A Study of Single Economic Entity Doctrine in Context of India

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ABSTRACT:

The basic principle or the objective of the competition laws all over the world is to protect the consumers and to prevention such "practices that harm the normal routine market practices between the independent parties who aim or who are competing for a larger slice of the market. The Single Economic Doctrine lays down that irrespective of the legal status of two or more enterprises can be said to form a single entity for the purposes of competition law". "The concept of the Single Economic Doctrine was enumerated by the European Commission in 1960s and now it has been accepted in India also. The main reason behind the evolution of the Doctrine is that a subsidiary does not take a decision independently, and when its parent company is involved in a particular business it is a normal course of business that they would decide together," in fact it is the parent company that decides and the subsidiary follows and thus when they both agree together, they should not be treated differently but rather they should be treated as a single economic entity, as such an agreement cannot be said to be anticompetitive. In the present paper, the researcher will discuss upon how the SEE Doctrine has evolved all over the world especially by referring to European cases and the US cases. Further the paper will discuss upon how the SEE Doctrine evolved in India and it will also state as to the present scenario of the applicability of the Doctrine in various situations. Lastly the paper will try to critically analyse that whether the current applicability of the Doctrine is adequate or not. For the preparation of research paper, the author has mostly referred to the secondary resources like online journals, books etc. to which the author has access.

I. INTRODUCTION

The basic principle or the objective of the competition laws all over the world is to protect the consumers and to prevention such practices that harm the normal routine market practices between the independent parties who aim or who are competing for a larger slice of the market. The Single Economic Doctrine lays down that irrespective of the legal status of two or more enterprises can be said to form a single entity for the purposes of competition law . The concept of the Single Economic Doctrine was enumerated by the European Commission in 1960s and now it has been accepted in India also. The main reason behind the evolution of the Doctrine is that a subsidiary does not take a decision independently, and when its parent company is involved in a particular business it is a normal course of business that they would decide together, in fact it is the parent company that decides and the subsidiary follows and thus when they both agree together, they should not be treated differently but rather they should be treated as a single economic entity, as such an agreement cannot be said to be anticompetitive.

In the present paper, the researcher will discuss upon how the SEE Doctrine has evolved all over the world especially by referring to European cases and the US cases. Further the paper will discuss upon how the SEE Doctrine evolved in India and it will also state as to the present scenario of the applicability of the Doctrine in

various situations. Lastly the paper will try to critically analyse that whether the current applicability of the Doctrine is adequate or not.

II. EVOLUTION OF SINGLE ECONOMIC DOCTRINE:

The concept of single economic entity doctrine can be said to a double-edged concept. It has both defensive dimension and also prosecutorial dimension.[1] Under Defensive dimension, the entities have the advantage to include their parent companies as well as their subsidiaries and thus through this they can take the defence that whatever they have agreed upon has been done by them under the purview of single economic entity doctrine. Under the prosecutorial dimension, while giving the doctrine a broader conception, it enables the competition authorities to sanction larger entities comprising multiple affiliated corporations, as the authorities can include the parent companies when computing the penalties on account of any act done by the subsidiaries .[2]

The concept of SSE was foremost introduced in the European Commission Guidelines on horizontal cooperation, which states that companies which are part of the same "undertaking" within the ambit of Article 101(1) are not considered to be competitors under the guidelines. The Article 101 applies only to the agreements between independent undertakings. A scenario when a company exercises a decisive effect over another company, they are said to form a single economic entity & therefore are the part of same undertaking.[3]As per the current jurisprudence scenario, SEE does not have the individual functioning capacity . The SEE works on the whims & wishes of the parent company and also doesn't have any separate decision-making capacities. It is however evolved from the concept of holding company and subsidiaries as given in Companies Act, 2013. It's an established principle that every company i.e. even subsidiary is a separate legal entity. That the affairs are completely under the control of holding company, in simple terms, if subsidiary has no independent authority to take any decision on its own and they are out and out guided only by holding company, would be in a position to hold that subsidiary and holding company constitute a single economic unit. The major difference is concept of subsidiary and holding company is a concept of company law whereas the SEE doctrine is exclusively a concept of antitrust law. [4]

The evolution of SEE Doctrine in U.S. antitrust law:

Under the U.S. antitrust law, the single entity doctrine acts as a defense to the business units from competition law sanctions. In U.S., the concept of the doctrine was dealt firstly by the Supreme Court in the case of

[1] Single entity tests in U.S. antitrust and EU competition law, Pieter Van Cleynenbreugel, (available at https://orbi.uliege.be/bitstream/2268/201655/1/SSRN-id1889232.pdf last accessed on 25/02/2019 at 21:49)
[2] *Supra* 1
[3] K Shiva , Curtailing cartelisation through single economic entity doctrine, SSC Online Blog (Available at: https://blog.scconline.com/post/2018/02/06/curtailing-cartelisation-single-economic-entity-doctrine/, last accessed on 26.02.2019 at7:40 pm)
[4] BalwantRaiSaluja v. Air India Ltd., (2014) 9 SCC 407.

