

Law, Liberalisation and Globalisation in India: Just a Game of Chance?

Abstract

This paper is a part of a larger research on the working of business law in India in the changing context of globalisation and liberalisation. The macro theme requires details of the changes in law, economy and business in different fields. However, as the changes in the economy were in a nascent stage, the details were yet to emerge. Now, after a decade of reforms, changes in different fields are beginning to be discernible. Towards creating a corpus on the working of law in its micro details, this paper takes up the law on holding of games, contests and lotteries for promotion of products and services. With liberalisation, as entry into production and services is no more a barrier, firms have got into aggressive and competitive trade practices to entice the customers. This has included proliferation of games, contests, lotteries and similar promotional schemes. The paper explores the working of the provision on the subject, contained in the Monopolies and Restrictive Trade Practices Act, and finds out that while the business practices in the post-liberalisation-globalisation period required better regulation, the interpretation of the law by the courts has made the law non-existent.

Law, Liberalisation and Globalisation in India: Just a Game of Chance?

The failure to build legal capacity in matters concerning the economy is as grave as the failure to build capacity in our roads, railways, ports and airports. As India integrates itself with the global economy, the inadequacy of the legal system has become more glaring.¹

The fervent call was only to be expected. In the pre-liberalisation period, law making and judicial interpretation in the field of economy and business, fitted into the political economy of the state. State was the largest deployer of capital. For private capital, entry into production was dependent on accessing the bureaucratic-political alignment of the state to secure requisite permits and licenses. However, for those who could secure this access, a market was relatively secured.² In this arrangement, judicial interpretation and intervention, more often, was in review of actions and decisions of the state itself. There was a limit to which the judiciary, a part of the state formation itself, could question the state. The legal institutions, knowledges and capacities in the field of law, economy and business were built around this formation.

With liberalisation of the economy, which started in 1985³, but was formally inaugurated and given a thrust to in 1991, entry into production and services

¹ The quote becomes even more relevant as it comes from an ex-finance minister, Chidambaram, P., 'Law & Commerce: And the twain shall Meet', *The Sunday Express*, OP-ED 7, Ahmedabad, October 26, 2003.

² On political economy of the Indian state in pre-liberalisation period, see Bardhan, Pranab, (1984): *Political Economy of Development in India*, Oxford University Press, New Delhi; Kaviraj, Sudipta, (1988): *A Critique of the Passive Revolution in India*, *Economic and Political Weekly*, Special No., Vol. 23, Nos. 45-47, November, 1988; and Patnaik, Prabhat, (1985) *Political Economy of Liberalisation in India*, *Social Scientist*.

³ See Patnaik, Prabhat, (1985) *Political Economy of Liberalisation in India*, *Social Scientist*.

is not a barrier in most of the sectors. The state has shown eagerness to disinvest its capital from the public sector. The foundation of the earlier formation is being dismantled, to make space for a new one to emerge. It is interesting to explore how a new order emerges from the womb of the old. Several questions arise. Does a new rationality, of market, competition and efficiency, as was celebrated, arise on its own with the dismantling of the state controlled system? Even before that, does a new 'order of things' at all gets created in a Foucauldian sense of different 'regimes of truth'⁴. Or history, time and society admit of no ruptures. Thus, the celebration of 'liberalised' India over the 'licence permit raj' itself is creation of a vacuous binary duality, to privilege one over the other without any foundation. The seemingly new is only a continuation of the old, manifesting the 'globalised economy' in its own provincialities? These questions have been asked, answered and contested for a decade now. However, as the concrete processes were yet to unfold, these issues have been debated either at the level of general ideas and principles or expressed just as opinions and predilections. After a decade of reforms, in different fields, changes, even if transient, are discernible. Towards grappling with the macro questions, we wish to examine the micro details of practices in the field of law, economy and business.

In liberalised India, competitive thrust in the economy has got directed into two spheres. At the top end, firms have merged and amalgamated to enlarge the firm size, market share and resource base. Two, firms have got into aggressive and competitive trade practices to entice the customers. These practices raise questions about truthfulness and fairness of representation of products, services, advertisement, and schemes and modalities for promotion of products and services. The question will not be whether a consumer has adequate remedies and protection against unfair trade practices of a corporation but whether the warring corporations have adequate law against unfair trade practices, and a justice delivery system to have some 'rules of the game' to compete among themselves.

⁴ See Michel, Foucault (1979): Discipline & Punish: the Birth of the Prison. New York: Vintage; and Michel, Foucault, (1980): Power/Knowledge: Selected Interviews and other writings 1972-1977. C. Gordon, ed. New York: Pantheon and (1984).

