FINAL REPORT

DEMYSTIFYING THE RULE OF PER SE AND RULE OF REASON

IN THE INDIAN CONTEXT

BY

NIKHIL PARIKSHITH

UNIVERSITY OF PETROLEUM & ENERGY STUDIES, DEHRADUN

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Nikhil Parikshith
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LIST OF ABBREVIATIONS

1) AAEC: Appreciable Adverse Effect on Competition
2) AIR: All India Reporter
3) CAT: Competition Appellate Tribunal
4) CBOT: Chicago Board of Trade
5) CCI: Competition Commission of India
6) CFI: Court of First Instance
7) Cir: Circuit
8) CMLR: Common Market Law Review
9) EC: European Commission
10) ECJ: European Court of Justice
11) ECR: European Court Reports
12) Edn: Edition
13) EU: European Union
14) DG: Director General
15) F.2d: Federal Reporter
16) Fed: Federal Circuit
17) FTC: Federal Trade Commission
18) p: Page
19) RPM: Resale Price Maintenance
20) SC: Supreme Court
21) SCC: Supreme Court Cases
22) Sh Act: Sherman Act, 1890
23) TPS: Television Par Satellite
24) US: United States
25) 3d Cir: Third Circuit
1. INTRODUCTION

1.1. CONTEXT

India began its journey towards a modern anti-trust regime with the enactment of the “Competition Act” in the year 2002 (Hereinafter also referred to as “the Act”). The Act came into effect in phases. The provisions dealing with “anticompetitive agreements”\(^1\) and “abuse of dominance”\(^2\) came into effect from the year 2009 and the “combination”\(^3\) provisions were notified on July 1 of this year. The Act incorporates the “appreciable adverse effect on competition” (also referred to as “AAEC”) test as the substantive legal standard for assessing anticompetitive behavior and structural changes.\(^4\) Section 3\(^5\) of the Act (which expressly deals

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\(^1\) See Section 3, Competition Act, 2002;
\(^2\) See Section 4, Competition Act, 2002;
\(^3\) See Section 5 & 6, Competition Act, 2002;
\(^4\) Rajiv K Luthra and GR Bhatia, “THE HANDBOOK OF COMPETITION ENFORCEMENT AGENCIES”, p137 Global Competition Review;
\(^5\) Section 3, Anti-competitive agreements

(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.
with anti-competitive agreements) has been called into play on numerous occasions, often attracting intense media scrutiny and analysis. The jurisprudence on anti-competitive agreements in India is still at the nascent stage as result the Competition Commission of India (Hereinafter also referred to as “CCI” or “commission”) and the Competition Appellate Tribunal (Hereinafter

Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—
(a) tie-in arrangement;
(b) exclusive supply agreement;
(c) exclusive distribution agreement;
(d) refusal to deal;
(e) resale price maintenance,
shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation.—For the purposes of this sub-section,—
(a) "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
(b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
(c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
(d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
(e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

(5) Nothing contained in this section shall restrict—
(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—
(a) the Copyright Act, 1957 (14 of 1957);
(b) the Patents Act, 1970 (39 of 1970);
(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);
(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);
(e) the Designs Act, 2000 (16 of 2000);
(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);
(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.
referred to as “CAT” have found it prudent to import legal principles from other jurisdictions and apply them in the Indian context.

The process of identifying an agreement and then condemning it as anticompetitive has always been a grey area in anti-trust cases. As a result the courts have devised tools of investigation in order to expeditiously come to a logical conclusion. Of the many legal principles that have become the cornerstone of anti-trust common law none have attracted more attention then the rules of “per se” and the “rule of reason”. These two rules have been instrumental in discerning whether a particular agreement is anti-competitive or not. Notwithstanding the utility of these two rules, critics have been quick to point out an apparent dichotomy between the two. The “rule of reason” is an outcome of the US court’s interpretation of Section 1 of the Sherman Act. The “rule of reason” typically mandates an elaborate inquiry into the reasonableness of a challenged business practice. The rule requires the fact-finder to weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. The plaintiff bears an initial burden under the “rule of reason” by showing that the alleged combination or agreement produced adverse, anti-competitive effects within the relevant product and geographic markets. The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods or services. Such proof is often impossible to make, due to the difficulty of isolating the market effects of challenged conduct. Accordingly, courts

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6 Evolution of the “rule of reason” discussed in the next chapter;
7 Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir.1991);
8 See FTC v. Indiana Federation of Dentists 476 U.S. 447 (1986); Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 166 (3d Cir.1979);
9 See Supra Note 7 at 728;
10 P. Areeda, Antitrust Law p 1503, at 376 (1986);
typically allow proof of the defendant's "market power" instead. If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective.

The "*per se*" rule and its rationale were explained by the US courts in a number of cases. In *Northern Pacific Railway Co v. United States*\(^\text{12}\), the court observed that "there are certain agreements or practices which because of their pernicious effects on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and, therefore illegal without any elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of "*per se*" unreasonableness not only makes the type of restraints that are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable-an inquiry so often wholly fruitless when undertaken." The above observation of the US Supreme Court was also followed in the case of *United States v. General Motor Corp.*\(^\text{13}\) In simpler words the "rule of reason" calls for an elaborate inquiry into the "reasonableness" of an alleged anti-competitive agreement whereas the "*per se*" rule condemns an agreement as anticompetitive on the existence of certain parameters without the need for further inquiry.

