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Sports Governing Bodies under the Scanner of Competition Law: A New Approach

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ABSTRACT

To regulate the competition in market, government passed the Competition Act, 2002. It regulates the whole market and bans anti-competitive agreements. It makes the business practices illegal which try to abuse its dominant market position. In the era of internalization and commercialization of sports, it has created rapid growth of economic interest of the businesspersons and investors. The economic importance of sports has been recognized by almost every country. It can be termed as Sports Market and there is lack of regulatory mechanism in this market to regulate illegal activities. Therefore, it has travelled around new cross-roads for the application of competition law in sports. Various sports federation show their dominance position and try to control the sports which deny the fair competition. Due to advancement in sports, it has lifted lot of other legal issues also, like match fixing, doping, employment contract, issues on abuse of dominance etc. and the paradigm of competition law application on the sports will improve the administration and control the unethical practices. This paper analysed that how competition law affects the development of sports in new era. It provided the overview that how competition law is applicable on sports and highlighted international practices in sports.

Keywords: *Competition Law, Sports, Economic interest, Anti-Competitive Agreement, Abuse of Dominance.*

I. INTRODUCTION

Today, the popularity of sports is increasing day by day. Every sport has its own place like cricket, hockey, football, tennis, badminton, kabaddi etc. as all the sports are now internationalized and commercialized. In country like India, there are ardent supporters of sports which makes it as a money-spinning business. It means sports are no longer cultural vision, but it is also turn into a big business which effects on our economy. All the sports are having big commercial transactions and continuously contributing to country's economy. Not only it is making money but also contribute to providing paid employment, developing

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infrastructure sector as every sport also require some basic infrastructure, transport sector, medical support, tourism sector, electronic sector, Hospitality Sector, Taxation sector etc. In fact, any activity of sport effect each and every sector of our country and contributes to GDP directly or indirectly. This converted form of sports (Cultural vision to big business) also carry all the other negative practices of business like try to control market, anti-competitive contracts, price fixing etc. The monopolistic nature of sports organisation and unfair practices in sports, attract competition law. The Competition Law will provide fairness, effective resource allocation and economic development.

II. INDIAN PERSPECTIVE

Dhanraj Pillay Case

In Dhanraj Pillay Case², Hockey India (HI) disqualified, through its Code of Conduct agreement, some players from Indian National Team because of their participation in unsanctioned events³. It was alleged that this act hampered the mobility of players⁴ and also opportunities for new sport organizers.⁵ Competition Commission of India (CCI) concluded that though HI has dominance in the market for organising hockey events and for providing services to the hockey players but it not abusing its dominance and also not entered into any anti-competitive agreement.⁶

However, in this case Commission clarified the importance of application of competition laws on sports cases. The Commission appreciated the regulation of sports through pyramid structure, but it also viewed that it is the Commission's duty to see that the functioning and activities of sports must not disturbed the healthy competition by violating the objectives of the Act. Commission confirmed that Sports Governing Bodies (SGB) are self-regulated but immunity from the application of rules in case of overlapping of regulations and economic gains by SGB is not possible.⁷

All India Chess Federation (AICF) Case:

In AICF Case⁸, it was alleged that that there was a contravention of Section 3⁹ and 4¹⁰ of Competition Act, 2002 against AICF. AICF is a registered society for the sport of chess

² Sh. Dhanraj Pillay and M/s Hockey India, Ref. Case No. 73 of 2011, 2013 SCC Online CCI 36: [2013] CCI 35

³ Ibid, Para 4.3

⁴ Ibid, Para 4.8

⁵ Ibid, Para 4.9

⁶ Ibid, Para 10.9 to 10.14

⁷ Ibid, Para 10.6.3

⁸ In Re Hemant Sharma Case, Ref. Case No. 79 of 2011 (August 24, 2019, 11.33 AM), <https://www.cci.gov.in/sites/default/files/Case%20No.%2079%20of%202011.pdf>

