank/OECD: Glossary of Industrial organization economics and Competition Law

[3] Black's Law dictionary, 7th edition, pg. 1033

[4] (1977) 2 SCC 55

The rule of reason in examining the legality of restraints on trade was explained by the US Supreme Court in ***Board of Trade of City of Chicago vs US***[5]as follows:

"Any restraint is of essence, until it merely regulates and promotes competition. To determine this question, the Court must ordinarily consider the facts peculiar to the business to which restraint is applied, its condition before and after the restrain was imposed, the nature of restrain and its actual or probable effect".

Hon'ble Supreme Court of India in ***Mahindra and Mahindra Ltd v. UOI***[6] observed that, *"it will thus be seen that the "rule of reason" normally requires an ascertainment of the facts or features peculiar to the particular business; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable; the history of the restraint and the evil believed to exist, the reason for adopting the particular restraint and the purpose or end sought to be attained and its only on a consideration of these factors that it can be decided whether a particular act, contract or agreement, imposing the restraint is unduly restrictive of competition so as to constitute restraint of trade".*

The applicability of section 19(3) justifies the application of rule of reason in the Indian context, whereby the agreements have to be analyzed against the parameters laid down under Section 19(3).

b) The Per Se Rule

'*Per se*' is a Latin phrase meaning "in itself". In legal terms it basically means that the courts will regard a certain action to always be harmful and therefore it must only be proved that the defendant has committed the action to find him guilty.

The *Per se* rule and its rationale has been explained by US courts in a number of cases. Like in ***Northern Pacific Railway Company v.United States***[7]the Court observed that there are certain agreements and practices which because of their pernicious effects on competition and lack of any redeeming virtue are confusedly presumed to be unreasonable and therefore illegal without any elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints that are prescribed by the Sherman Act more certain to everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged investigation into the entire history of industry involved, as well as related industry, in an effort to determine at large whether a particular restraint has been unreasonable, an inquiry so often wholly fruitless when undertaken.

There is no concept of *per se rule* in India and any kind of presumption under Section 3(3) is rebuttable on account of various grounds mentioned under Section 19(3). The per se rule is applicable to other jurisdiction where certain

[5]Board of Trade of City of Chicago v US, (1918) 246 US 231
[6] (1979) 2 SCC 529
[7] 356 US 1 (1958)

agreements are per se anti-competitive and cannot be rebutted. Under Section 3(3), certain agreements are presumed to be anti-competitive, but this presumption is clearly rebuttable.[8]

The *per se* rule finds no relevance under the Competition Act, 2002; but, according to US Supreme Court, certain practices or acts are deemed or presumed to have an AAEC, and therefore are themselves listed and prohibited. It is unnecessary to consider, under the per se rule, if they limit or restrict competition. This is on the basis of established experience of their nature to produce anti-competitive effects. Therefore, it is no longer necessary to prove the anti-competitive nature of per se violations. Only, if any defence is permitted under the Act—the proviso to section 3(3) is an example, providing efficiency increases in a joint venture—may a justification for the conduct or practice charged be advanced.[9]

c) Rule of Presumption[10]

Since the Act in section 3(3) used the term "shall be presumed" so it becomes important to elaborate this principle of interpretation as well while discussing anti-competitive agreements. The principle has been provided in the Evidence Act, 1872 under section 4 clause 2 which says: "*whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.*"

The Hon'ble Supreme Court in ***State of West Bengal v. E.I.T.A India Ltd***.[11] observed that the expression shall presume leaves no discretion with the Court to make the presumption and it is a legislative command to Courts to raise a presumption and regard such fact as proved unless and until it is disproved. Therefore court was of the view that, *"the expression 'may presume' postulates whenever it is provided by the Evidence Act that the court may presume a fact, it will regard such fact as proved, unless and until it is disproved, or may call for proof of it; but the expression 'shall presume' implies, whenever the Evidence Act says that the court 'shall presume' a fact, it shall regard such fact as proved, unless and until it is disproved. The statutory presumption incorporated in Explanation to sub-section (1) of Section 11 is in the nature of the second category of presumption".*

In ***Union of India v. Pramod Gupta[12]***, the Hon'ble Supreme Court was of the view that the question of calling upon the parties to formally prove a fact does not arise. The Court is bound to take the fact as proved until the evidence is given to disprove it. Therefore the court held that, *"the meaning of the expressions "may presume" and "shall presume" have been explained in section 4 of the Evidence Act, 1872, from a perusal whereof it would be evident that whenever it is directed that a court shall presume a fact it shall regard such fact as proved unless disapproved. In terms of the said provision, thus, the expression "shall presume" cannot be held to be synonymous with conclusive proof".*

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[8] NeerajMalhotra v Deustche Post Bank Home Finance Limited (Deustche Bank) and ors, (5 of 2009) decided on 2nd December 2010

[9] Book on **Competition law in India – Policy, Issues and Developments**, Third Edition 2014, Pg. 93authored by T.Ramappa

[10] Research article published by CCI, submitted by Pratima Singh Parihar on " Anti-competitive Agreements -Underlying concepts & Principles under the Competition Act, 2002" available at: "***http://cci.gov.in/images/media/ResearchReports/Pratima31jan2012.pdf***

[11] (2003) 5 SCC 239

[12] (2005) 12 SCC 1

The principle of "*shall presume*", used in section 3(3), has been explained by Courts in India in numerous cases. Supreme Court in ***Sodhi Transport co v. State of Utter Pradesh***[13] observed that, *"the words "shall presume" have been used in Indian judicial lore for over a century to convey that they lay down a rebuttable presumption in respect of matters with reference to which they are used and not laying down a rule of conclusive proof".* The Court also observed that a presumption is not in itself evidence but only makes a prima facie case for the party in whose favor it exists. It indicates the person on whom the burden of proof lies. But when the presumption is conclusive, it obviates the production of any other evidence. But when it is rebuttable, it only points out the party on which lies the duty of going forward on the evidence on the fact presumed, and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of presumption is over.

Therefore it can be drawn from the above discussion that in case of agreements listed in section 3(3), once it is established that such an agreement exist, it will be presumed that the agreement has an AAEC and then the burden of proof will come on to the alleged defendant. Hence the presumption as provided under section 3(3) can be rebutted by the party concerned in particular case.

[13] (1986) 2 SCC 486