LEGAL CHECKS ON MONOPOLIES AND RESTRICTIVE TRADE PRACTICES

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The problem of concentration of economic power arises almost as a natural corollary from the rapid pace of economic advancement of a young and developing economy. Such economic malfunctioning does not generally manifest itself in an acute form in an old established economy with an industrial tradition of long standing. However, even such an economy may be confronted with these problems when investments in the economy are stepped up substantially in times of economic depression. Paradoxically, more often than not, the government in its eagerness to harness available means with a view to reaching quickly the stage of economic self-sufficiency or for regenerating its depressed economy becomes instrumental in fostering this state of affairs. India has been no exception. In this country other potent factors, such as the existence of the managing agency system (peculiar only to this country), inter-corporate investments, interlocking of directorships, etc. all combined to bring about a state of concentration of economic power. Some of the instruments wielded by the government, *viz.*, industrial licensing, capital issues control, financial assistance through banks and financial institutions, intended to curb this tendency, however, in their actual application operated in favour of big business, and thus in no small measure contributed to the aggravation of the problem.

The attention to the existence of concentration of economic power in the private sector was focussed for the first time by the Committee on Distribution of Income and Levels of Living, commonly known as Mahalanobis Committee, constituted by the Government in the later half of 1960. The Committee was *inter alia* asked to ascertain the extent to which the operation of the economic system had resulted in concentration of wealth and means of production. The terms of reference of that Committee did not require it to suggest remedial measures. This was left to a later Committee "The Monopolies Inquiry Commission" formed in 1964. This Committee's terms of reference included suggesting of necessary legislative and other measures for curbing the forces leading to concentration in

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terms of economic power and production so as to protect essential public interests and suggest the procedure and agency for the enforcement of such legislation.

The Directive Principles of State Policy as laid down in the Constitution of India enjoin upon the state to ensure, *inter alia* that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. The Industrial Policy Resolution of 1956 also lays emphasis on this aspect. It is stated therein that, "Equally it is urgent to reduce disparity in income and wealth which exists today, to prevent private monopolies and the concentration of economic power in different fields in the hands of a small number of individuals." In conformity with these objectives provisions curbing concentration of economic power were incorporated in some of the corporate laws, notably amongst them are the Industries (Development and Regulation) Act 1951,[1] the Companies Act 1956, and the Capital Issues (Control) Act 1947, as amended in 1957. On the recommendations of the Monopolies Enquiry Commission a more direct legislation, *viz.*, the Monopolies And Restrictive Trade Practices Act of 1969 was brought into force. The object of this legislation is to prevent concentration of economic power, product concentration, the formation of monopolies and the concomitant malpractices which such concentration and monopoly bring in its train, *viz.*, the monopolistic and restrictive trade practices. It is proposed to bring out in this article briefly the different provisions of these enactments which have a bearing on the subject.

Industries (Development and Regulation) Act 1951

The IDRA empowers the Central Government to take under its control certain industries considered important from the national point of view.[2] These industries, in which private sector concerns may also participate, have been specified in the First Schedule to the Act. If it is considered expedient in the public interest, the Central Government may, on the strength of this provision exercise a large measure of control over such industries.

For the prevention of geographical concentration of industries, *i.e.*, concentration in few areas or regions of the country, the Act provides that no person or authority other than the Central Government can establish any new industrial undertaking except under and in accordance with a licence issued by the Central Government who has also the discretion to impose *inter alia* any conditions it may deem fit as to the location of the undertaking.[3] Moreover, for changing the location of the whole or any

1. hereinafter cited as IDRA.
2. IDRA section 2.
3. IDRA section 11.

part of an undertaking after it is licensed under the Act, prior permission of the Central Government has been made mandatory.[4] These powers, however, can be used only negatively to check undesirable concentration of industries in a particular part of the country but it is of no avail in securing even distribution of industries over the country as a whole or the location of the industry in any desired area.

For the production or manufacture of new articles, an undertaking registered under the above Act or in respect of which a licence has been issued thereunder has, in terms of section 11A, to obtain a fresh licence or to have the existing licence amended, as the case may be, in the prescribed manner. The Central Government has the final say on the question whether an article is a new article within the meaning of section 11A.[5] The above provisions afford to some extent the Central Government an opportunity to control concentration of manufacturing programmes.