This paper is on evolution of law and practices in the past 20 years on one aspect of unfair trade practices- unfairness in holding of games, contests, lotteries and similar schemes for promoting sales or utilisation of services. The state came to regulate unfair trade practices in 1984, before liberalisation and globalisation was inaugurated, by amending the Monopolies and Restrictive Trade Practices Act, 1969. Its birth was tied to the exigencies and context of the state controlled economy, largely in legitimating the political order⁵. However, law once enacted, gets a life of its own. The law on unfair trade practices has come to be given a meaning in the changed context.

MRTP Act: Law and its organisation

The Monopolies and Restrictive Trade Practices Act, 1969, (MRTP) was enacted to prevent monopolies and restrictive trade practices in the economy. In 1984, the MRTP Act was amended to add a chapter on Unfair Trade Practices. The MRTP Act created a body called the Director General of Investigation and Registration (DGIR). On a complaint, or on its own, the DGIR could investigate into a claim of a restrictive or unfair trade practice. The MRTP creates a judicial body called the Monopolies and Restrictive Trade Practices Commission. The DGIR was to take cases before the benches of the Commission. The Commission, on judging a practice to be an unfair trade practice, could order the offending party to cease and desist the practice.

To understand the working of the law on unfair trade practices, we would need to examine specific provisions of the MRTP Act. Section 36 A lists unfair trade practices. This is the substantive ground on which the DGIR could start investigations and bring the matter before the MRTP Commission. The Commission could discontinue an unfair trade practice, under Section 36 D, if the practice was 'prejudicial to the public interest, or to the interest of any consumer or consumers generally'.

Section 36 A has five parts, called sub-sections. The five parts cover different themes. A summary of the five themes defining unfair trade practices is as follows:

⁵ Oza, A. N. (1977): Committee on Company Law and MRTP Act: Exercise in Futility, *Economic and Political Weekly*, August 6, 1977; and Paranjape, H. K. (1984): The MRTP Amendment Bill: A Trojan Horse, *Economic and Political Weekly*, April 28, 1984.

36 A (1): False representation of products or services, including false description, guarantee, warranty or performance of a product or service.

36 A (2): Advertisement of false bargain price.

36 A (3): Contest, lotteries, game of chance or skill for promotion of sale.

36 A (4) Sale of goods, not in conformity with safety standards provided by the law.

36 A (5): Hoarding or destruction of goods, or refusal to sell goods.

We now turn to an examination of the provision on holding of contests and game. We could excerpt the law and reproduce the one relevant for us.

Section 36-A. 'unfair trade practice' means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provisions of any services, adopts one or more of the following practices and thereby causes loss or injury to the consumers of such goods or services, whether by eliminating or restricting competition or otherwise, namely

1 XXXX

2 XXXX

(3) permits -

(a) the offering of gifts, prizes or other items with the intention of not providing them as offered or creating the impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole.

(b) the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest;

(4) XXXX

(5) XXXX

In interpreting the above provision, The Commission took the position that once a scheme had an element of contest, or lottery through giving of coupons and other means, it attracted Section 36 (A)(3)(b). There are several illustrations of this. Oswal Agro Mills Ltd. had introduced a campaign where a person could buy two soaps and enter a contest which made him eligible for prizes through a draw. This was held to be a contest. The British Airway had advertised a scheme where students who were flying by the British Airways to the U.S.A for studies could write 50 words on how 'he believes his further studies in the U.S.A. will help'. A panel of eminent members were to be the judges. Prize included free air tickets. This was held to be a contest.

Mid-Day, a newspaper, had announced the launching of a 'pick-a-team' contest. A contestant was to pick the ideal World XI Cricket Team using an entry form available in an issue of the newspaper.⁶ The team selected by the contestants was to be matched with the team selected by a team of experts. Three prizes were to be awarded for correct entries. This was held to be a contest within the meaning of Section 36(A)(3)(b). Similar schemes of the Competition Success Review and Amar Chitra Katha were also held to be contests and attracted provisions of Section 36 A(3)(b).

Thus, the Commission's position was that any campaign which had an element of chance through a contest, draw of lots or game of skill attracted the provision. However, it was not enough for a scheme to be a contest or a game of chance. It must further be towards promotion of sale or services. Since Section 36 A(3)(b) used the word 'directly or indirectly', the Commission

⁶ See review of judgement of Mid-Day Publications Pvt. Ltd., dated March 12, 1986 in Society For Civic Rights v Colgate Palmolive (India) Limited, judgement of the Monopolies and Restrictive Trade Practices Commission, dated 19/06/1991. Citation: 1991 (72) CC 80.

took the position that every campaign by a business house was towards promoting its products.

