Mrtp act: rise fall and need for change: eco legal analysis

1. INTRODUCTION

1. 1 Title

The title of the project is ‘ MRTP Act: Rise, Fall and Need for Change: Eco-Legal Analysis’ and is part of the submissions to be made for the internal assessment for the course of Economics II.

1. 2 Overview of Topic

India, in its formative years of freedom, laid down the seeds of socialistic approach towards economic development. Five-year plans were designed with the aim of self-realance and self-sufficiency of the Indian industry and in this process of indigenuity, focus was laid on strong governmental regime to ensure equal and prosperous distribution of resources. One such attempt of the state resulted in the enactment of the MRTP Act, 1969 with the basic aim of comprehensive control over direction, pattern and quantum of investment to ensure that wealth is not concentrated in the hands of the few.

However, with the emergence of the new Industrial Policy statement of 1980, a need was felt for promoting competition in domestic market, technological upgradation and modernization which was then followed by the massive New Policy Reforms of 1991 which emphasized attainment of technological dynamism and international competitiveness, by opening up the Indian economy to foreign investment. This could not be met by the Indian industry since it was not in competitive terms with the rest of the world and operated in an over-regulated environment. Hence, as was concluded in the Raghavan Committee Report, 2000[1]– changes were sought in the competition policies of India and thus, the MRTP Act was laid to rest.

This project will trace the performance of the MRTP and point out the faults that led to its failure and thus its repeal by the Competition Act.

1. 3 Objective of Project

This project is aimed at advocating and analysing the performance of the Monopolies and Restrictive Trade Practice Act, 1969 (henceforth, MRTP Act) in the Economic-Legal aspect. The project will primarily analyse the performance of the MRTP Act over the various Industrial development phases (From 1951 to post-1991 Reforms) and then try to establish how and why it paved the way for Competition Act, 2002.

Thus, the basic aim is to establish the reasons for the failure of the MRTP and the subsequent reasons for the establishment of the Competition Act.

1. 4 Data Set Explanation

In the course of this project, the following data-sets have been used:

1) MRTP Commission Data: Depicting the number of cases considered and disposed of by the MRTP Commission in its last years of existence, i. e. from 2002-2004. This data has been computed in the form of Bar-Graph for illustrative purpose.

This data has been sourced from the work of Sh. Pradeep S. Mehta, Gen. Sec., CUTS International in A Functional Competition Policy for India published by Academic Foundation, New Delhi, 2005. This data is available online and has been accessed through www. books. google. com [Link has been provided at the concerned graph]

2) Annual Growth Rate of Industrial Production Index: Depicting the trend in the growth of Industrial Production from the Year 1951 to the year 2007. This has been represented in the form of Data-Table, and the data divided into the various Industrial phases.

This data has been sourced primarily from the book of S. K. Misra and V. K. Puri titled Economic Environment of Businees, 5th ed, Himalaya Publishing House, 2008. This book is available at the Reference Section of the NALSAR Law Library.

This data is originally sourced in the above-mentioned book from:

(a) Government of India, Handbook of Industrial Statistics, 1992, Table 50, p. 150;

(b) S. L. Shetty, Structural Retrogression in the Indian Economy since the Mid-1960s", Economic and Political Weekly, Special Supplement, 1978, Table 4, p. 9;

(c) Government of India, Economic Survey, 2000-01, Box 7. 1, p. 130;

(d) RBI, Handbook of Statistics on Indian Economy, 2000, Table 199, p. 409;

(e) Government of India, Economic Survey, 2004-05, Table 7. 2, p. 142;

(f) RBI, Handbook of Statistics on Indian Economy, 2006-07, Table 237, p. 606 and Table 238, p. 607.

1. 5 Research Methodology

The methodology adopted in this project is descriptive. The research is based on findings and statistics provided in primary sources like Statistical data and Committee Reports and on secondary sources of books and articles published in journals, hence the methodology adopted is despcriptive in nature.

1. 6 Limitations

The research is limited to the resources available at the NALSAR Library and the data sets available online and at the NALSAR Library in the manner of Study Reports and Research findings.