Before embarking upon a substantial expansion of its business, an undertaking registered or licensed under the Act has to obtain prior permission of the Central Government.[6] Substantial expansion has been defined in the Act as

> "the expansion of an existing industrial undertaking which substantially increases the productive capacity of the undertaking, or which is of such a nature as to amount virtually to a new industrial undertaking, but does not include any such expansion as is normal to the undertaking having regard to its nature and the circumstances relating to such expansion."

As to what constitutes substantial expansion the decision of the Central Government is final.[7]

The Central Government has sufficient powers under the Act for controlling supply, distribution, prices, etc. of any article or class of articles relatable to any of the scheduled industries.[8] The Central Government, if and in so far as it thinks necessary or expedient for securing equitable distribution, supply or availability at fair price of any of these articles, may by a notified order, provide for the regulation of the distribution and supply thereof and trade and commerce therein. This power can, to some extent, be utilised to curb undesirable trade practices though it may not be helpful in striking at the source, *viz.*, concentration of economic power, which encourages the emergence of anti-social practices.

4. IDRA section 13 (e).
5. IDRA section 23.
6. IDRA section 13(d).
7. IDRA section 23.
8. IDRA section 18G.

Companies Act 1956

Of the various legislations designed to regulate corporate activities, other than the Monopolies and Restrictive Trade Practices Act of 1969 which is aimed directly at preventing concentration of economic power and monopolies, the Companies Act 1956 contains by far the largest number of provisions which have the effect of at least curbing to some degree, if not eliminating altogether, concentration of economic power in the corporate sector. Some of the important provisions of this type are as follows:

Investments can be utilised directly and loans indirectly as powerful levers for spreading the area of control and therefore, economic power. Subject to certain exceptions, section 372 of the Act limits (*i*) the investment by a company in the shares of another company to 10 per cent of the subscribed capital of the latter, (*ii*) the total investment that can be made by a company (other than an investment company) in the shares of other companies to 30 per cent of the subscribed capital of the investing companies and, (*iii*) the investment within the same group to 20 per cent of the subscribed capital of the investing company. A company desiring to make any investment in excess of the above limits can do so only if such investment is sanctioned by a resolution passed at its general meeting and is further approved by the Central Government. However, banking and insurance companies, a private company which is not a subsidiary of a public company, financial companies and investment by a holding company in its subsidiary have been excluded from the purview of this section. To an extent, however, these exceptions provide opportunity for spreading control. The maximum limit for the aggregate loans which a lending company can make to companies under the same management has been fixed at 20 per cent of the subscribed capital and free reserves of the lending company and 30 per cent of the subscribed capital and free reserves for loans made to other bodies not under the same management.[9] Any loans made in excess of these limits require the prior sanction of the Central Government. These provisions play their part in curbing concentration of economic power in the same way as those relating to inter-corporate investments. These limits, however, do not apply to loans by a holding company to a subsidiary company, and by a banking company in the ordinary course of its business.

The provisions of the Act restricting the number of directorship a person can hold to a maximum of 20[10] and the number of companies of which an individual can be a managing director or manager to 2[11] place a check on the widening of the sphere of influence and control, financial or otherwise, by a single individual or a group of individuals beyond a

9. Companies Act 1956, (hereinafter referred to as CA) section 370.
10. CA section 275.
11. CA sections 316 and 386.

certain degree. However, directorship held in (*i*) a private company which is not a subsidiary or a holding company of a public company, (*ii*) an association not for profit, (*iii*) directorship in an officiating capacity, and (*iv*) the managing directorship and managerships held only in private companies other than subsidiaries of public companies, do not come within the above restrictions.

Prior to the coming into force of the Companies Act 1956 it was a common practice with the promoters and persons concerned with the management of companies to have allotted to themselves shares of small face value (often referred to as 'founders' shares or 'deferred' shares) carrying disproportionately excessive voting rights. This enabled them to exercise a greater control than the investment they had staked in business. In effect, it often converted the majority shareholders into a minority and deprived them of their rightful claim to have a greater say in the conduct of a company's business. Sections 87, 88 and 89 of the Act have put an end to this state of affairs. Section 87 provides that the voting rights of every member holding equity shares must be proportional to his share of the paid-up equity capital of the company while section 88 prohibits the issue of shares carrying disproportionate voting rights. Section 89 terminated disproportionate voting rights in companies existing at the commencement of the Act and brought them at par with the voting rights attached to equity shares. In terms of section 293, the Board of Directors of a public company or of a company which is a subsidiary of a public company cannot, without the consent of the shareholders in general meeting, (*i*) sell, lease or otherwise dispose of the undertaking of the company or any of the undertakings, in case the company owns more than one, (*ii*) remit or extend the time for the repayment of debt due by a director, (*iii*) invest, otherwise than in Trust securities, the amount of compensation received in respect of the compulsory acquisition of any of the company's undertakings or the premises or properties used for any such undertaking, (*iv*) borrow money (except temporary loans from banks) of an aggregate amount exceeding the sum of the company's paid-up capital and the free reserves, and (*v*) contribute in any financial year, to charitable or other funds not connected with the business of the company or the welfare of its employees in excess of twenty-five thousand rupees or five per cent of its average net profits during the last three financial years. Again, unless the appointment of sole selling agents made by the board of directors is specifically approved by the shareholders in general meeting within a period of six months such appointment becomes null and void.[12]