Copperweld Corp. v Independence Tube Corp.[5] which is a 1984 case, in which the Court held that a parent corporation and its wholly owned subsidiary would be constituted as a single entity. Under the Sherman Act, the provision which can be believed to have the concept of single economic entity doctrine, is Section 1[6], which states that, "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint trade is prohibited. Thus it can be inferred that under Section 1 infringement there is a requirement of at least a bilateral action .[7]

III. ANALYSIS OF THE DOCTRINE

Required Criteria for the Application of Single Economic Entity Doctrine

Given the possibility of this doctrine, the criteria that undertakings must satisfy with the end goal to be perceived as a solitary monetary substance, and hence get away from the utilization of section 3, must be analyzed. These criteria have been drawn from a corporate law that credits obligation on a parent for its auxiliary's activities and has been extemporized through legal points of reference for the reasons for competition law. The focal managing rationale behind the doctrine is that, if the undertakings never were in a competitive relationship regardless, the relationship isn't equipped for being limited by any agreement. Courts hence seek to determine whether the concerned enterprises are capable of exerting individual and autonomous competitive forces in the market, or whether their market conduct is regulated by other organizational and economic linkages. In order to determine whether a competitive relationship exists, *inter alia,*factors like legal control, single centre of decision making, unity in economic decisions and exercise of decisive influence have been considered by courts .[8]

Parent- Subsidiary Relation under Single Economic Entity Doctrine

Generally, the doctrine is invoked in cases of a parent-subsidiary relationship. But, the cases of sister companies, or agency relationships are preladious. Cited in *Viho v. Commission*,[9] the doctrine was first adopted in India in the case of *Shamsher Kataria v. Honda*[10], where there was an agreement between Hyundai Motor Company and its subsidiary company Hyundai Motor India Limited could not subject to section 3 .[11] A subsidiary does not freely decide its lead in the market but rather acts as per its parent company's directions, the

[5] 467 U.S. 752 (1984)
[6] Section 1, Sherman Act, 1890
[7] *Supra* 1
[8] Kapoor Glass Private Limited v. Schott Glass India Private Limited, CCI March 29, 2012
[9] Natasha Menell,The Copperweld Question: Drawing the Line between Corporate Family and Cartel, Cornell Law Review, Vol. 101, page 467.
[10] *Supra* 10.
[11] PayaswiniUpadhaya , Single Economic Entity: Has The Competition Regulator Set A Confusing Precedent? , Bloomberg-Quint (Available at: https://www.bloombergquint.com/law-and-policy/single-economic-entity-has-the-competition-regulator-set-a-confusing-precedent, last accessed on 30.10.2018 at 11:45pm)

agreement between the parent and the subsidiary can't be considered to be anticompetitive. A rebuttable assumption of the activity of unequivocal impact by the parent is brought up in instances of entirely or about completely owned subsidiary.

The doctrine was applied to legal enterprises having a common owner in the *Hydrotherm*case.[12] Similarly in the 1998 and 1999 UEFA Cup, AEK Athens and Slavia Prague were not allowed to compete together owing to the common ownership of the English National Investment Company . For sister entities who have a common owner, or partly owned subsidiaries, the single economic entity doctrine may be invoked if it is shown that there is a unity of economic interest between the enterprises. This entails a scrutiny of any evidence of a coordinated strategy, organisational linkages and economic synergy.

Parallelism Plus Approach Under The Doctrine

Be that as it may, in situations where essential dependence is set upon the perception of an economic interest, such an investigation can create counter-beneficial outcomes. This is on account of a parallelism in addition to approach is utilized to build up the presence of an agreement, or, which is the first stage of section 3 to apply. This requires there be parallel monetary lead, alongside some plus factors, for example, proof of correspondence, coordination, etc. These in addition to factors, regularly depended upon, appear to be like the example of conduct considered to demonstrate the presence of a single entity.

There are a number of important implications that flow from the 'single economic entity' assessment. However, the primary ones are:

that agreements between legal entities comprising the same 'undertaking' (in circumstances where a subsidiary has no real freedom to determine its own course of action) are not caught by Article 101(1) TFEU, and

parent company liability - parent companies can be held liable for the wrong-doings of their controlled subsidiaries (ie where economic unity is demonstrated).