2. MRTP: WHY IT WAS ENACTED

2. 1 Post-Independence: Socialistic Industrial Regime Structure

In the years preceding the enactment of the MRTP Act, 1969, India had only been a free nation for a little more than 15 years. Following independence, it had laid down the formative structure of its governance and organization on the touchstone of socialism. The socialist approach was inherent in the functioning of the government as it preached social and economic equality, which was later adopted in the Preamble to the Constitution of India[2]by the 42nd Amendment. In this process, the concept of planned economic development started since the early 1950s.

However, this approach did not yield the desired result of socio or economic equality. The initial industrial licensing policies had not borne the planned results- instead, the market and the industries were showing negative trends and wealth was getting concentrated in the hands of the few. This was observed by the Hazari Committee in its 1967 Report on Industrial Planning and Licensing Procedure, 1955 where it found that working of the licensing system had resulted in disproportionate growth of some big industrial house.[3]

Similarly, the Mahalanobis Committee Report (1964) on Distribution and Level of Income, reported that the top 10% of the population cornered 40% of the income while the 20 of the largest firms in India owned 38% of the total built up capital of the private sector.[4]

2. 2 Emergence of MRTP

The previous industrial policies had clearly not worked in the direction the state had hoped for since, post independence many new and big firms had entered the Indian market and they had little competition and thus, were trying to monopolize the market.

Hence the need for a stricter policy regime was realised to safeguard the welfare of the consumers by removing barriers to competition in the Indian economy, and this resulted in the enactment of the MRTP Act, 1969 which came into force in June 1970. The primary objectives of the Act were listed down in the Preamble as follows:[5]

i) Regulate the concentration of economic power to the common detriment,

ii) Control monopolies and monopolistic trade practices,

iii) Prohibit restrictive trade practices, and

iv) Regulate unfair trade practices.

2. 3 Primary Concepts

To understand the objectives of the MRTP and for the understanding of this project, we will first proceed to discuss the primary concepts related to the project topic:

1) Monopolistic Trade Practices

Section 2(i) of the MRTP Act, 1969 defines Monopolistic Trade Practice as trade practices that have the effect of preventing or lessening competition in the production, supply or distribution of any goods or in the supply of any services- by misusing one’s power to use the market conditions, in terms of production and sales of goods and services, and thus abuse its market position- are called monopolistic trade practices.

Firms involved in monopolistic trade practice try to eliminate competition from the market by taking advantage of their monopoly and charge unreasonably high prices. This in effect leads to deterioration in the product quality and limits technical development. Thus, such practices are anti-consumer-welfare.

2) Restrictive Trade Practices

Activities that firms indulge in that tend to block the flow of capital into production, in order to maximize their own profits and to gain control over the market- such activities are termed as Restrictive Trade Practices.[6]Such firms also control conditions of delivery to affect the flow of supplies leading to unjustified costs of production and distribution- while establishing their monopoly in the market.

3) Unfair Trade Practices

Section 36-A of the MRTP Act, 1969 which was inserted on the recommendation of the Sachar Committee Report, laid down as to what may be termed as Unfair Trade Practices:[7]

False representation and misleading advertisement of goods and services.

Misleading representation regarding utility, quality and standard of goods and services.

Giving false guarantee or warranty on goods and services without adequate tests.

False claims or representation regarding price of goods and services.

Giving false facts regarding sponsorship, affiliation etc. of goods and services.

Making false or misleading representations of facts.

2. 4 Doctrine of the Act

The MRTP Act, 1969 had its origin in the Directive Principles of State Policy embodied in the Constitution of India. Article 39[(b) and (c)] of the Constitution lay down that the State shall direct its policy towards ensuring: [8]

(i) that the ownership and control of material resources of the community are so distributed as to best serve the common good; and

(ii) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

Thus, the doctrine behind the MRTP Act, 1969 was based on the concept of planned economic development that had started since early 1950s. The Public Sector Industrial (Development & Regulation) Act, 1951 and Monopolies and Restrictive Trade Practices Act, 1969 together commanded a comprehensive control over direction, pattern and quantum of investment. However, despite such control that the state exercised through these Acts, these did not entirely benefit the consumers rather, these complex network of controls and regulations fettered the freedom of the enterprises and yielded negative results for the economy.