\(^{11}\) See NCAA v. Board of Regents of the Univ. of Oklahoma, 468 U. S. 85 (1984);

\(^{12}\) 356 U.S.1(1958);

\(^{13}\) 384 U.S. 127 (1966);
1.2.OBJECTIVE OF THE REPORT

An attempt has been made in this report to identify the myriad dimensions of the “rule of reason” and “per se” and test its applicability in the Indian scenario. The inspiration behind this endeavor has been the landmark order of the “CCI” in the matter of Neeraj Malhotra v Deutsche Post Bank Home Finance Ltd. & Ors\(^{14}\) (also known as the prepayment loans case) wherein the commission was called upon to examine the issues of anti-competitive agreements and abuse of dominance by banks while charging prepayment penalty on home loans. The commission had the opportunity to examine the length and breadth of section 3(3) of the Competition Act, 2002. Under Section 3(3), law permits the commission the presume the violation without further inquiry only and only if any trade practice tested on the parameters laid down in clauses (a) to (d) of Section 3(3) in relation to the relevant market falls foul of any of those parameters. The majority judgment does not give any clarity on the nature of the presumption raised under section 3(3) however the dissenting opinion of Mr. PN Parashar, Member of the commission is worth noting. In his dissent Mr. PN Parashar very categorically comes to the conclusion that section 3(3) lays down the rule of “per se”. Unfortunately as the majority judgment is silent on how the burden of proof operates under section 3(3) it would be presumptuous to state that section 3(3) lays down the rule of “per se”.

In light of the several grey areas on this issue an attempt has been made to demystify the nature of the presumption under section 3(3). In pursuance of this an in-depth study of the rule of “per

\(^{14}\) Case No. 5/2009, Date Of Decision: 2.12.2010;
“per se” and “rule of reason” has been made. Chapter 2 of this report looks back on the seminal events that shaped the evolution these two rules. Chapter 3 will exclusively deal with the contours of the two rules with the aid of relevant case laws from the US and other jurisdictions. Another feature of this chapter is a comparative analysis of EU law with US anti-trust law. Chapter 4 is an in-depth examination of section 3 of the Indian Competition Act. As a continuation of the study on section 3 of the Competition Act, Chapter 5 will seek to answer whether there is a “per se” rule in India? Finally chapter 6 deals with the final comments and conclusions of the author. The objectives of this report can be summarized in two bullet points:

- To examine the contours of the “rule of reason” and “per se”;
- To discern the applicability of the two rules in Indian competition law;
2. HISTORICAL PERSPECTIVE

2.1. THE SHERMAN ACT

The Sherman Act 1890 was passed against a background of widespread ill feeling against rail road companies, which were in a position to exploit their monopolies to the disadvantage of farmers, shippers and other traders. Also, many industries were in the hands of ‘trusts’, combinations of powerful firms which perfected techniques for driving competitors out of the market and indulged in practices widely regarded as exploitative and unfair. Both major parties had by 1888 accepted the need to control the problem of monopoly, although it was unclear how this best could be done. What emerged was a piece of legislation which harnessed common-law notion of restraint of trade.\textsuperscript{15} Section 1 of the Sherman Act (Hereinafter also referred to as “Sh Act”\textsuperscript{16}) provided that ‘every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade….is hereby declared to be illegal’. Section 2\textsuperscript{17} made it an offence

\begin{footnotesize}
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  \item \textsuperscript{15} “ARTICLE 85 AND THE “RULE OF REASON””, Richard Whish and Brenda Sufrin, COMPETITION LAW (“THE INTERNATIONAL LIBRARY OF ESSAYS IN LAW AND LEGAL THEORY), Rosa Greaves, ASHGATE DARTMOUTH;
  \item \textsuperscript{16} Section 1.Trusts, etc., in restraint of trade illegal; penalty
    Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
  \item \textsuperscript{17} Section 2.Monopolizing trade a felony; penalty
    Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be
\end{itemize}
\end{footnotesize}
to monopolize or to attempt to monopolize a market. These provisions are still the foundations of US antitrust laws, and many millions of words have been spilled on their meaning.

2.2. EVOLUTION OF THE “RULE OF REASON”

As stated earlier the Sherman Act of 1890 was the first federal antitrust statute in the United States. Section 1 of the “Sh Act” declares “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade” to be unlawful both civilly and criminally. An offence under section 1, therefore, consists of two elements: (1) concerted action—a “contract, combination or conspiracy”, and (2) an anticompetitive effect—a “restraint of trade”. In its earliest attempt to interpret the second requirement of a violation of section 1 of the “Sh Act” (i.e. “restraint of trade”) the US Supreme Court considered itself to be constrained by the seemingly plain meaning of the word “every” as it related to concerted action that restrained trade. Rejecting the defendant’s assertion that a reasonableness qualification was inherent in “restraint of trade”, the court held,

“When…the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by congress.”
In *United States v. Trans-Missouri Freight Ass’n*\(^{18}\), Justice White, in his dissenting opinion urged the court to recognize the full import of English and American common law history, by interpreting section 1 as prohibiting only “unreasonable” restraints of trade\(^{19}\).