⁹ Anti-Competitive Agreements

¹⁰ Abuse of Dominant Position

under the Tamil Nadu Societies Registration Act, 1975. It is registered as National Sports Federation (NSF). AICF is also recognized by and affiliated to, Federation Internationale des Echecs ('FIDE'), which is the apex International body governing the sport of chess.¹¹ AICF put restriction on the registered players on participating in any other tournament that is not authorized by AICF with sanction of banning for one year from participating in any event. Further, they have to surrender 50% of prize money to AICF from such unauthorized events. Petition was filed before Delhi High Court, but Court disposed of it with the direction to present it before CCI (Competition Commission of India).¹²

CCI cleared the position of 'Enterprise'. According to it engagement in any economic activity is sufficient. CCI stated that AICF is an enterprise and ploughing back all its revenue into game of chess does not change its nature of economic activities.¹³

For applying the competition laws, delineation of relevant market is necessary. Thus, Commission recognized 2 relevant markets in this case- "*market for organization of professional chess tournaments/ events in India*" and "*market for services of chess players in India*".¹⁴ Commission determined that AICF enjoyed dominant power in both the relevant markets as the players are mandatorily required to be registered with AICF if he is desirous to participate in FIDE/Asian/Commonwealth Championships and also it regulated the players to participate in any unauthorized tournament by AICF.¹⁵ In this direction CCI held that imposing cash penalties and ban on the violation are very harsh consequences, thus AICF is abusing its dominant position.¹⁶ These unethical practices comes under denial of market access.¹⁷

BCCI Case¹⁸

This case is related to anti-competitive activities of BCCI in respect of grant of Broadcasting Rights. The matter was initially decided by the Competition Commission of India (CCI) and held that BCCI has violated the provision of section 4 of the Competition Act, 2002. BCCI filed appeal before Competition Appellate Tribunal (COMPAT). The COMPAT, vide its order dated 23rd Feb., 2015, set aside the CCI's order on the ground of natural justice with the order of fresh disposal and reinvestigation.

¹¹ Supra Note 7, Para 3

¹² Ibid, Para 4

¹³ Ibid, Para 26

¹⁴ Ibid, Para 40

¹⁵ Ibid, Para 50

¹⁶ Ibid, Para 55

¹⁷ Ibid, Para 78

¹⁸ In Re Surinder Singh Barmi and The Board of Control for Cricket in India, Ref. Case No. 61/2010, 2017 SCC Online CCI 57

On 29th November 2017, CCI again passed order against The Board of Control for Cricket in India (BCCI) and held that it is abusing its dominance power by denial of access and it is a severe form of abuse. To understand the basis of the CCI's order and BCCI's conduct it is necessary to throw light on the impugned agreement and findings of the CCI.

BCCI entered into an agreement, with the duration of 10 years, with broadcasters of IPL that *“it shall not organize, sanction, recognize, or support during the Rights period another professional domestic Indian T20 competition that is competitive to the league”*.¹⁹ BCCI contended that it is a not-for-profit organization, and profits are reinvested for the development of the cricket, hence it is not an enterprise. Further it was argued that the scope of the impugned clause was too narrow as it is applicable only on the T-20 form of cricket and not on the other forms.²⁰

CCI held that the BCCI generates income from different types of activities. These activities are termed as economic activities and the economic activities of BCCI is sufficient to cover it under the term of enterprise, it does not depend on its profit motive.²¹ The Commission noted that though the impugned clause adopted by BCCI to protect the commercial interest but it is taken in aggravating form. Monopoly of IPL for ten years excluded all potential competitors in Sports Market and restrict development of the game.²² BCCI failed to explain that how 10 years restriction will serve the interest of cricket.²³ Hence, *“The Commission has held that the contravening anti-competitive conduct of BCCI amounts to denial of market access to the market for organization of professional domestic cricket leagues/events in India”*.²⁴ CCI also imposed penalty of Rs. 52.24 Crores.²⁵