In addition, under EU competition law relationships between principals and agents may, if certain conditions are met, be effectively treated like relationships between parents and controlled subsidiaries (ie single economic entities).[13]

[12]The Prohibition 0n Restrictive Agreements- Overview, Lexisnexis Journal (Available at : https://www.lexisnexis.com/uk/lexispsl/competition/document/391329/55KB-7MM1-F187-511S-00000-00/The_prohibition_on_restrictive_agreements_overview#, last accessed on 27.02.2019 at 01:24am)

[13] The Prohibition 0n Restrictive Agreements- 0verview, Lexisnexis Journal (Available at : https://www.lexisnexis.com/uk/lexispsl/competition/document/391329/55KB-7MM1-F187-511S-00000-00/The_prohibition_on_restrictive_agreements_overview#, last accessed on 27.02.2019 at 01:24am)

IV. STATUS OF SINGLE ECONOMIC ENTITY DOCTRINE UNDER THE COMPETITION LAW OF INDIA

The Competition Act does not expressly identifies the Single Economic Entity Doctrine, and as such, does not also convey an implied protection to the conduct of the enterprise. However, in line with internationally recognized principles, the CCI and the Competition Appellate Tribunal ("COMPAT") have acknowledged the protection of the SEE Doctrine to Section 3 offenses (i.e. anti-competitive agreements) on multiple occasions. The CCI dealt with the SEE Doctrine for the first time in 2012, when it held that an exclusive arrangement between Automobili Lamborghini S.p.A. and its group company, Volkswagen Group Sales Pvt. Ltd. could not be considered as an agreement between two enterprises under Section 2(h) of the Competition Act, and consequently, could not be examined under Section 3 of the Competition Act.3 On the question of what constitutes a single economic entity, the CCI noted that so long as two enterprises form part of the same group, 4 any internal agreement between them is not considered an agreement for the purpose of Section 3 . The COMPAT upheld the CCI's finding, albeit by deviating slightly in the line of reasoning adopted by the CCI. The latest CCI decision concerning the SEE Doctrine, i.e. Association of Third Party Contractor v. General Insurers'Association re-affirmed the group-test. In ShamsherKataria,[14] the CCI also held "inseparability of economic interest" to be a vital ingredient in the rebuttable presumption of the SEE Doctrine available to enterprises belonging to the same group. Further, moving away from an enterprise-level control, the CCI in the Insurance Cartel Case narrowed its assessment to de facto and de jure control over specific business decisions which were the subject-matter of the allegations. Clearly, due to the statutory requirement of showing an "agreement" between "enterprise[s]" under Section 3, these decisions of the CCI and the COMPAT only extend the SEE Doctrine to Section 3 offenses. Its application to Section 4 offenses remains elusive, and a matter of potential debate. Section 4 of the Competition Act, which is the corresponding provision to Section 2 of the U.S. Sherman Antitrust Act of the 1890 and Article 1O2 of the Treaty on the Functioning of the European Union ("TFEU"), deals with certain categories of unilateral conduct by a dominant enterprise or group. By its very nature, Section 4 is aimed at combatting single-firm conduct . What stands out, however, is the prohibition on enterprises on imposing discriminatory conditions or price in purchase or sale of goods or service, which forms part of the prohibition contemplated by Section 4(2)(a) of the Competition Act ("Anti-Discrimination Provision"). The Anti-Discriminatory Provisions have a unique requirement of showing a discriminatory price

[14]ArjunNihal Singh, India: Revisiting The Concept Of Single Economic Entity Under The Indian Competition Act, 2002, Mondaq 0nline Publication ,21.12.2015(Available at:http://www.mondaq.com/india/x/453008/Antitrust+Competition/Revisiting+The+Concept+Of+Single+Economic+Entity+Under+The+Indian+Competition+Act+2002, last accessed on 28.02.2019 at 7:05 am)

or condition to be in relation to a "purchase or sale." A "purchase or sale" cannot be purely unilateral in nature, and arguably, should be subject to the same SEE Doctrine principle as section 3[15]

Exclusion of SEE from the scope of Section 3 of Competition Act, 2002

According to Chapter 2 of the Competition Act, 2002 the scope and ambit of Section 3 extends only over the agreements entered into among two or more enterprise, association of enterprise, persons, group of persons or person and enterprise . The prerequisite of the anti-competitive agreement according to the plain reading of the Act is that, such agreements must be entered between two or more enterprises.However, the member of SEE does not form a separate enterprise to be covered under the definition of enterprise as discussed earlier. They form a part of single enterprise .[16]