A little more than a decade after *Trans-Missouri Freight*, the Court charted a new course for Section 1 in its watershed decision in *Standard Oil Co v. United States*\(^{20}\). This case was by far the most celebrated anti-trust case that had yet been brought under the Sherman Act. Indeed the name “anti trust” had been coined with trust such as Standard Oil in mind. Pitting the determined antitrust enforcers of the time against the financial interests of John D. Rockefeller and other prominent industrialists, the case marked an end of antitrust’s adolescence in more ways than one. At the conclusion of the case, one of the most extensive trust to emerge from the late nineteenth century became a casualty of the twentieth, disassembled into its over thirty constituent parts. More importantly for current purposes, the Court did so after implying a reasonableness modification to the language of section 1 of the act. Now writing for the court’s majority, Justice White implemented the approach he had first outlined in his dissent in *Trans-Missouri*: the “rule of reason”. In so doing, the Court forever turned its back on the plain meaning approach of *Trans-Missouri*, emphasizing instead the link between the Sherman Act and the English and American common law of restraint of trade as it stood in 1890\(^{21}\).

“Section 1 of the Sherman Act necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated. Thus, not specifying, but

\(^{18}\) 166 U.S.290, 328 (1897);

\(^{19}\) Ibid at 343-74;

\(^{20}\) 221 U.S 1 (1911);

\(^{21}\) Ibid. at 60;
indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.”

The full import of *Standard Oil* was not apparent, however, until the court’s decision in *Chicago Bd of Trade v. United States*. The facts were as follows, Defendant Chicago Board of Trade (CBOT) was a commodity market, dealing in spot sales (sales of grain stored in Chicago and ready for delivery), future sales (grain to be purchased for delivery at a later time), and “to arrive” orders (grain which is en route to Chicago). CBOT introduced a new “call rule” which regulated board members buying or selling sales of “to arrive” orders—at the close of the call session (which at that point was 2:00 p.m Central Time), the price of grain is set and dealers can’t sell grain at any other price. The United States Department of Justice accused CBOT of price-fixing, and in 1913, filed suit against the Board in the United States District Court for the Northern District of Illinois. At trial, CBOT asserted that the rule did not have any unlawful purpose, but rather was set up to curb certain pre-existing problems and abuses. CBOT claimed that a group of agents were lowering discounts on commissions to those people buying grain after hours. These agents would wait until after hours, and then buyers would get cheaper prices. CBOT wanted to curb the power of these monopolies /oligopoly type of buyers by making prices same for everyone after hours. Also, the rule shortened the traders’ work hours, for the convenience of its members. Ultimately, however, the District Court did not issue an opinion. The Justice Department and CBOT entered into a consent decree under which enjoined them

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22 Supra Note 20 at 60;  
23 246 U.S. 231, 238-39 (1918);
from acting upon the same or from adopting or acting upon any similar rule. Justice Brandeis writing for a unanimous court first observed that every trade association and board of trade imposes some restraint upon the conduct of its members. He explained the essence of the “rule of reason” in the following words:

“The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court interpret facts and to predict consequences.”

2.3.EVOLUTION OF THE RULE OF “PER SE”

From a contemporary perspective, Standard Oil and Chicago Board of Trade can be read as echoing aspects of the approach embraced in Judge Taft’s 1898 opinion in Addyston Pipe. There Justice Taft separated restraints of trade into two categories. In the first lay restraints that had no purpose save restraining trade. These were condemned absolutely at common law, and, he reasoned, should be similarly condemned under the Act. In this way, Addyston Pipe, like

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24 United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir.1898), aff’d, 175 U.S. 211 (1899);
Trans-Missouri, introduced the concept of “absolutely” prohibited categories of conduct. But in contrast to Trans-Missouri, Taft’s approach followed from the restraints plainly anticompetitive effect rather than any literal reading of the language of the Sherman Act. It can, therefore, more fairly be identified as the point of origin of later “per se” rules.

In the United States, illegal “per se” often refers to categories of anti-competitive behavior in antitrust law conclusively presumed to be an “unreasonable restraint on trade” and thus anti-competitive. The United States Supreme Court has, in the past, determined activities such as price fixing, retail price maintenance, geographic market division, group boycotts, and tying arrangements to be illegal "per se" regardless of the reasonableness of such actions. Traditionally, illegal “per se” anti-trust acts describe horizontal market arrangements among competitors.25 In Jefferson Parish Hospital Distt. No.2 v. Hyde26, the court observed that the rationale for “per se” rule, in part, is to avoid a burdensome inquiry into the actual market conditions in situations where the likelihood of anti-competitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anti-competitive conduct. The “per se” rule, as opposed to the “rule of reason”, has been applied by the courts in respect of particularly harmful agreements such as agreements relating to price fixing, allocation of territories, bid rigging, group boycotts, concerted refusal to deal, and resale price maintenance.

It should be noted, however, that in recent years the approach of the US courts has undergone a transition from a dichotomous approach based on two distinct rules, the “per se” rule and the “rule of reason”, to a more nuanced and cases specific inquiry tailored to the suspect conduct in each particular case. In Bayer AG v. Commission of the European Communities, European Court reports 2000 Page II-03383, it was observed:

25 Discussed in detail in the next chapter;
26 466 US 2 (1984);
‘The proof of an agreement between undertakings within the meaning of Article 85 (1) of the Treaty (now Article 81 (1) EC) must be founded upon the direct or indirect finding of the existence of the subjective element that characterizes the very concept of an agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market in accordance with the terms of that agreement is expressed. The Commission misjudges that concept of the concurrence of wills in holding that the continuation by wholesalers of their commercial relations with a manufacturer when it adopts a new policy, which it implements unilaterally, amounts to acquiescence by those wholesalers in that policy, although their de facto conduct is clearly contrary to that policy’.
3. THE RULE OF “REASON” AND “PER SE”