Mergers and acquisitions can serve as handy tools for acquiring significant control over or for cornering the markets. The provisions of

12. CA section 294.

the Companies Act which can be effectively used to regulate this aspect of concentration of economic power are contained in sections 394 and 394A. In terms of the provisions of section 394, a court cannot sanction a compromise or arrangement between a company and its creditors or members, proposed for the purpose of amalgamation of any two or more companies unless the court has received a report from the Company Law Board or from the Registrar of Companies to the effect that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or of the public. Under section 394A the court is required to give notice of every application made to it under section 394 to the Central Government and has to take into consideration the representation, if any, made to it by the Central Government before passing any order under the section. This provides the Central Government an opportunity to oppose the application if it has reasons to believe that the merger or acquisition is likely to lead to concentration of economic power and thus run counter to the public interest.

Capital Issues (Control) Act 1947

Under the Capital Issues (Control) Act 1947, consent of the Central Government in respect of any issue of capital a company intends to issue has been made mandatory. The Central Government has also the power to qualify the consent with such conditions as it may think fit.[13] These powers can be used, *inter alia*, to secure dispersal of shareholding by making the consent conditional upon the offering of a substantial proportion thereof for public subscription, where circumstances suggest such a course to be in the public interest. At present, however, issue of capital up to Rs. 25 lakhs has been exempted from the operation of this section.

Monopolies and Restrictive Trade Practices Act 1969

The enactments discussed earlier have the effect of curbing one aspect or the other of concentration of economic power. These are, however, not so comprehensive as to cover all possible ways in which concentration of economic power may grow and has not thus been able to eliminate it to any appreciable degree. This fact has been confirmed by both the Mahalanobis Committee and the Monopolies Inquiry Commission. The Monopolies and Restrictive Trade Practices Act 1969[14] enacted in pursuance of the recommendations of the Monopolies Inquiry Commission is designed to achieve this end. This Act contains provisions for the control and prevention of—

(1) Concentration of economic power in the hands of (*i*) large industrial undertakings having by itself or jointly with other inter-connected

13. Capital Issues (Control) Act 1947, section 3.
14. Hereinafter cited as MRTPA.

undertakings total assets of the value of rupees twenty crores or more and (*ii*) a dominant undertaking, whether it is a single undertaking or consists of more than one undertaking if the value of its assets or the sum total of the value of the assets of all the interconnected undertakings constituting the dominant undertaking, as the case may be, is rupees one crore or more.[15]

A dominant undertaking, as defined in the Act, is one which, subject to certain other conditions, either by itself or along with inter-connected undertakings (*i*) produces, supplies, distributes or otherwise controls not less than one-third of the total goods of any description that are produced, supplied or distributed in India or in any subtantial part thereof, or (*ii*) provides or otherwise controls not less than one-third of any services that are rendered in India or any substantial part thereof.

(2) Monopolistic trade practices, that is, trade practices which have the effect of maintaining price at unreasonable level or unreasonably preventing competition or limiting technical development or capital investment or allowing the quality of goods or services to deteriorate.[16]

(3) Restrictive trade practices which effect adversely the free flow of capital or resources into production or manipulate prices in such a manner as to impose on consumers unjustified costs or restrictions.[17]

Specific measures intended to prevent or check concentration of economic power as laid down in the Act are broadly as follows:

(*i*) The large undertakings or the dominant undertakings referred to cannot without the prior approval of the Central Government :

(*a*) undertake substantial expansion entailing increase in their assets, or production of goods and services by 25 per cent or modify a scheme of expansion approved by the Central Government;[18]

(*b*) give effect to any scheme of merger or amalgamation or take-over of large and dominant undertakings or of undertakings which are not themselves large or dominant undertakings but where their merger, amalgamation or take-over, as the case may be, results in bringing into existence such an undertaking;[19] and