3. FUNCTIONING AND PERFORMANCE: THE MRTP COMMISSION

3. 1 Functions

The Monopolies and Restrictive Trade Practices Commission (MRTPC), a quasi- judicial body, was established under Section 5 of the MRTP Act, 1969 to take up action against companies that indulged in monopolistic and unfair trade activities. It discharged functions as per the provisions of the Act.

The main functions of the MRTP Commission being:

to enquire into and take appropriate action in respect of unfair trade practices and restrictive trade practices.

in regard to monopolistic trade practices, to enquire into such practices:[9]

upon a reference made to it by the Central Government, or

upon its own knowledge or information;

submit its findings to Central Government for further action.

The Office of the Director General of Investigation & Registration was created in the year 1984 to perform certain statutory functions and duties under the MRTP Act, 1969 so as to subserve its objective to protect the interests of the consumers in the country.[10]The Act was amended from time to time and major amendments took place in the years 1984 and 1991 and these reforms shall be discussed later in this project.

3. 2 Mechanism

The working of the MRTP Commission can be put down in the following steps:

1) As discussed above, the MRTP Commission was empowered under section 10 of the Act to take either suo motu action or action upon reference by the government, against companies that were deemed to be adopting restrictive, monopolistic or unfair practices.

2) All such trade practices were considered to be prejudicial to public interest. Hence, the onus was on the entity, body or undertaking charged with the perpetration of such trade practices, to plead under the MRTP Act to avoid being indicted.

3) If the pleadings were satisfactory to the Commission and if it was further satisfied that the restriction is not unreasonable, the Commission would arrive at the conclusion that the trade practice is not prejudicial to public interest and discharge the enquiry against the charged party. [11]Furthermore, if a trade practice was expressly authorised by any law for the time being in force, the Commission was barred from passing any order against the charged party.

4) Otherwise, if the Commission deemed it to be fit, it could either:

a) give temporary injunction, or

b) award compensation.

3. 3 Illustrative Cases

A) Shyam Gas Company Case

This was a case where the supply of cooking gas cylinders was in short supply, which led to unfair exploitation of the situation. Shyam Gas Co. was the sole distributor of BPCL for cooking gas cylinder at Hathras (U. P.) which was allegedly engaging in the following restrictive practices:

giving gas connections to the customer only when he purchased a gas stove or a hot plate from the company; and

charging customers twice the price for supply of fittings and appliances.

The MRTP Commission held that the company was indulging in a restrictive trade practice that was prejudicial to the interest of the consumers.

B) Bal Krishna Khurana Case

This was the first case where a sales promotion organizer was charged under unfair trade practices. The respondent, Bal Krishna was famous all over North India for his selling ‘ export quality’ hosiery at extremely low prices wherein he sold goods worth Rs. 210/- for as low as Rs. 15/-

The Commission received complaints from consumers who reported that they were being cheated into buying sub-standard goods. The Commission then put a restraining order against Bal Krishna from organizing any such promotion ventures. In addition, the Commission also advised newspapers against carrying any such misleading advertisements.[12]

3. 3 Performance

The MRTP Commission’s performance can be understood by looking at the data which shows the functioning of the Commission in its last phase (till 2007), depicting the volume of inquiries commissioned and reliefs awarded.

A) Under Restrictive Trade Practices

Figure 1: Enquiries Considered and Disposed of by MRTP Commission as of 31. 12. 2004 (RTP)

SOURCE: Computed from data available at- Pradeep S. Mehta, CUTS International, A Functional Competition Policy for India, p. 47, Academic Foundation, New Delhi 2005.[13]

B) Under Unfair Trade Practices

Figure 2: Enquiries Considered and Disposed of by MRTP Commission as of 31. 12. 2004 (UTP)

SOURCE: Computed from data available at- Pradeep S. Mehta, CUTS International, A Functional Competition Policy for India, p. 47, Academic Foundation, New Delhi 2005.[14]

4. MRTP AND INDUSTRIAL GROWTH RATE: ANALYSIS

The objective of this project is to analyse the performance of the MRTP Act, 1969 and then establish why it had to be replaced by a newer Competition Act, 2002. For this purpose, and to establish the shortcomings of the MRTP, we will now consider the Industrial Production Growth Rates during the period starting from 1951 till 2007 (the year MRTP was formally declared to be dysfunctional) and then draw conclusions by contrasting between the stricter regime, pre-1991 reforms and the post-1991 reforms phase of industrial development.