3.1. “RULE OF REASON”

The contours of the traditional “rule of reason” inquiry have remained largely unchanged since they were first defined in *Chicago Board of Trade v. United States*, The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

3.1.1. Application of the “rule of reason”

Most vertical agreements are subject to the “rule of reason” approach. In *Continental TV Inc v GTE Sylvania*, it was observed that, “When anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the “rule of reason” Thus, vertical arrangements such as exclusive dealing, tying agreements are tested based on the “rule

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27 Supra Note 23;
28 433 US 36 (1977);
of reason” method. In *Business Electronics Corp v. Sharp Electronics Corp*\(^{29}\), it was held “A vertical restraint of trade is not “per se” illegal under 1 of the Sherman Act unless it includes some agreement on price or price levels…Although vertical agreements on resale prices are illegal “per se”, extension of that treatment must be on demonstrable economic effect rather than upon formalistic line drawing.”

3.1.2. US and EC

US and EC competition law are materially different in numerous respects, not least in that it has the ‘bifurcation’ of Article 81(1)\(^{30}\) and Article 81(3)\(^{31}\), which does not exist in the Sherman Act, and that it is concerned with the promotion of a single market as well as with “conventional” competition law concerns. The fact that the ECJ has handed down reasonable judgments does not mean that it has adopted the “rule of reason” in the sense in which that expression is used in the US. Various commentators have argued against the incorporation into EC law a “rule of reason”

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\(^{29}\) 485 US 717 (1988);

\(^{30}\) Article 81(1): *The following shall be prohibited as incompatible with the common market:*

all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

\(^{31}\) Article 81(3): *The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*

any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question;
modeled upon US experience. In its White on Modernization the Commission said that it did not see the adoption of the “rule of reason” as solution to the problem of enforcement and procedure and that it had identified. In particular, it said that it would, “be paradoxical to cast aside Article 81(3) when that provision in fact contains all the elements of a “rule of reason” and that the adoption of the “rule of reason” under article 81(1) would ‘run the risk of diverting Article 81(3) from its purpose, which is to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations.

In Metropole Televesion v Commission, the CFI expressly rejected the suggestion that a “rule of reason” existed under Article 81(1). Six television companies in France had established a joint venture, Television Par Satellite (‘TPS’), to devise, develop and broadcast digital pay-TV services in French in Europe: TPS would be a competitor to the dominant pay-TV company, Canal+. The parties notified a number of agreements to the commission. In 1999 the commission adopted a decision that the creation of TPS was not caught by Article 81(1); however it concluded that a non-competitive clause, preventing the parents of TPS from being involved in other digital pay-TV satellite companies, could be cleared (that is, found not to infringe Article 81(1) for a period of three years; and that clauses giving TPS rights of pre-emption in relation to certain channels and services offered by its parents and exclusive rights to other channels infringed Article 81(1) but could not be exempted under Article 81(3) for three years. Four of the shareholders in TPS applied to the CFI requesting that the commission’s decision should be

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32 Whish and Sufrin (1987) 7 Ox YEL 1; Waelbroeck “Vertical Agreements: is the Commission Right not to follow the US Policy? (1985) 25 Swiss Rev ICL;
annulled. They argued that the commission should have applied the ““rule of reason””, according to which “an anti-competitive practice falls outside Article 81(1) of the Treaty if it has more positive than negative effects on competition on a given market; in particular the clauses in the agreement giving TPS rights of pre-emption and exclusivity would enable it to enter the market dominated by Canal+ and therefore would ‘favor’ new competition. Several well known judgments of the ECJ and CFI were cited in support of this version of the “rule of reason”. What is of interest is the explicit way in which CFI’s judgment rejected the applicant’s argument:

72. According to the applicants, as a consequence of the existence of a “rule of reason” in community competition law, when Article 81(1) of the Treaty is applied it is necessary to weigh the pro and anti-competitive effects of an agreement in order to determine whether it is caught by the prohibition laid down in the article. It should, however, be observed, first of all, that contrary to the applicant’s assertions the existence of such a rule has not, as such, been confirmed by the community courts. Quite to the contrary, in various judgments the Court of Justice and Court of First Instance have been at pains to indicate the existence of a “rule of reason” in Community competition law is doubtful.

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37 Ibid, para 69;
The CFI went on to say that pro-and anti-competitive aspects of a restriction of competition should be weighed at the stage of considering whether an agreement satisfies the terms of Article 81(3)\textsuperscript{40}; in CFI’s view:

*Article 81(3) would lose much of its effectiveness if such an examination had to be carried out already under Article 81(1) of the Treaty*\textsuperscript{41}. The CFI acknowledged that in various judgments the Community Courts have been ‘more flexible’ in their interpretation of Article 81(1), but concluded that did not mean that they had adopted the “‘rule of reason’” in the sense argue by the applicants\textsuperscript{42}. Rather, the more flexible judgments of the Courts demonstrate that they are not willing to find a restriction ‘wholly abstractly’; instead a full market analysis is required\textsuperscript{43}. The Commission cites the *Metropole* judgment in paragraph 11 of its *Guidelines on the application of article 81(3) of the treaty* in support of its proposition that “the balancing of anti-competitive and pro-competitive effects is conducted exclusively within the framework laid down by Article 81(3)\textsuperscript{44}.