V. JUDICIAL APPROACH IN APPLICATION OF SINGLE ECONOMIC ENTITTY DOCTRINE:

Competition Commission of India Cases & Application of SEE Doctrine

Given its beginning stage, the points of reference so far on the idea of single economic entity are to a great degree constrained under the Indian competition arena. In any case, the Competition Commission of India (CCI) has additionally perceived that when a parent company possesses all in its backup, it comprises a single economic entity. In Exclusive Motors, the CCI acknowledged the idea of single economic entity and opined that *"Agreements between entities constituting one enterprise cannot be assessed under the Act. This is with accord with the internationally accepted doctrine of 'single economic entity'.... As long as the opposite party and Volkswagen India are part of the same group, they will be considered as a single economic entity for the purpose of the Act"*.[17]

Similarly, in *ShamsherKataria*[18], the CCI observed that *"an internal agreement/arrangement between an enterprise and its group/parent company is not within the purview of the mischief of section 3(4) of the Act... At the same time, the Commission would like to emphasize that the exemption of single economic entity stems from the inseparability of the economic interest of the parties to the agreement. Generally, entities belonging to the same group e.g. holding-subsidiaries are presumed to be part of a 'single economic entity' incapable of entering into an* [anti-competitive] *agreement, the presumption is not irrebuttable."*[19]

[15] *Ibid.*
[16] RimaliBatra, The Case of Economic Oneness of Group Companies, JSA Law (September 2015) (Available at http://www.jsalaw.com/wp-content/uploads/2015/09/The-Case-of-Economic-Oneness-of-Group-Companies.pdf, last accessed on 28.02.2019 at 06:45pm)
[17] *Ibid.*
[18] ShamsherKataria v. Honda Siel Cars India Ltd. and others, C-03/2011
[19] *Ibid.*

Further, in a recent judgment the opposite parties in *cartelization by public sector insurance companies*[16],presented that the Government of India holds 100% shares of each of the companies i.e., National Insurance Co. Ltd., New India Assurance Co. Ltd., Oriental Insurance Co. Ltd. and United India Insurance Co. Ltd and that also the management and affairs of the companies are controlled by the Government of India via Department of Financial services (Insurance division), Ministry of Finance . However, the CCI rejected the submissions of the insurance companies and stated that even though the overall supervision of the insurance companies are with the central government, each of the companies placed a separate bid in response to the tenders floated by the government. Further, it was also observed that the Ministry of Finance did not exercise *de facto* control over the insurance companies business decisions and as such cannot be considered as a single economic entity.

Grasim Industries and Aditya Birla Chemicals: Cartel Case

While assessing Grasim Industries and Aditya Birla Chemicals conduct under Section 3 itself, the regulator deviated from its position in the Lamborghini group case.In a recent order, the CCI found Grasim Industries and Aditya Birla Chemicals guilty of bid-rigging a Delhi Jal Board tender. The regulator rejected the argument of the companies that there can't be collusion since they are part of the same group and hence constitute a single economic entity. It held that since public procurement involves use of taxpayers' money and consumer welfare, bid rigging should be viewed as 0ne of the most pernicious anti-competitive conduct inviting serious penalty to serve as a deterrent.

CCI OBSERVATIONS:

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- The rates besides simultaneously increasing every year were converging on a narrow band.
- It was observed that even the fact that the plants are located in various geographical areas but the rates quoted by all the bidders remained same. It was also stated that in an average market condition, the freight should decrease with the increase in the distance covered .[20]
- On examination of the cost of production of the product by the respective companies, the CCI observed that the cost of production of GACL has been nearly constant whereas the cost of production of GIL and BACIL has been increasing, which was contrary to explanations of narrow band pricing offered by the parties, which attributed the same to PAC being a homogenous product .

[20]Delhi Jal Board v. Grasim Industries and ors. CCI-03/2013

- In connection to the conduct of GIL and ABCIL, it was stated that they have been continuously and throughout the tender process were engaged in exchanging vital stats with each other .
- Whereas with respect to the tendering of LC it was observed that the product features of LC differs it from PAC, such as LC is a by-product and it's hazardous and toxic nature and hence its market conditions was different from that of PAC. It was also stated that in case of LC, apart from the timing of bid submissions there were no other factors indicative of a concerted action.
- The Commission noted that for LC, no analysis has been made by the DG with respect to basic price, transportation cost, taxes and policy of profit margin and in the absence of any analysis in this regard, no finding of contravention can be recorded against the bidders based on the conclusions drawn by the DG.[21]