Athletics Federation of India (AFI) Case²⁶

Athletics Federation of India (AFI)²⁷ decided in its Annual General meeting to take action against those who are encouraging marathons not authorised by AFI. The decision was challenged on the ground of restrictive in nature and hamper healthy competition in India.²⁸

Director General (DG) found that AFI was having dominant position in the relevant market

¹⁹ Ibid, Para 2

²⁰ Ibid, Para 9

²¹ Ibid, Para 11-16

²² Ibid, Para 41-46

²³ Ibid, Para 47-49

²⁴ Ibid, Para 55

²⁵ Ibid, Para 58

²⁶ In re Department of Sports Ministry of Youth Affairs and Sports vs. Athletics Federation of India, Ref. Case No. 01 of 2015, 2018 SCC Online CCI 63

²⁷ It is an apex body to regulate athletics in India

²⁸ Supra Note 25, Para 5

i.e. “provision of services relating to organisation of athletics/athletic activities in India”²⁹ as it is affiliated with International Association of Athletics Federation (IAAF), Asian Athletics Association (AAA) and Indian Olympic Association (IOA). It was argued on behalf of the AFI that investigation was done mala fide manner.³⁰

The Commission viewed that the services required for the different sports are altogether different and one sport cannot substitutable with other. In this case, AFI is the apex body governing the athlete sport in India and it is the only authority for selection of athletes in the event. Therefore, there is no supply side substitutability. Also, the athletes cannot participate in events not authorised by AFI. Thus, supply of services also only with the AFI and there is no supply substitutability.³¹ The Commission held that as AFI is the apex body governing the athletics in India, is in dominant position in relevant market.³²

The CCI found that the alleged provision of AFI in Annual General Meeting (AGM) was only draft minutes which required to be finalize in next AGM. In next AGM, AFI changed this provision in the following terms: “It is decided that State Association and the Federation must be very careful and should restrict and educate the athletes which can be subversive to their health and they are also cheated sometimes for not having paid the money”.³³ CCI viewed that the amended provision was not abusive. Also there was no record available that AFI disallowed anybody to organise marathon and permission from AFI and paying fee are required only when any organiser want to use its services. Thus, it was held by the Commission that AFI was not abusing its dominant position.³⁴

The Road Ahead

Previously there was no connection between the sports and other laws. But in this new era where the sports are internationalized, new challenges are coming in way, issues with governing bodies are raising regularly. To control these problems, Sports Policy need to be revamped. As sports are now commercialized, it creates a link between sports and competition law, as discussed earlier competition law ensure fair competition in market. *Dhanraj Pillay Case* was registered in 2011. So, the interference of the Competition law in Sports are not ancient. It is a new approach to control governing bodies of sports from abusing its dominant position in the market. These legal developments in India are increasing

²⁹ Ibid, Para 7 & 8

³⁰ Ibid, Para 14-27

³¹ Ibid, Para 30-39

³² Ibid, Para 40-47

³³ Ibid, Para 52

³⁴ Ibid, Para 53-62

the relevance of Competition law in Sports. Now Sports Governing Bodies are controlled from the judicial review and came up with fair policies.

Question comes in our mind that how competition law applies on Sports bodies? All these Sports bodies are registered society, which come under the definition of 'enterprise' of the Competition Act, 2002. As per the definition u/s 2(h), 'enterprise' can be a person and as per definition of 'Person' define u/s 2(l) it includes registered Co-operative Societies. In all the above cases basic difference drawn by CCI between economic and non-economic activities. As Competition Law applies only on economic activities of enterprise. In all the above-mentioned cases, one common ground was taken by all these Sports bodies that they were not come under the purview of 'enterprise' as they had no profit motive and all the funds collected by these bodies, ploughed it back to the sport. But CCI cleared the confusion that for coming under the purview of 'enterprise', profit motive is not an essential condition, but performance of some kind of economic activity is.