According to Richard Whish, the judgment in *Metropole* was correct to reject the US-style “‘rule of reason’” in Article 81(1). Of course, the Commission and the courts should be ‘reasonable’ when applying Article 81(1), but that does not mean that they should import the method of analysis adopted in the quite different context of the Sherman Act\textsuperscript{45}.

### 3.2. “PER SE” RULE

\textsuperscript{40} [2001] ECR II-2459 [2001] 5 CMLR 1236, para 74;
\textsuperscript{41} Ibid, para 74;
\textsuperscript{42} Ibid paras 75-76;
\textsuperscript{43} Ibid, para 76;
\textsuperscript{44} OJ [2004] C 101/8;
\textsuperscript{45} See Richard Wish, “COMPETITION LAW”, 6 Edn, Oxford University Press;
In its purest form, the “per se” rule reduces the Section 1 inquiry to whether the defendants engaged in a “contract, combination or conspiracy” and whether the agreement falls into a recognized “per se” category such as price fixing or market division. Once such an agreement is proved, the anticompetitive effect is presumed under the “per se” rule. At that point, all defenses i.e. attempts to demonstrate “reasonableness”, are precluded. One way to look at the “per se” rule, therefore, is a rule of evidence, as opposed to one of substantive antitrust law. When sufficient indicia of anticompetitive potential are present, they can give rise to an irrebuttable presumption of unreasonableness.

The “per se” rule reflects a judgment that costs of identifying exceptions to the general rule so far outweigh the costs of occasionally condemning conduct that might upon further inspection prove to be acceptable, that is it is preferable not to entertain defenses to the conduct at all. Hence “per se” rules have long been justified on the ground that certain kinds of conduct are so likely to prove to be unreasonably anticompetitive that time spent considering defenses would be time wasted. From the point of view of administrative convenience and judicial efficacy, the search for the exceptional case-the truly “reasonable” instances of such conduct-are not worth the cost of investigation. Finally, it was argued that “per se” rules provided unambiguous guidance to courts and the business community.

The Supreme Court explained in FTC v Superior Court Trial Lawyers Ass'n46, the “per se” rules in antitrust law serve purposes analogous to “per se” restrictions upon, for example, stunt flying in congested areas or speeding. Laws prohibiting stunt flying or setting speed limits are justified by the states interest in protecting human life and property. Perhaps most violations of

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46 493 U.S. (1990);
such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen.47

In part the justification for these “per se” rules is rooted in administrative convenience. They are also supported, however, by the observation that every speeder and every stunt pilot poses same threat to the community.48

From a law and economics perspective, “per se” rules may be preferred to a “rule of reason” when violations are expensive for a court to observe but are strongly correlated with observable behavior that are cheaply observed, and when it would be expensive for a violator to break the law without engaging in the observable behavior. Under such circumstances, the judicial system would minimize enforcement costs by conditioning liability on the cheaply observable behavior, and the resulting enforcement errors, corporate compliance costs, and social costs of deterring socially beneficial actions, would not produce an efficiency loss.49

3.2.1. Application of the “per se” Rule

The Court has made clear; however, that the test for determining what constitutes “per se” unlawful price-fixing is one of substance, not semantics. “Per se” rules of illegality are judicial constructs, and are based in large part on economic predictions that certain types of activity will more often than not unreasonably restrain competition.50 In determining whether to characterize conduct as “per se” unlawful, the Court considers whether the practice facially appears to be one

47 Ibid 411;
48 Ibid 433-34;
50 Supra Note 42;
that would always or almost always tend to restrict competition and decrease output.\textsuperscript{51} The economic models of behavior that spawn these predictions are not equally applicable in all situations. The fact that overlap may be said to involve price-fixing in "a literal sense," therefore, does not mean that it automatically qualifies as “per se” illegal price-fixing.

The “\textit{per se}” method of antitrust analysis is usually applied to cartel type horizontal agreements. In \textit{White Motor Co. v United States}\textsuperscript{52}, Justice Brennan who gave the dissenting opinion noted that “Specifically, the “\textit{per se}” rule of prohibition has been applied to price fixing agreements, group boycotts, tying agreements and horizontal division of markets. As to each of these practices, experience and analysis have established the utter lack of justification to excuse its inherent threat to competition.” In \textit{Northwest Wholesale Stationers Inc v. Pacific Stationary and Printing Co}\textsuperscript{53}, it was observed that this court has long held that concerted refusals to deal or group boycott are likely to restrict competition without any offsetting gains that they should be condemned as “\textit{per se}” violations of section 1 of the Sherman Act. Horizontal price-fixing, where competitors at the same market level agree to fix or control the prices they will charge for their respective goods or services, is among the activities that the Supreme Court has consistently held to be illegal “\textit{per se}”.\textsuperscript{54}

\textsuperscript{51} Broadcast Music, 441 U.S. at 19-20, 99 S.Ct. at 1562;
\textsuperscript{52} 372 U.S. 253 (1963);
\textsuperscript{53} 472 US 284 (1985);
\textsuperscript{54} Supra Note 42;
4. SECTION 3 COMPETITION ACT, 2002

From the foregoing discussion we can conclude that the task of the two rules is to devise a set of legal commands that can effectively distinguish between arrangements that promise to invigorate competition, or at least have little effect on it, and those that present a threat of serious anticompetitive harm. Whether this distinction applies in India is a matter of considerable debate. The prevailing notion is that Section 3 of the Indian Competition Act, 2002 accommodates the true spirit of both the rules ("per se" and reason) vide sub-section (3) and (4) respectively. However practitioners of law in India still find it difficult to distinguish between agreements that are subject to "per se" and reason test. In order to truly discern whether the two rules have any relevance in India a careful examination of section 3 of the Competition Act is called for.