Hereafter, in the interpretation of the provisions, two differing positions emerged within the Commission. The opening paragraph of Section 36 A contained the phrase 'adopts one or more of the following practices and thereby causes loss or injury to the consumers'. One position was that this was an essential requirement for a trade practice to become an unfair trade practice. Thus, some members of the Commission required before condemning a scheme whether it caused 'loss or injury to the consumer' or not. The other position was that the phrase 'thereby causes loss or injury' was only descriptive of an unfair trade practice. Loss and injury was inherent in an unfair trade practice. Thus, once a trade practice was held to be unfair under any of the five sub sections of Section 36 A, no further substantiation of 'loss or injury' was to be required. We would see how the two positions were used by the different benches and members of the Commission, to give life to the provision.

Element of Loss or Injury

The Commission in *Oswal Agro Mills Ltd.* held that the beneficiaries of the contest were no more than about 12, 500 as against over one lakh who entered the contest. Only a small percentage benefited while the bulk of them had to suffer disappointment. Thus, the contest had caused loss or injury. In *MecoTronics Pvt. Ltd.*⁷ the Commission reiterated that any scheme which benefited a few and disappoints many had a strong element of what may be described as invisible loss or injury. In *Parle Products Pvt. Ltd.*⁸, the Commission noted that a purchaser has to purchase much larger number of products than he would normally consume to enter the contest. This would

⁷ See review of judgement of *MecoTronics Pvt. Ltd.*, in *Society For Civic Rights v Colgate Palmolive (India) Limited*, judgement of the Monopolies and Restrictive Trade Practices Commission, dated 19/06/1991. Citation: 1991 (72) CC 80.

⁸ See review of Judgement of *Parle Products Pvt. Ltd.*, in *Society For Civic Rights v Colgate Palmolive (India) Limited*, judgement of the Monopolies and Restrictive Trade Practices Commission, dated 19/06/1991. Citation: 1991 (72) CC 80.

increase unnecessary expenditure and financial loss if the buyer were not a lucky winner of a prize. Secondly, the contest promoted excessive consumption of sweets which created dental problems for consumers. Thus, it created public prejudice.

However, in other cases, a different view was taken. In the British Airways case, the Commission held that there was no additional cost to the contestants. Thus, it was held that the contest did not cause any injury or loss to the consumers. Similarly, in cases where entry forms for contest came with newspaper or magazines, the Commission took the view that the participants had to purchase a copy to get the form. However, cost of this was nominal. Further, the participant had to pay no extra amount for participating in the contest. And he got his money's worth in the purchase.⁹

In their decisions, the benches of the Commission had no doubt that these schemes were 'contest, lottery or game of chance or skill' for 'directly or indirectly' promoting sales or services. However, there were multiple viewpoints in interpreting the scope and significance of 'loss or injury'. In some cases it was assumed that a requirement to purchase a product in order to participate in a contest itself was a loss. In other cases, it was reasoned that those who do not get a prize in a contest suffer a loss. And in yet other cases, it was said that the purchaser gets his money's worth, thus, a contest causes no loss.

Full Bench of the MRTPC: Colgate Trigard Case

Eventually, to settle on the meaning of the clause, a full bench of the Commission was convened to decide on the Colgate Trigard Case. The Colgate Ltd. had advertised that a person could buy two tooth brushes to enter the contest. A simple set of questions on healthy brushing habits, put in

⁹ See review of judgement of Mid-Day Publications Pvt. Ltd., dated March 12, 1986, and Competition Success Review Pvt. Ltd., in Society For Civic Rights v Colgate Palmolive (India) Limited, judgement of the Monopolies and Restrictive Trade Practices Commission, dated 19/06/1991. Citation: 1991 (72) CC 80. India Book House, In Re, decision of the MRTPC, dated 03/06/1987. Citation: 1989 (65) CC 36.

a multiple answer format, were to be ticked and submitted. There were several awards for correct answers as well as early replies. There was no doubt this was a contest within the meaning of Section 36 A(3)(b). The unsettled point was whether it was necessary to explore if the contest caused 'loss or injury' to the contestants.

The Commission noted that Section 36 A listed a total of 15 practices. A trade practice, to become an unfair trade practice, must fall in one of the 15 practices mentioned in paragraphs 1 to 5 of the section. The adoption of the practice should be for promoting the sale, use or supply of any goods or for the provisions of any services. The Commission noted:

Most of the debate before us has centred on the correct meaning of the words "and thereby causes loss or injury to the consumers of such goods or services". The two interpretations are: one, the phrase necessarily means that the trade practice must cause loss or injury to the consumers before it can be branded an unfair trade practice. The argument on the other hand is that adoption of any of the 15 classes has innate character of causing loss or injury to the consumer if it adopts one or the other of the practices mentioned in subsequent paragraphs of section 36A.