4. 1 Industrial Growth Rate: 1951-1980

Table 1: ANNUAL GROWTH RATES OF INDUSTRIAL PRODUCTION IN INDEX NOS., 1951-1980.

Use-Based or Function Classification

1951-55

1955-60

1960-65

1965-74

1974-79

1979-80

1. Basic Goods

4. 7

12. 1

10. 4

6. 5

8. 4

-0. 5

2. Capital Goods

9. 8

13. 1

19. 6

2. 6

5. 7

-2. 3

3. Intermediate Goods

7. 8

6. 3

6. 9

3. 0

4. 3

1. 9

4. Consumer Goods

4. 8

4. 4

4. 9

3. 4

5. 5

-4. 4

(a) Durables

6. 2

6. 8

5. 6

(b) Non-Durables

2. 8

5. 4

-6. 1

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5. 7

7. 2

9. 0

4. 1

6. 1

-1. 6

SOURCE: (1) Government of India, Handbook of Industrial Statistics, 1992, Table 50, p. 150; S. L. Shetty, Structural Retrogression in the Indian Economy since the Mid-1960s", Economic and Political Weekly, Special Supplement, 1978, Table 4, p. 9. (2) Accessed in: S. K. Misra and V. K. Puri, Economic

Environment of Businees, 5th ed, p. 399, Himalaya Publishing House, 2008.

[Available at NALSAR Law Library]

4. 2 Industrial Growth Rate: 1981-1991

Table 2: ANNUAL GROWTH RATES OF INDUSTRIAL PRODUCTION IN INDEX NOS., 1981-1991.

Use-Based or Function Classification

1981-85

1985-90

1990-91

1. Basic Goods

8. 7

7. 4

3. 8

2. Capital Goods

6. 2

14. 8

17. 4

3. Intermediate Goods

6. 0

6. 4

6. 1

4. Consumer Goods

5. 1

7. 3

10. 4

(a) Durables

14. 3

11. 6

14. 8

(b) Non-Durables

3. 8

6. 4

9. 4

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6. 4

8. 5

8. 3

SOURCE: (1) Government of India, Handbook of Industrial Statistics, 1992, Table 50, p. 150; S. L. Shetty, Structural Retrogression in the Indian Economy since the Mid-1960s", Economic and Political Weekly, Special Supplement, 1978, Table 4, p. 9. (2) Accessed in: S. K. Misra and V. K. Puri, Economic Environment of Businees, 5th ed, p. 400, Himalaya Publishing House, 2008. [Available at NALSAR Law Library]

4. 3 Industrial Growth Rate: 1992-2007

Table 3: ANNUAL GROWTH RATES OF INDUSTRIAL PRODUCTION IN INDEX NOS., 1981-1991.

Use-Based or Function Classification

1992-93 to 1996-97

1997-98 to 1996-97

1997-98 to 2001-02

2002-03 to 2006-07

1. Basic Goods

6. 8

4. 1

6. 6

6. 7

2. Capital Goods

8. 9

4. 7

14. 4

15. 7

3. Intermediate Goods

8. 5

5. 8

6. 2

2. 5

4. Consumer Goods

6. 6

5. 5

9. 6

12. 0

(a) Durables

13. 4

10. 7

8. 8

15. 3

(b) Non-Durables

4. 8

3. 8

10. 0

11. 0

GENERAL INDEX

7. 4

5. 0

8. 2

8. 2

SOURCE: (1) For Column 2, Government of India, Economic Survey, 2000-01, Box 7. 1, p. 130; For Column 3, RBI, Handbook of Statistics on Indian Economy, 2000, Table 199, p. 409; For All Columns 1 & 4, Government of India, Economic Survey, 2004-05, Table 7. 2, p. 142; RBI, Handbook of Statistics on Indian Economy, 2006-07, Table 237, p. 606 and Table 238, p. 607. (2) Accessed in: S. K. Misra and V. K. Puri, Economic Environment of