FINDINGS OF THE CCI:

- Being part of the same 'group', any agreement between cannot be termed as an anti-competitive agreement under Section 3 of the Act.[22]
- The concept of 'group' is applicable only in the context of regulation of combinations under Sections 5 and 6 of the Act and has no application, whatsoever, to the proceedings under Section 3 of the Act .
- With respect to the allegations of collusive bidding, the Commission observed that despite all the OPs having huge variation in variable cost of production, fixed cost of production, transportation cost, taxes as well as policy on profit margin, there was close margin in bid prices quoted for PAC by them in DJB's tenders year after year. [23]
- In case of absence of an economic rationale behind the trend of quoting similar rates by the bidders together with the prolonged supra-competitive pricing by GACL, the bid rotation, the tenders floated by other municipal corporations and the exchange of vital information taken in totality were sufficient enough as 'plus factors' and established concerted action and meeting of minds .
- Consequently, the bidders *i.e.* ABCIL, GIL and GACL were found to have acted in a concerted manner in respect of the tenders floated by DJB (for supply of PAC) during 2009- 10 to 2014-15 in contravention of the provisions of Section 3(1) read with Section 3(3)(d) of the Act. **No** violation for the bidders for LC i.e ABCIL, GIL and PACL was found and the reference case No. 04/2013 was closed**.**

[21] *Ibid.*
[22] M M Sharma , CCI limits the scope-of single economic entity concept in antitrust proceedings, Anti-Trust & Competition Law Blog , (Available at: http://www.competitionlawyer.in/cci-limits-scope-of-single-economic-entity-concept-in-antitrust-proceedings/, last accessed on 01.03.2019 at 11:10pm)
[23] *Supra*f.n. 27

- Regarding the quantum of penalty to be imposed, the Commission noted that PAC is used in the purification of water. Therefore, the criticality of the procured product for public health was considered as an aggravating circumstance . Therefore the Commission ordered a penalty on ABCIL and GIL at the rate of 8% on their average relevant turnover and at 6% on GACL for their first three financial years, being INR 2.09 Crore, INR 2.30 Crore and INR 1.88 Crore respectively.[24]

VI. CONCLUSION

CCI should use its advocacy programme to educate public sector procurers against this behaviour. And until that happens, companies should make the procurer aware of the fact that they belong to the same group, specifically mention this in the tender documents and use it as a defence if it comes to that. The prime rational behind Section 3 is to prevent collusion among the market players that creates unwanted hindrance to new comers or the already existing players. The single economic entity doctrine provides for vast exploitation of the basic objective of the Act. Many foreign investors purchase the shares of multiple companies indulged in a particular field to enter the Indian market but would not exercise any substantial control over those companies.[25] This would be sufficient for Indian players to enter into anti-competitive agreement and evade themselves the purview of Competition Act and defraud the administration by invoking the doctrine of single economic entity. This principle is clearing a route for an extremely perilous law, which gives a lawful yet ethically wrong approach to utilize the vacuum present in the antitrust case. The Indian law composers did not envision the risk of the tenet of the single economic entity while the drafting of antitrust market laws. The need of great importance is to make a more stringent law to keep the maltreatment of the single economic entity teaching to accomplish the genuine goal of the antitrust law. [26]

While the Indian invocation of the doctrine has been rare, the *ShamsherKataria* and *Exclusive Motors* cases, along with several decisions on the Treaty on the Functioning of the European Union and Sherman Antitrust Act, provide the requirement of decisive influence and supporting indicators to invoke the single economic entity doctrine . Competition law authorities must tread with alert and depend on confirmations of economic synergy that originate before the supposed anticompetitive lead. For example, linkages like joint production, common employees or a long-standing open relationship might be better pointers of a single unit, than parallel financial procedure or data, to decisively build up a guiltless intra-undertaking activity.

[24]Chirayu Jain , Single Economic Entity Doctrine In India, SSRN Journal(Available at : https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3184957, accessed on 01.03.2019 at 11:28pm)

[25] K Shiva , Curtailing cartelisation through single economic entity doctrine, SSC Online Blog (Available at: https://blog.scconline.com/post/2018/02/06/curtailing-cartelisation-single-economic-entity-doctrine/, last accessed on 01.03.2019 at 11:40 pm)

[26] PayaswiniUpadhaya , Single Economic Entity: Has The Competition Regulator Set A Confusing Precedent? , Bloomberg-Quint (Available at: https://www.bloombergquint.com/law-and-policy/single-economic-entity-has-the-competition-regulator-set-a-confusing-precedent, last accessed on 02.03.2019 at 11:45pm)