The Commission was clear that a superficial reading of the provision might make it appear that in addition to being an unfair trade practice, it also must be asked if it caused loss or injury to the consumer. However, the Commission noted that this becomes incongruous when one looks at the 5 sub-sections of 36 A. Sub-section 5 is on hoarding, destruction of goods and refusal to sell. This inherently causes 'loss or injury to the consumer'. Section 36 A (4) is on sale of goods, not in conformity with safety standards. This can only cause loss or injury to the consumers. Further, false bargain price, provided in Section 36 A(2), can only cause loss and injury. Again, creating an impression that a gift or prize was free while it was being charged for, provided for in Section 36 A(3)(a), will only lead to a loss for the consumer.

Thus, the practices mentioned in 36 A have innate quality of causing loss or injury to the consumers. The key phrase, however, must mean the same thing to all the subsequent paragraphs. The Commission, thus, ruled:

Returning to the opening part of section 36A, we are of the opinion that the key phrase does not require the causing of actual loss or injury to the consumer. On the other hand, we are of the opinion that the key phrase is a part of the definition which implies that in every trade practice which adopts one or the other of the practices mentioned in the subsequent paragraphs of section 36A, loss or injury is implicit.

By putting the phrase "thereby causing ... ", in the context of the section, the Commission reasoned, the legislative intention was to convey that the listed practices had 'innate capacity or inherent quality of causing loss or injury to the consumers of the goods and services'. The purpose of adding the words was to indicate that 'the trade practices described in section 36A of the Act are vehicles of loss or injury.' Thus, the Commission ordered Colgate Ltd. not to hold such contests in the future. The judgement of the Commission was dated June 19, 1991. The Commission was a part of the Ministry of Company Affairs. It must have communicated the ambiguity in interpreting Section 36 A. A comprehensive amendment of the MRTP Act deleted the disputed phrase. The amended opening paragraph instead came to read:

In this Part, unless the context otherwise requires "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provisions of any services, adopts any unfair method or unfair or deceptive practice including any of the following practices,

Thereafter, the MRTPC consistently took the position that a contest or a lottery *per se* was an unfair trade practice.¹⁰ For example, Usha International Ltd. had announced a gift scheme to promote Usha fans where a person could get a discount of Rupees 30 or opt to be a part of the scheme which entitled him to prizes through a draw. The Commission held this to be nothing but a lottery.

¹⁰ Director-General (Investigation and Registration) v Usha International Limited and Another, a judgement of the MRTPC, dated 31/10/1996. Citation: 1997 (89) CC 648.

Towards the end of January 1997, Whirlpool Ltd. had launched a 'Scratch a Gift Scheme'. Every purchaser of Whirlpool refrigerator or washing machine was to pick a card and scratch the opaque strip on the card. Underneath the opaque surface, the gift offered was mentioned. This became visible on scratching the card. The gifts ranged from one kilogram of Aerial washing powder to a two-bed room apartment. The Commission considered this to be a lottery and thus, an unfair trade practice under Section 36 A (3)(b). The case had been brought before the Commission by Whirlpool's competitor, the Godrej GE Appliances Ltd. The MRTP Commission granted an injunction on 20th February, 1997.

Horlicks Hidden Wealth Prize Offer Case

It just took one judgement of the Supreme Court to change everything. There have been just five cases on the working of unfair trade practices under the MRTP Act on which Supreme Court has given a ruling in the past 20 years. One of the first cases was the Horlicks Hidden Wealth Prize Offer Case, involving the HMM Ltd.¹¹

The HMM limited, manufactured and marketed Horlicks. In September 1985, it advertised a scheme called the "Hidden Wealth Prize offer" for the buyers in Delhi. A lucky purchaser of a bottle of Horlicks could find a coupon inside the bottle. The coupons indicated the prize. This included 5 Hotline Colour TVs, 10 gift vouchers of Rs. 2000 each for Hotline appliances and other cash prizes. The prizes were to be claimed by January 15, 1986. The advertisements stated that even if the buyers' coupon did not carry a winning message, he had "several more chances to try. So get the goodness of Horlicks, now. Because with it, you surely can't lose!"

The MRTP Commission had held this to be an unfair trade practice as the system of getting coupon was nothing but a lottery.¹² The Commission was of

¹¹ H. M. M. Ltd v. Director General, Monopolies & Restrictive Trade Practices Commission, Supreme Court of India, judgement dated 11/08/1998. Citation: AIR 1998 SC 2691.