(*c*) allow the appointment of any of their directors as a director of any other undertaking if he already holds such office in more than ten inter-connected undertakings:[20]

(*ii*) No new undertaking, which when established, would become an

15. MRTPA Chapter III.
16. MRTPA Chapter IV.
17. MRTPA Chapter VI.
18. MRTPA section 21.
19. MRTPA section 23.
20. MRTPA section 25.

inter-connected undertaking of a large undertaking can be floated without the previous permission of the Central Government.[21]

In all the above cases the Central Government will give approval only after ensuring that the proposed expansion, merger, take-over or establishment of new undertaking, as the case may be, is not likely to lead to concentration of economic power to the common detriment or be prejudicial to the public interest in any manner. Where it is felt that no such approval can be granted without a further enquiry, the Central Government may refer the proposal to the Monopolies and Restrictive Trade Practices Commission for advice and on receipt of the report of the Commission, may pass such orders as it may think fit. Also, if the working of an existing large or dominant undertaking is found to be prejudicial to the public interest or to have led to or is likely to lead to adoption of monopolistic or restrictive trade practices, the Central Government may, if so recommended by the Commission, after a reference is made to it, order the division of the trade of the undertaking or inter-connected undertakings in a manner specified by it.[22]

For control and prevention of monopolistic trade practices the Central Government has been vested with wide powers under the Act.[23] If one or more of monopolistic undertakings are found to indulge in monopolistic trade practices in respect of any goods or services, the Central Government may refer the matter to the Commission for inquiry and on receipt of the Commission's findings to the effect that the trade practices concerned are operating or are likely to operate against the public interest, may pass such orders as it may think fit to remedy the situation including orders:

(*a*) regulating the production, supply, distribution or control of any goods or control or supply of any services by the undertaking;
(*b*) fixing the terms of sale (including prices) or supply;
(*c*) prohibiting the undertaking from resorting to any act or practice or from pursuing any commercial policy which prevents or lessens or is likely to prevent or lessen competition in the production, supply or distribution of any goods or provision of any services;
(*d*) fixing standards for the goods used or produced; and
(*e*) declaring unlawful the making or carrying out of any agreement and requiring any party to the agreement to determine the agreement within a specified time.

These powers are applicable to monopolistic trade practices indulged by a monopolistic undertaking which under the Act means a dominant under-

21. MRTPA section 22.
22. MRTPA section 27.
23. MRTPA section 31.

taking or an undertaking which together with not more than two other independant undertakings produces, supplies, distributes or controls not less than one-half of the total goods produced, supplied or distributed in India or any substantial part thereof or provides or controls not less than one-half of the services rendered in India or any substantial part thereof.

As regards restrictive trade practices, the Monopolies and Restrictive Trade Practices Commission has been empowered to inquire into any agreement which may come before it, whether such agreement has been registered under the Act or not, and if after such inquiry it finds that the practice is prejudicial to the public interest, may by an order direct that the practice shall be discontinued or shall not be repeated. The Commission may permit the party to the restrictive trade practice to take necessary steps to ensure that the trade practice is no longer prejudicial to the public interest.[24]

The fact that further legislative measure of a rather drastic nature was necessary only reflects the inadequacy of the provisions of the earlier corporate laws such as the Capital Issues (Control) Act 1947, the Industries (Development and Regulation) Act 1951, and the Companies Act 1956, to plug all possible sources which give rise to concentration of economic power. The Government's powers under the Monopolies and Restrictive Trade Practices Act are *prima-facie* quite comprehensive, yet it is to be seen how affective such powers would prove in achieveing the desired goal. The regulatory and preventive provisions of the Act aimed at curbing concentration of economic power with its attendant malpractices, are to be exercised only after an assessment of the likely impact, the existing or likely concentration of economic power or the resultant malpractices may have on the public interest. Thus the discretion the Government has in the matter should afford it an opportunity to use the powers judiciously according to the needs of the hour and the state of the country's economy. For, what may be beneficial for a nation in the initial stages of its development may not be so after it has attained some degree of development or when the economy is fully developed. Again, the strategy that yields fruitful results in peace time may be found to be outmoded and may need to be changed or even reversed in times of war or economic crisis. The discretionary powers are expected to take care of all such changing circumstances. However, even so, no law can be perfect particularly in a dynamic society like ours and changing conditions may render any law out of tune in course of time and require to be modified or adapted to suit altered conditions.

24. MRTPA section 37.