Businees, 5th ed, p. 401, Himalaya Publishing House, 2008. [Available at NALSAR Law Library]

4. 4 Comparison of the Phases

Now basing on the above data-set, the researcher would now proceed to draw some inferences while considering the economic and social conditions prevailing at the corresponding time in India.

4. 4. 1 Phase of 1951-1980

1) If one observes closely, the general index (G. I.), the time-band of 1951-55 shows an impressive figure of 5. 7 (impressive because India had just gotten independence and was taking its foundational steps in setting up the economy). This rate moves positively as we trace the G. I till the year 1965- where it reaches a peak of 9. 0. This is the phase where the Indian economy was controlled by a handful of big business houses, and the government was struggling with its licensing and controlling policies- even in the absence of many players, the industry saw a sharp growth.

2) However, as we move on to the year 1965-76 we see a sharp fall to 4. 1 accompanied by sharp falls in the index of basic goods, capital goods and intermediate goods. This is the phase where the unfettered growth of the few business houses could not be controlled and the market had started showing monopolistic trends- and showing falling indexes.

More importantly, during the same phase, MRTP was introduced in the year 1969. Though it was implemented to control any monopolistic trends by preventing concentration of wealth in the hands of the few and catalyse competition in the market, it clearly failed in the initial years. The market did not react in a positive manner- the government had started with its nationalization and strict licensing policy. Some economists were of the view that there was a considerable slackening of real investment and this was followed by a decline in private-investment as well. This has been attributed to ‘ loss of stimulus’ for investment, and this possibly stems from the strict regime of MRTP, 1969.[15]

In addition, other reasons can also be adduced to the fall in the index. Among them:

Wars fought in 1965 and 1971

Drought conditions in some of the years between 1965-71

Oil crisis of 1973

3) Though the new policy was slowly starting to yield results, however the growth never really happened and this is evident from the negative trend observed in the phase 1979-80. It only changed after the New Industrial Policy of 1984 which is discussed next.

4. 4. 3 Phase of 1981-1991

1) The phase of 1981-85 shows a positive growth, in contrast to the preceding decade primarily because of the 1984 reforms. This broadened investment across the public and private sectors, while some level of deregulation was allowed. Most importantly, the cap on MRTP firms (which were subject to special regulation) was increased, which resulted in the more

number of small-sized firms to be free from government regulation- thus, in turn leading to an increase in the production of consumer goods- especially durables. Thus, the loosening of government hold on small businesses was returning dividends to the consumers.

The Industrial Policy of 1984 made the most significant changes to the Indian market- it reduced the domestic barriers to entry and expansion to inject a measure of competition in domestic industry, simplifying the procedures and providing easier access to better technology and intermediate material imports.[16]

2) Also, this was the phase when the Green Revolution was yielding positive results and the agricultural sector was seeing a manifold increase in production.

2) This growth rate was successfully sustained over the next decade till the time preceding 1990. However, parallel to this growth was the increase in govt. spending deficit. India had reached a stage where it could lend no more- its Foreign Reserves had dried up and investment in all forms had almost ceased. This was the time when India took the mammoth step of Liberalization with the New Policy Reforms of 1991.

4. 4. 3 Post 1991 Reforms

1) The New Policy Reforms of 1991 brought about a host of changes to the Indian economy. The most major change being Liberalization- opening up of the market in accordance with the WTO Regime. This not only opened the gates of foreign investment but also brought about domestic policy changes in the licensing and regulation scenario.

2) The greatest change in the market was that made to the MRTP Act. Prior to the 1991 Reforms, a total of 1, 854 undertakings were registered under the MRTP Act- of these, 1787 belonged to large industrial houses and remaining 67 were dominant undertakings.[17]The New Industrial Policy, 1991 now scrapped the assets limit for MRTP companies- this meant doing away with the requirement of prior approval from Central government for establishing new undertakings, expansions, mergers, amalgamations and takeovers.