4.1. SECTION 3, COMPETITION ACT, 2002: NATURE AND SCOPE

4.1.1. Overview

Section 3 has been enacted by the Competition Act, 2002. Notes on the clauses of the bill stated:

Notes on clauses - This clause, inter alia, provides for prohibition of entering into anti-competitive agreements. It shall not be lawful for any enterprise or association of enterprises or person or association of person to enter into an agreement in respect of production, supply, storage, distribution, acquisition or control of goods or provision of service, which causes or is likely to cause an “AAEC” effect on competition within India. All such agreements entered into in contravention of the aforesaid prohibition shall be void. This clause also specifies certain activities which shall be presumed to have an “AAEC” on competition and also specifies certain agreements which shall be in contravention of sub-clause (1) of the said clause if such agreements cause “AAEC” on competition.56

Section 3 of the Competition Act, 2002 explicitly deals with anti-competitive agreements. Sub-section (1) states that, “No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.” The term “agreement”, is defined in section 2 (b) of the Act as follows:

“agreement” includes any arrangement or understanding or action in concert-
(i) whether or not, such arrangement, understanding or action is formal or in writing; or
(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;’

56 Clause 3 of the Competition Bill, 2001;
It is clear that the definition includes *any* arrangement or understanding or action in concert whether or not formal or in writing or is intended to be enforceable by legal proceedings. Thus, it may be noticed that the definition is inclusive and not exhaustive. Further, the same has been worded in a wide manner and the agreement does not necessarily have to be in the form of a formal document executed by the parties. Thus there is no need for an explicit agreement and the existence of the agreement can be inferred from the intention and objectives of the parties. In the cases of conspiracy the proof of formal agreement may not be available and may be established by circumstantial evidence only. The concurrence of parties and the consensus amongst them can, therefore, be gathered from their common motive and concerted conduct.\(^5^7\) Similarly sub-section (2) condemns any agreement in contravention of the provisions of sub-section (1) as void. Section 3 classifies anti-competitive agreements into two categories (1) Horizontal\(^5^8\) and (2) Vertical\(^5^9\) agreements.

1. **Horizontal Agreements [Section 3(3)]**

Horizontal Agreements are agreements between two or more enterprises that are at the same stage of the production chain and, in the same market. The most obvious example would be that of agreements between enterprises dealing in the same products. However, in general, it is important to define the relevant markets. To attract the provision of law, the products must be substitutes. Being at the same stage of the production chain implies that the parties to the agreement are both (all) producers, or retailers or wholesalers.

\(^{57}\) See PN Parashar’s dissenting opinion p 29 in *Neeraj Malhotra v Deustche Post Bank Home Finance Ltd. & Ors*

\(^{58}\) Sub-section (3) of section 3 deals with “Horizontal Agreements”;

\(^{59}\) Sub-section (4) of section 3 deals with “Vertical Agreements”;
Under section 3(3) the following agreements are presumed to be anti-competitive and having an “AAEC”:

a. directly or indirectly determines purchase or sale prices;
b. limits or controls production, supply, markets, technical development, investment or provision of services;
c. shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
d. directly or indirectly results in bid rigging or collusive bidding;

2. Vertical Agreements [Section 3(4)]

Vertical agreements, on the other hand, are agreements, between enterprises that are at different stages or levels of the production chain, and therefore, in different markets. An example of this would be an agreement between a producer and distributor. Vertical restraints on competition include:

a. **Tie-in arrangements**- includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods

b. **Exclusive supply agreements**- includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person.
c. **Exclusive distribution agreements** - includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods

d. **Refusal to deal** - includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought

e. **Resale Price Maintenance (RPM)** - includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

4.1.2. **Observations of the Raghavan Committee Report**

The report of the High Level Committee on Competition Policy and law, popularly known as Raghavan Committee, made numerous observations relating to restrictive agreements stated to be anti competitive agreements:

a. **On Horizontal Agreements**\(^{60}\):

    “Agreements are considered illegal only if they result in unreasonable restrictions on competition. Based on the U.S. law, this is tested on what is known as the “rule of reason” analysis. It is also required that the parties to the agreement are engaged in rival of potentially rival activities. A potential rival is one who could be capable of engaging in the same type of activity.”

\(^{60}\) Para 4.3.5 and 4.3.6, High level Committee On Competition Policy;
The committee gave an illustrative list of agreements that must be subject to the “rule of reason”:

a. Agreements regarding fixing of purchase or selling prices;

b. Agreements limiting quantities, markets, technical development or investment;

c. Agreements regarding territories to be served and sources of supply;

d. Agreements regarding dissimilar treatment of equivalent transactions with their trading parties that place them at a disadvantage;

b. **On Agreements involving Presumption of Illegality**\(^6\):

In general the “rule of reason” test is required for establishing that an agreement is illegal. However, for certain kinds of agreements the presumption is often that they cannot serve any useful or pro-competitive purpose and therefore do not need to be subject to the “rule of reason” test. The following kinds of horizontal agreements are often presumed to be anti-competitive:

a. Agreements regarding fixing prices. This would include all agreements that directly or indirectly fix the purchase or sale price.

b. Agreements regarding quantities. This includes agreements aimed at limiting or controlling production and investment.