¹² See review of judgement in H. M. M. v/s DGIR of the MRTPC, dated 11-5-1989, in H. M. M. Ltd v. Director General, Monopolies & Restrictive Trade

the opinion that the prize scheme was intended to wean away the consumers from Bournvita by allurements of lucky prizes of high value rather than by fair means. Commission was of the view that such schemes did not benefit the general run of the consumers. According to the Commission, only a small fraction of the buyers of Horlicks got the benefit of the said Scheme. Most got nothing. The prizes were manifold costlier than the price of a bottle of Horlicks, a fact on account of which the winning of the prize will be of overriding consideration than the product in question. The Commission, thus, had held:

On these postulates it is not difficult to say that the trade practice is no better than a lottery and that the buyer who does not get any prize, does lose it as against the one who wins it although both take to the same transaction. So the trade practice that is meant to wean away the consumer from Bournvita by this allurements is obviously an instrument of facing competition in the market by unfair means and, therefore, prejudicial to public interest.

The MRTPC gave its judgement in 1989. In the light of its own experiences, it as never an issue that schemes like this were not 'contest, lottery, game of chance or skill' for 'direct or indirect' promotion of sales. Thus, here was no gain in even emphasising or elaborating the point. As the case was for a period prior to 1991 amendment, what was to be emphasised was that it caused loss or injury to the consumers. The Supreme Court, in its short judgement in 1998 commented that this was not a case of lottery as there was no:

... draw of lots or that a price was charged for participation in the draw... The fact that some bottles of Horlicks contained a slip of paper which entitled the buyer to a prize is not a lottery in the ordinary sense of the word.'

Once the Court had concluded that the scheme of coupons inside Horlicks bottle was not a lottery, there was no point in commenting whether it caused loss or injury to the consumer. The detailed reasoning of the Commission in

Practices Commission, Supreme Court of India, judgement dated 11/08/1998. Citation: AIR 1998 SC 2691.

the Colgate Trigard Case, which was also pending in appeal before the Supreme Court, was not brought out. The judgement, thus, merely replied on the opening paragraph in Sec 36 A and held "for holding a trade practice to be an unfair trade practice, therefore, it must be found that it causes loss or injury to the consumer'. The judgement went on to further conclude that 'it is difficult to hold that a consumer who bought a bottle of Horlicks that did not entitle him to a prize suffered a loss'.

While its interpretation of the phrase 'thereby causes loss or injury' was of limited relevance as the provision itself had been amended, that such schemes were not lottery was to have a wide impact on the subsequent judgements of the MRTP Commission. From the organisation and tenor, it does not appear that the judgement was intended to be applied as a binding principle for all promotional schemes. The judgement was more to settle the immediate case. The few lines in the judgement could not have been taken as binding principles. What if the HMM Ltd. had introduced the same prizes through a different modality? Instead of some bottles containing prize-bearing coupons, every bottle contained a coupon with a number. The winners of the prizes were to be decided through a draw. The two schemes are the same, yet, if we were to apply the HMM decision, the first would not be a lottery while the second would be a lottery, as it has a draw.

Another reason the judgement could not have been intended to be setting guiding principle for all promotional schemes was inconsistencies which would arise in its application. The judgement commented that a prize scheme was not a lottery in the 'ordinary sense of the word'. But the word 'lottery' in Section 36 A(3)(b) is not used in the ordinary sense of the word. It is used in relation to a manufacturer using a lottery to promote sales. If a person were to pay for a lottery ticket and participate in it, it would only be a lottery, incapable of bearing a relationship with promotion of sale. For it to be a lottery for promotion of sales or services, the sale transaction must necessarily be tied up with the lottery. In other words, the price paid by the buyer for the good, the chance of getting a prize and actually getting it, must be tied with one another. Further, the word lottery appears in conjunction with several other words 'any contest, game of chance or skill' where a payment of money is not necessary.

Judgement of the Commission- Post- HMM Case

Coca Cola Ltd. Case

The judgements of the Supreme Court are binding on all other courts. But this would be only to the extent the Supreme Court categorically sets out binding principles. The Commission, in its judgement, felt obliged to simply follow the judgement of the Supreme Court in the HMM case. Coca Cola Ltd.¹³ had introduced a promotional scheme for its drink Coke. A lucky winners could get a flat in Mumbai, Honda City Car, Mobile phones and Walkmans. The case was brought before the Commission by its rival Pepsi that it was a lottery under Sec 36 A (3)(b). The Commission had taken it up as an unfair trade practice before the Supreme Court gave its HMM Case Judgement. Later, the Commission said the case was very much like the HMM case, and thus, not a lottery.