III. INTERNATIONAL APPROACH

Meca Medina Case³⁵

It is a landmark judgment on the European court of justice in which it was held the primacy of EU Law over sports federations.³⁶ In this case two athletes of swimming found their anti-doping test positive. As a penalty they suspended for the period of four years by International Swimming Federation (FINA³⁷) but in appeal before the Court of Arbitration for Sport (CAS) the penalty was reduced to two years.³⁸ Against the decision of CAS, the athletes filed complaint before the Commission of the European Communities (Commission)-

"16 In their complaint, the applicants challenged the compatibility of certain regulations adopted by the IOC and implemented by FINA and certain practices relating to doping control with the Community rules on competition and freedom to provide services. First of all, the fixing of the limit at 2 ng/ml is a concerted practice between the IOC and the 27 laboratories accredited by it. That limit is scientifically unfounded and can lead to the exclusion of innocent or merely negligent athletes. In the applicants' case, the excesses could have been the result of the consumption of a dish containing boar meat. Also, the IOC's adoption of a mechanism of strict liability and the establishment of tribunals responsible for the settlement of sports disputes by

³⁵ Meca-Medina & Majcen case, Case C-519/04, [2006] ECR I-6991

³⁶ (August 23, 2019, 01:56 PM), https://en.wikipedia.org/wiki/Meca-Medina_ruling#cite_ref-europa.eu_1-0

³⁷ Fédération internationale de natation

³⁸ Supra Note 34, Para 2-3

arbitration (the CAS and the ICAS) which are insufficiently independent of the IOC strengthens the anti-competitive nature of that limit.

17 According to that complaint, the application of those rules (hereinafter “the anti-doping rules at issue”) leads to the infringement of the athletes’ economic freedoms, guaranteed inter alia by Article 49 EC and, from the point of view of competition law, to the infringement of the rights which the athletes can assert under Articles 81 EC and 82 EC.”³⁹

But the complaint was rejected by the Commission and refused to intervene. The appellants raised their voice before the European Court of First Instance. But the appeal was rejected by the court on the reasoning that EU Competition law applies in sport where economic aspect is present but anti-doping rules are not concerned with any economic activity but purely sporting in nature, thus didn’t fall under the scope of EU Competition law. The decision was again appealed before the highest court in Europe i.e. the Court (Third Chamber).⁴⁰ This Court also dismissed the appeal of appellant but on different grounds. The court viewed that if any rules which are purely sporting for the application of Articles 39EC (Freedom of movement for workers) and 49EC (Prohibition on freedom of movement in certain cases), it doesn’t mean that those rules also outside the purview of Articles 81EC (Unfair trade practices) and 82EC (Abuse of dominant position). As per the Court – “*even if those rules do not constitute restrictions on freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activity (Walrave and Koch and Donà), that fact means neither that the sporting activity in question necessarily falls outside the scope of Articles 81 EC and 82 EC nor that the rules do not satisfy the specific requirements of those articles.*”⁴¹

Accordingly, the Court of First Instance had made error of law in holding that anti-doping rules at issue if not subjected to Article 49EC, then it was also not concerned with Competition law.⁴² In present case, impugned order of imposing penalty is not covered under the specific provisions of Competition Law i.e. 81EC and 82EC.

This approach opened the gate for Competition Law in the field of Sports.

³⁹ Ibid, Para 3

⁴⁰ Ibid, Para 4-12

⁴¹ Ibid, Para 31

⁴² Ibid, Para 22-34

Super league Case⁴³

Australian Rugby League (ARL) and New South Wales Rugby League (NSWRL) with some other clubs arranged and conducted rugby competitions. The players and team playing in the competition signed 'Commitment Agreement' to commit themselves for playing with NSWRL for the period of 5 years and 'Loyalty Agreement' with same effect, with ARL and NSWRL. News Limited wanted to set up rival club i.e., Super league. Some members of ARL and NSWRL signed with News Limited. ARL and NSWRL claimed that there is a breach of contract by members and induced by News Limited. News Limited responded that the Commitment Agreements and Loyalty Agreements were in a contravention of sections 45⁴⁴ and 46⁴⁵ of Trade Practices Act and hence, they are anti-competitive in nature.