\(^6\) Para 4.3.8;
c. Agreements regarding bids (collusive tendering). This includes tenders submitted as a
result of any joint activity or agreement.

d. Agreements regarding market sharing. These include agreements for sharing of markets
by territory, type or size of customer or in any other way;

The presumption is that such horizontal agreements and membership of cartels lead to
unreasonable restrictions of competition and may, therefore, be presumed to have AAEC. This
provision of “per se” illegality is rooted in the provisions of the US law and has a parallel in
most modern legislations on the subject. The Australian law prohibits most price fixing
arrangements, boycotts and some forms of exclusive dealing. Similarly, the new U.K. law
presumes that certain agreements have an ‘appreciable effect’ on competition. In case such a
provision is to be made law, there should be very limited scope for discretion and interpretation
on the part of the prosecuting and adjudicating authorities. Hence, such agreements are presumed
to be illegal and the governing principle is that they have an ‘appreciable’ anti-competitive
effect. It may be pointed out that a significant number of members of the Committee were not in
favor of identifying categories presumed to illegal. They feel that they should be subject to the
“rule of reason” and the CCI can issue relevant regulations in this regard. But the majority
however felt that such agreements are presumed to be illegal.

c. On Vertical Agreements\textsuperscript{62}

\textsuperscript{62} Para 4.4.0;
In the past, the U.S. anti-trust laws had treated vertical restraints, like tie-in arrangements quite harshly. The thinking has changed in recent times, and, under the “rule of reason”, vertical agreements are generally treated more leniently than horizontal agreements. This is because vertical agreements can often perform pro-competitive functions. Such agreements are generally considered anti-competitive if one or more of the firms that are party to the agreement have market power. In such a situation, the agreement is, in any case, likely to attract the provisions of the law relating to abuse of dominance. In a number of countries RPM is presumed “per se” anti-competitive.

4.2. The “Pre-Payment” Loans Case

The “commission” was presented an opportunity to examine the scope of section 3 of the Competition Act in the landmark case of Neeraj Malhotra v Deustche Post Bank Home Finance Ltd. & Ors. This case was incidentally the first order of the “CCI” since its inception in the year 2002.

4.2.1. Facts

The CCI was called upon to examine the legitimacy of an act of charging pre-payment penalties by “Banks” and “Housing Financial Companies” on premature payment of home loans. The informant Sh. Neeraj Malhotra filed an ‘information” under section 19 (1) (a) of the Act against
banking and non banking financial companies for the levying of “Prepayment Charges” on the prepayment of amount of home loan taken. The opposite parties were private and public sector banking and non-banking financial institutions, engaged in the business of offering different types of loans including retail home loans, to the general public. Out of the numerous allegations made by the “informant” the following are relevant to the discussion:

a. The levy of prepayment charges/penalty has the effect of increasing the actual interest rate initially agreed upon by the client. According to the informant this has the effect of indirectly determining the prices of the services of home loans provided.

b. The above practice also limits the supply/provision of services, as the client is unable to opt for another source of loans. This results in an Appreciable Adverse Effect on Competition (AAEC) within India.

c. The acts/practices carried on and decision taken by opposite parties are violative of provisions of the Section 3(1), (2) & (3) (a) and (b) read with Section 4(1), (2) (a) (i) of the Competition Act, 2002.

The “CCI” being of the opinion that a prima facie case existed, directed the “Director General” to cause an investigation into the matter. Upon investigation of facts, the DG concluded that:

a. The allegations regarding violation of Section 3(1), (2) read with Section 4(1), (2) (a) (i) are found to be untrue.
b. Further, with regard to allegation for violation of Section 3(3) (a) & (b) made by the information provider, violation of Section 3(3) (b) of the Act is found to be true.

4.2.2. Order of the Commission

The Order of the commission was not unanimous with two members of the “commission” giving separate dissenting opinions. The majority came to the conclusion that there was no violation of section 3(3) of the act (thereby overruling the findings of the DG). The two dissenting members were of the opinion that there was a legitimate case against the opposing parties. There is no need to go into the detailed reasoning adopted by the “commission” as the present discussion is limited to the application of section 3(3) of the act. It is important to note here that the majority opinion was silent on how the burden of proof under section 3(3) operates. Thus the majority did not state categorically whether the rule of “per se” applies to section 3(3). However the majority while adjudicating the matter before it operated on the premise that section 3(3) must be understood in the context of section 19(3) of the act (the relevance of this point will become apparent in the forthcoming paragraphs).