Whirlpool 'scratch a gift scheme' Case

The Whirlpool Ltd.¹⁴ was back before the Commission to get the interim injunction lifted on its 'scratch a gift scheme' in the light of the HMM case. In the earlier instance, the Commission was convinced that the scheme involved an element of chance or luck and was, therefore, prima facie, violated section 36A(3) of the Act. It had, thus, put an interim injunction on Whirlpool to stop the scheme. The Commission, post-HMM Ltd. case, reversed its reasoning. Citing similarity with the HMM case, it observed:

In this case also there is no draw of lots nor any price charged for participation in the scheme. Each participant got the value for his or her money and in addition stood a chance for winning a prize.

¹³ The MRTPC made this order on 9th October, 1998 in the case Devyani Beverages Ltd. v. Coca Cola Ltd. See summary of judgement in Godrej G. E. Appliances Limited v Whirlpool of India Limited, MRTP Commission, judgement dated 10/02/1999. Citation: 1999 (2) CPJ 41A.

¹⁴ Godrej G. E. Appliances Limited v Whirlpool of India Limited, MRTP Commission, judgement dated 10/02/1999. Citation: 1999 (2) CPJ 41A.

According to the Commission, the Whirlpool case was on even sounder foundation as:

... while some purchasers of Horlicks in the 'Hidden Wealth Prize Offer' did not get any prize, in the 'Scratch a Gift Scheme' of the respondent, every purchaser of scheme would get gifts though of varied values.

Usha 'Better Fans, Better Gifts' Case

Usha International Ltd., engaged in the business of marketing Usha fans manufactured by Jay Engineering Works Ltd., in February 1986, had started a scheme called 'Better Fans, Better Gifts!' The scheme offered prizes like cars, scooters, tape-recorders etc. On purchase of a fan, the dealer would give the purchaser a sealed envelope containing the name of the gift. A gift for every one was ensured which was a discount of Rs. 30 or so. The Commission had ruled in 1996¹⁵:

That the impugned scheme has an element of chance cannot be denied as the bigger prizes are predicated on chance rather than skill. A game in which chance rather than skill determines the outcome, is a game of chance ... it also has an element of chance for a prize for a price. The essential elements of a lottery are consideration, prize and chance and any scheme by which a person for a consideration is permitted to receive a prize as may be determined predominantly by chance. In other words, the receipt of a prize in a game of chance is not a result of human reason, foresight, sagacity or design but is a result of chance.

The Commission refuted the point that since every one was assured a gift, there was no chance. The Commission ruled that the bigger prizes 'were securable by purchasers only by chance'. And thus, the scheme attracted Section 36A(3)(b).

After HMM judgement, the Commission reversed its reasoning:

¹⁵ Director-General (Investigation and Registration) v Usha International Limited and Another, 31/10/1996, Citation: 1997 (89) CC 648.

In a lottery or game of chance while some participants get the prizes offered, other remain deprived of the same. This does not appear to be the case with the respondent's scheme. The distinguishable feature of the impugned scheme is that every buyer gets some prize or the other be it small or big cash discount or some other prize. This eliminates the possibility of the gift-scheme being totally a game of chance. This being so, the prize scheme of the respondent does not infringe upon the provisions of section 36A(3)(b).

National Panasonic Prize Contest Case¹⁶

The National Panasonic India Private Limited had launched a prize contest in 1997. A person had to buy a Panasonic television to enter the contest. The prizes included a trip for two persons to witness the Winter Olympics in Japan, the second prize was two Panasonic Mini Hi-Fi systems with 5 CD changer and the third prize three Panasonic G-400 cellular phones and 500 consolation prizes. It was alleged before the Monopolies and Restrictive Trade Practices Commission that the prize contest constituted an unfair trade practice.

The Commission, relying on the HMM Case, summarised its position:

This Commission had an occasion to consider the aforesaid binding ruling of the Hon'ble Supreme Court in several cases where the prize scheme was floated by certain business houses. ... It has been held by this Commission in those cases that such prize scheme would not fall within the purview of Section 36A(3)(b) of the MRTP Act for the simple reason that the purchaser of an item with which the prize scheme is attached gets his money's worth and he gets the additional benefit of participating in the scheme in question.

¹⁶ The National Panasonic India Private Limited v. Director General (Investigation and Registration), MRTP commission, dated 05/10/1999. Citation: 2000 (1) CPJ 14.