In the final order it was held that the Commitment Agreements and Loyalty Agreements had exclusionary provisions which prevented the players and clubs to participate in tournaments with other persons, hence the agreements were void.

SBF v. KKV⁴⁶

The case was between the Swedish Competition Authority and the Swedish Automobile Sports Federation. The issue was imposing restrictions in participating in motor sports events organized by other than SBF member clubs. Swedish Competition Authority held it as a restrictive practice in the relevant market for "*arrangements of motor sports competitions in Sweden*". SBF challenged this decision before the Market Court. Market Court relied on the ratio established by EU law that the non-profit organization any economic activity is enough to consider it as undertaking regardless that income was used to administer competitions. Accordingly, it was held that SBF was come under the definition of association of undertakings.

SBF objected that the prohibition was imposed for achieving certain objectives like "*providing sports for all*", "*supporting children and youth activities*", "*to ensure that competitions can be organized under similar and fair forms*" and "*to ensure that motor sports competitions are held in a secure manner.*" The Market Court stated that absolute ban for achieving objectives could not be a valid justification for anti-competitive rules. Accordingly, the appeal was dismissed.

⁴³ News Limited v. Australian Rugby League Ltd., (1996) ATPR 41-466

⁴⁴ Prohibits agreements which have the effect of substantially lessening competition.

⁴⁵ Conduct by a firm which have substantial degree of market power.

⁴⁶ The Swedish Market Court's ruling 2012:16 in Case A5/11, Svenska Bilsport för bundetv Konkurrensverket (December 20, 2012), (August 20, 2019, 12:14 PM), https://www.academia.edu/3891221/The_Impact_of_SBF_v_KKV_on_Sport_Swedish_FenderBender_or_European_Pileup

IV. RECENT DEVELOPMENT

FINA Case

Italian Swimming Federation (ISF) announced an event that it planned to host in Turin on 20th and 21 December 2018, but the event was declared as ‘non-approved’ by FINA⁴⁷ (Fédération internationale de natation) and also warned swimmers for imposing ban on participation in World’s Championship in South Korea in 2019. According to FINA, organizers gave short notice for the event and in this short calendar period all the requirements for organizing international sport could not be fulfilled.⁴⁸ According to BBC report, ISF brought legal action⁴⁹ against FINA on the ground that its decision was against EU Competition law i.e. the decision were restricting competition and reducing the opportunities for athletes.⁵⁰ Simultaneously, Swimmers Tom Shields (U.S. Olympic Gold Medalist), Michael Andrew (U.S. National Champion), and Katinka Hosszu (Hungarian Olympic Gold Medalist) filed a suit⁵¹ against FINA in U.S. District Court on the ground for restraining competition in the “*market for top-tier International Swimming Competition*”.⁵² The suits are still pending the court. The decision of FINA was also criticized all over the world.

On 15th January 2019, FINA lifted all the restrictions imposed and allowed swimmers to participate in unaffiliated events.⁵³ FINA announced that all the independent organisers have to obtain approval from FINA. In case of failure, event of competition shall be deemed to be void. However, it will not affect on the participation and there will be no sanction by the FINA for such participation.⁵⁴

⁴⁷ It is an International Federation for governing International Competitions in Water Sports. It is recognised by International Olympic Committee.