Thus, the changes brought about in the 1991 Reforms opened up the market in more ways than one. And hence, one can safely conclude that keeping with India’s liberalization, MRTP had become undesirable, rather, an obstacle to the growth story and thus, had to undergo multiple amendments in the period following the 1991 Reforms.

In the next chapter, the researcher will continue with this line of thought and bring about the other shortcomings of the MRTP and how it finally came to be replaced.

5. SHORTCOMINGS OF MRTP

Continuing from the last chapter, we have observed by comparing the industrial data that over the course of 4 decades from the time MRTP was enacted, the industry reacted in manners not suitable to the consumer. In this chapter, the researcher will discuss the other facets relating to the problems associated with the MRTP.

5. 1 Anti-Welfaristic Results

Though the MRTP was enforced with the aim of distribution of resources and leveraging of competition in the market, the desired results could not be obtained. Rather, the market conditions turned out to be hostile for the consumer, and small-businesses and big-businesses alike, were subjected to excessive control. The heightened governmental control, where new undertakings and ventures were severely restrained by complex procedures, created conditions wherein the firms, existing and new, found it difficult to survive and thus, could not give back any benefits to the consumer.

5. 2 Stringent Provisions

The Act aimed at abolishing all acts which were anti-competition. The Act, over the years became very active in taking on firms head-on to make them stand in line with the provisions of the Act. The provisions, though aimed at benefitting the consumers and the industrial growth, often played out tough- and the stringent provisions did not benefit anyone.

For instance, the concept of ‘ Predatory Pricing’, which is still a marketing policy adopted by companies to have an edge over their competitors, was handed down heavily by the MRTP Commission. Predatory Pricing is defined as pricing a good or service below the cost of production of the good or service, with the objective of driving a competitor out of trade or to discipline him and thereby achieve elimination of competition.[18]This is a means for a firm with strong market power to eliminate other competitors and then, dominate the market.

This is effectively an anti-competitive mechanism, however, it can also be used to drive competition i. e. it can be effectively used to establish a strong competitive market. Examples are ripe in the current market where there are strong competitive conditions for the firms- they have to dole out quality at the best price to keep themselves established in the market, otherwise other competitive firms will drive them out of business. Examples being:

A) Tide, a detergent that was introduced in the Indian market in 2000 was successful in breaking into a market which was strongly held by Surf (so much so, that households used to use ‘ Surf’ as a generic term for any kind of detergent). Tide used strong pricing, backed by its robust parent company, predatory in nature, to quickly grab a large market share for itself. It offered quality detergent at a price than the other existing detergents. This in turn made the other companies lower their price and offer better quality. Hence, the consumer emerged the winner from this competitive trend between the detergent makers.

B) Tata Docomo, a mobile service provider that rolled out only 2 years back in the Indian market, entered at a time when there were established players in the market like Airtel, Reliance and state-run BSNL. But Docomo with its pricing policy which was unlike the prevailing market conditions, offered calling rates which changed the pulse. The market prior to the arrival of Docomo was based on per/minute charges, but Docomo came up with a per/second policy- thus, forcing other established players to also offer similar rates. Though such strategy was predatory in nature, but it helped in establishing a more competitive market which only went onto help the customers.

Thus, the point that the researcher is trying to drive home is that such predatory pricing is not necessarily anti-competitive but rather an agent to bring about better options for the consumer. Hence, this is more beneficial in terms of consumers’ welfare.

However, the MRTP Commission took up a strong case against such pricing and though it aimed at benefitting the market by ensuring fair competition, it instead closed down on the benefits to the customers. Hence, what was then required is a strong, case-by-case basis of handling and not absolute ban on predatory pricing.

5. 3 Ambiguity in Law

The MRTP Act, 1969 contained only one particular section, Section 2(o) to cover all anti-competition practices- defining Restrictive Trade Practice as a trade practice which prevents, distorts or restricts competition and thus, by defining it in