In the cases involving interpretation of the word 'lottery', one could understand that the Commission was constrained to follow the HMM decision. The Commission extended it to all schemes. It further noted:

This Commission has also considered what would be a lottery in its acceptable meaning. It has been understood to mean payment of a price for winning a prize. That would be applicable even for a game of chance or a contest in its strict sense. In order to win a prize in a contest or in a game of chance or in a lottery one has to pay a price.

Applying its principle to the case in hand, the Commission noted:

In the scheme in question, the purchaser of a T.V. would get his money's worth in the form of the T.V. itself. He has not to pay any separate price for participating in the scheme by whatever name or nomenclature it may be styled, whether as a contest, a game of chance or a lottery. If that be so, we are of the opinion that the scheme would not fall within the purview of the aforesaid statutory provision contained in Section 36A(3)(b) of the MRTP Act.

This extension would not be consistent with the HMM case. As we have noticed, as a part of several other considerations, the Supreme Court had noted that 'lottery in the ordinary sense of the word' would require a 'price' to be paid for a 'draw'. Following the judgement, we should go by the meaning of 'contest', 'game of chance' or 'game of skill' in their 'ordinary sense of the word'. While a 'lottery' necessarily requires purchase of a ticket, a contest or game of chance or skill does not have a requirement of a price in its 'ordinary sense of the word'. Each of the key words in Section 36 A(3)B should have been appraised on their own. Instead, the definition of 'lottery' got extended to all schemes.

Further Endorsement of the HMM Case

The Colgate Trigard case, the one in which the Commission had at length commented on the phrase 'loss and injury', was pending before the Supreme Court since 1991. The Supreme Court came to rule on it in 2002. The two judges in the HMM case were justice Barucha and Pattanaik. Justice Barucha

had retired and Justice Pattanaik was the Chief Justice of the Supreme Court. The Supreme Court, in another short judgement, ruled¹⁷:

It is now a well-settled principle of law that a literal meaning should be assigned to a statute unless the same leads to anomaly or absurdity. The terminology used in the provisions is absolutely clear and unambiguous.

The MRTP Commission had applied this principle itself. It had recognised that literal meaning was 'incongruous' that it went on to harmonise its meaning. The Supreme Court reiterated:

In H.M.M. Ltd's case (supra), this Court has clearly held that for holding a trade practice to be an unfair trade practice, it must be found that it had caused loss or injury to the consumer.

It must be recognised that the judgement in the Colgate Trigard Case was on the question of interpretation of the phrase 'loss and injury'. The judgement, however, by relying on the HMM Ltd. case, in some sense, endorsed the HMM case in its entirety.

Thus, after 20 years of introduction of a law to regulate unfair practices in holding of games and contests, the interpretation of the law has effectively left the field without any regulation. On the other hand, the competitive thrust has led firms to vigorous promotion of their products. The newspaper and television channels are full of contests and draws to entice consumers. Each promotion scheme is more fantastic than the other. No firm wants to be left behind by the others. Several of the cases alleging unfair trade practice have been brought before the Commission by the competitors themselves.

More than answers, several questions arise. One could ask what was the original intention of introducing the clause? The provision came on the recommendations of the Sachar Committee, constituted in 1977, to make recommendations for the amendments in the MRTP Act. The Sachar

¹⁷ Colgate Palmolive (India) Limited v Monopolies and Restrictive Trade Practices Commission and others, Judgement of the Supreme Court, dated 20 Nov, 2002. Citation: 2002 Indlaw SC 1407.

Committee proposed introduction of a chapter on unfair trade practices. This was eventually introduced by the amendment of the MRTP Act in 1984.

The para on holding of contests, that is, Section 36 A (3)(b), was borrowed from the Sachar Committee report. The Sachar Committee report had recommended that holding of a contest or game of chance etc was to be an unfair trade practice and to be stopped. The exception in which it could be allowed was:

Adequate and fair disclosure of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the knowledge of the advertiser that affects materially the chances of winning¹⁸.

In addition, there must be fairness and transparency in selection of participants and distribution of prizes. In the enactment, the above exception under which a contest could legitimately be held was not included. Perhaps, the intention was to prohibit holding of contests and games altogether. Alternately, the draftsmen may have subsumed all qualifications and exceptions by requiring that after a practice is held to an Unfair Trade Practice, the Commission would order cease and desist under Section 36 D if the practice was 'prejudicial to the public interest, or to the interest of any consumer or consumers generally.'

One could ask the practices which are followed and the law in the developed world. Sachar Committee had picked up and synthesised the provisions then, in 1977, in the USA, UK, Australia and Canada. Much the way the Indian law has evolved in these years, albeit to have no law, so have the law in these countries in the context of the practices and court ruling. It would be a different exercise to review the law in these countries. Suffice it to mention here that the law in the western world has become even more stringent for holding games, contests and lotteries for promotion of sales.¹⁹

¹⁸ Government of India, (1978) 'Report of the High-powered Expert Committee on Companies & MRTP Acts', August, 1978, Ministry of Law, Justice and Company Affairs, Government of India, New Delhi.