⁴⁸ Angelique Bret, Swimming case shows tension between sport and competition law, PINSENT MASONS (August 20, 2019, 06:14 PM), <https://www.pinsentmasons.com/out-law/analysis/swimming-case-shows-tension-between-sport-and-competition-law>

⁴⁹ International Swimming League, Ltd. v. FINA, Case No. 18-cv07394

⁵⁰ Adam Peaty criticises decision to scrap International Swimming League, BBC SPORT (August 20, 2019, 06:30 PM), <https://www.bbc.com/sport/swimming/46224766>

⁵¹ Shields, et al. v. FINA, Case No. 18-cv-07393

⁵² David Rieder, Tom Shields, Michael Andrew, Katinka Hosszu Sue FINA for Antitrust Violations, SWIMMING WORLD (August 20, 2019, 06:58 PM), <https://www.swimmingworldmagazine.com/news/tom-shields-michael-andrew-katinka-hosszu-sue-fina-for-antitrust-violations/>

⁵³ Angelique Bret, FINA backs down over international swimming league threat, PINSENT MASONS (August 20, 2019, 07:12 PM), <https://www.pinsentmasons.com/out-law/news/fina-backs-down-over-international-swimming-league-threat>

⁵⁴ Ibid.

International Skating Union (ISU) Case⁵⁵

The eligibility rules of ISU that provided sanction for the athletes who participated in events not organized by the ISU were challenged on the ground of violation of EU competition laws. On 08.12.2017 Competition Commission held that these rules restricted competition and detriment to the athletes. ISU filed Appeal against Commission's decision, but it is still pending.⁵⁶

V. CONCLUSION

From the above discussion, it is clear that we are gradually moving towards good governance in the field of sports. Mechanism of sports are now under the scanner of judicial review. Today, people are more aware of their rights and they want healthy competition in the market. The spirit and essence of sports should not be changed in this changing environment of globalization and modernization.

Decision of Meca and Medina was the milestone in the field of Sports and Competition Law as the ratio of the decision was applied by the Indian Courts in its decisions. It is not the application of EU law in Indian Courts but the approach behind the decision was applied. The decision was based on economic and non-economic activities of Sports Governing Bodies. This developing approach is clearly seen in the FINA's case and it has proved that paradigm has been shifted from old approach to new approach i.e. competition law is playing important role in governing sports. The Competition law now playing a complementary role in enhancing accountability of the Sports Governing Bodies.

In the BCCI case, the Commission strongly urges that the competition should be for the widespread benefit. The sport of cricket and all the monetary benefits should not be concentrated in few hands, it should be spread out. BCCI plays dual role of custodian of cricket and organizer of events. The objective of BCCI is to promote and develop the game of cricket. But the act of BCCI is not in the direction of promoting and developing game of cricket, rather it is compromised.

The Dhanraj Pillay Case clearly lighted the solution of the anti-competitive impact on the Sports Market by SGBs, in the way that the regulatory functions should be in the jurisdiction

⁵⁵ Case AT.40208 – International Skating Union's Eligibility rules, COMMISSION DECISION of 8.12.2017 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union (the Treaty) and Article 53 of the EEA Agreement (August 20, 2019, 09:37 PM) https://ec.europa.eu/competition/antitrust/cases/dec_docs/40208/40208_1384_5.pdf

⁵⁶ Angelique Bret, Sport and competition law – the year in review 2018/19, LAW IN SPORT (August 20, 2019, 09:49 PM) <https://www.lawinsport.com/content/articles/item/sport-and-competition-law-the-year-in-review-2018-19>

of one authority and commercial functions should be in the other.

The above discussion of cases shows that how the picture of sports has been changed and growing interference of the Competition law now playing a complementary role in enhancing accountability of the Sports Governing Bodies. Now under these checks and balances, the Sports Governing Bodies will act in responsible and non-arbitrary manner. The need of the hour is to clean the dust and show clear meaning of economic and non-economic activities in Sports Market. Self-regulation by these Bodies doesn't mean that they have right for violating the Competition laws and create monopoly in market of sports.