¹⁹ See a review of law in the US at www.adlaw.com

The changed context of liberalisation and globalisation required better mechanism for regulating business practices and settling disputes. The reverse seems to have happened in India. Even the limited protection available through the MRTP Act has gone away. The MRTP Act regulated monopolies, and restrictive trade practices and unfair trade practices. The Government of India constituted a Commission to recommend legislative measures for protecting and enhancing competition in the economy. Following the recommendations of the Competition Commission, the government has repealed the MRTP Act. Instead, a Competition Act has been enacted to regulate monopolies and anti-competitive or restrictive trade practices. This is to be done by creating Competition Councils in different regions of India. The Competition Commission was of the view that the Competition Act should not be burdened with unfair trade practices.²⁰ This was instead, to be given effect under the Consumer Protection Act, 1986.

While the Consumer Protection Act was being enacted in 1986, the provisions on unfair trade practices had already had a life for two years under the MRTP Act. Since a consumer needed protection not only from being supplied with defective goods and deficient services, but also from unfair trade practices, the provisions on unfair trade practices were copied from the MRTP Act into the Consumer Protection Act. The Consumer Protection Act creates three tiered quasi-judicial bodies, District Forum, State Forum and National Forum, through which a consumer can seek remedy. While the consumer forums have judged a large number of cases on 'defect in goods' or 'deficiency in service', the provisions on unfair trade practices have almost never been contested before the Consumer forums. The cases on unfair trade practices were taken to the MRTP Commission.

The provisions on Unfair Trade Practices, in the course of being copied from the MRTP Act into the structure of the Consumer Protection Act, have acquired a new meaning. Within the Consumer Protection Act, a 'consumer' cannot take up a case of an Unfair Trade Practice before a consumer forum. It can only be a consumer association, central government and the State Governments.

²⁰ Report of the High Level Committee on Competition Policy and Law, May 2000, see at www.nic.in/dca/comp

Second, in the arrangement of the MRTP Act, Section 36 A had listed all unfair practices. However, every practice falling under Section 36 A, though called Unfair Trade Practice, was not to be prohibited. Under Section 36 D, only if the Commission concluded that 'the practice is prejudicial to the public interest, or to the interest of any consumer or consumers generally' was the practice to be concluded. The listing of Section 36 A has been copied as 'unfair trade practice' while the limitation of Section 36 D has not been taken. Section 14 gives the right to a consumer to have an unfair trade practice discontinued. Thus, within the Consumer Protection Act, all games, lotteries and similar schemes, without qualifications, could be prohibited. Only cases before the consumer forums would settle whether this is a conscious choice of the lawmakers or inadvertence of the draftsmen.

Conclusion

This paper was intended to explore micro-details of working of business law. One cannot generalise from a specific focused illustration. There could only be tentative formulations and proposals for further investigation. Some of these inter-related issues are as follows. One, opening up of the economy, on its own, is not going to create and sustain competition. Appropriate law, adequate enforcement and quick dispute settlement mechanism would be needed to sustain competition in the economy. Two, changes in law come on the behest and initiative of some group. It should not be assumed that industry, even in the era of 'globalisation-liberalisation', would necessarily demand for laws conducive to competition. There may be several reasons for this. It may instead organise its practices around the existing law. Three, much the way the state steered the economy in the 'license-permit raj', the state would need to be centre-stage in continually reforming legislative environment to create and sustain competition in the economy. Four, India had made a new beginning after Independence. This required significant knowledges in several field to create and manage a 'command economy'. India has made another beginning as a 'liberalised-globalised' economy. The emergent context of India is new and unfamiliar to us. We would need to create newer frameworks and generate knowledges anew to understand this unfolding and better manage the economy and society. It would not be inappropriate to summarise by another quotation from Mr. Chidambaram's article:

A world class legal system is absolutely essential to support an economy that aims to be world class. India needs to take a hard look at its commercial laws and the system of dispensing justice in commercial matters. A beginning needs to be made at both ends — creation of a Commercial Court division within each High Court and the training of judges in the civil and criminal courts. There is no shame in admitting our inadequacies. Lawyers and judges need training in economic and commercial matters. Likewise, economists and subject-matter experts need training in legal principles. Together, they will constitute the legal infrastructure that will have the capacity to deal with the myriad problems that will arise in a growing and globalised economy.