4.2.3. Mr. Parashar’s Dissent

The learned dissenting member categorically stated that section 3(3) of the act lays down the rule of “per se”. He explained the “per se” rule and its rationale vide several U.S. cases. On the nature of the burden of proof the member examined the concept and meaning of the word’s shall

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63 The majority framed five substantive issues, issue No.3 was worded as follows, Whether there is any agreement of the nature mentioned under sub section (3) of section 3 or existence of any effect of the nature mentioned under clauses (a) to (d) to sub section (3) of section 3 of the act or some “appreciable adverse effect on competition” in India in the context of sub section (3) of section 19 due to imposing of pre payment charges by some banks?(p.153)

64 See P.35, PN Parashar’s Dissent;
presume’, used in section 3 (3) of the Act, as has been explained by the courts in India in numerous cases. He came to the conclusion that the presumption under section 3(3) is rebuttable. The following words of the dissenting order are of extreme importance:

The presumption laid down under section 3(3) of the Act is rebuttable. The opposite parties have attempted to rebut the presumption by submitting detailed arguments. However, the grounds taken for rebutting the presumption are to be tested on the touch stone of guiding factors laid down under section 19(3) of the Act which are being reproduced as under:

Section 19 (3):

The Commission shall while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard, to all or any of the following factors, namely:-

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market:

(c) foreclosure of competition by hindering entry into the market

(d) accrual of benefits to consumers

(e) improvements in production or distribution of goods or provision of services: or

(f) promotion of technical, scientific and economic development by means of production or distribution of goods and provision of services.

A combined reading of section 3(3) and section 19(3) of the Act suggests that although the term ‘appreciable adverse effect on competition’, used in section 3 (1) has not been defined, however, section 19 (3) of the Act states that while determining whether an agreement has an appreciable

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adverse effect on competition under section 3 of the Act, the Commission shall have due regard to all or any of the above mentioned factors. The first three factors laid down in section 19(3) of the Act, viz., (a), (b) and (c) relate to negative effects on competition while the remaining three relate to beneficial effects. Thus, in assessing whether an agreement has an appreciable adverse effect on competition, both the harmful and beneficial effects, as reflected in the above factors, are to be considered.

4.2.4. Criticism

The rule of “per se” prohibits the defendants/opposing parties from showing the pro-competitiveness of their actions. An irrebuttable presumption is raised against the opposite parties on the existence of certain parameters under the “per se” rule. As per the dissent of the learned member the ‘presumption’ raised under section 3(3) is rebuttable. He further states that the “presumption” only shifts the burden of proof against the defendants. The defendants can discharge this burden by taking refuge under section 19(3) of the act. The dissenting member’s interpretation of section 3(3) gives rise to the inference that the sub-section lays down the “rule of reason” and not the “per se” rule. This statement will be substantiated in the next chapter.

5. WHETHER THERE IS A RULE OF “PER SE” IN INDIA?

While it would fair to state that section 3(4) incorporates the “rule of reason” in India, there is still some doubt as to the applicability of the “per se” rule to section 3(3). In order to truly discern the spirit of sub-section (3) of section 3 the language of the provision must be given utmost supremacy. In order to unlock the mystery surrounding section 3(3) the words “shall be presumed” must be given utmost importance. The use of the words “shall be presumed” gives rise to a “presumption” against the defendants/opposing parties.

5.1. MEANING OF “PRESUMPTION”
The term ‘presumption’, in its largest and most comprehensive sense, may be defined to be an inference, affirmative or disaffirmative, of the truth or falsehood of a doubtful fact or proposition, drawn by a process of probable reasoning from something proved or taken for granted.\(^{66}\) “Presumptions operate where certain facts may be presumed to exist even in the absence of complete proof.”\(^{67}\) A presumption is a rule of law by virtue of which, where a party proves one fact (the primary fact) a second fact (the presumed fact) will also be taken to have been proved, in the absence of evidence to the contrary.\(^{68}\) “The structure of all true presumptions requires first the proof of a basic fact or facts. Once this has been done different consequences follow so far as the presumed fact is concerned.

5.2. CLASSIFICATION OF PRESUMPTIONS

Presumption is of three types, (i) ‘may presume’, (ii) ‘shall presume’ and (iii) ‘conclusive proof’\(^{69}\). ‘May presume’ leaves it to the discretion of the court to make the presumption according to the circumstances of the case. ‘Shall presume’ leaves no option with the court not to make the presumption. The court is bound to take the fact as proved until evidenced is given to disprove it. In this sense such presumption is also rebuttable. ‘Conclusive proof’ gives an artificial probative effect by the law to certain facts. No evidence is allowed to be produced with a view to the combating that effect. In this sense, this is irrebuttable presumption.\(^{70}\)

5.3. INTERPRETATION

\(^{66}\) Best, 12th Edn. Section 299, p.267;
\(^{67}\) Steve Uglow’s, “EVIDENCE: TEXT AND MATERIALS”, 1997, p.686;
\(^{68}\) Peter Murphy, “A PRACTICAL APPROACH TO EVIDENCE, 1985”, 2\(^{nd}\) Edn.p.455;
\(^{69}\) See Section 4, The Indian Evidence Act, 1872;
\(^{70}\) P.R. Metrani v Commissioner of Income Tax, (2007) 1 SCC 789;
From the aforesaid discussion it would be fair to state that the “presumption” raised under section 3(3) of the act is rebuttable. The moot question that comes to the fore is, “What are grounds available for the opposite party to discharge this burden?”

At the outset it is important to note that the presumption raised under Section 3(3) is that of “AAEC”. If there is sufficient proof to establish that the opposite parties are engaged in any of the proscribed activities laid down in the sub-section then the commission shall presume that there is “AAEC”. In other words if the opposing parties have indulged in any of the prohibited acts enlisted in clauses (a) to (d) of the sub-section the “commission” shall presume “AAEC”.

Two plausible scenarios emerge once “AAEC” is presumed; the first one being that opposite parties may rebut the presumption by showing that none of their actions fall foul with any of the clauses [(a) to (d)] of the sub-section, the other possibility is that the parties may rebut the presumption by availing the grounds laid in section 19(3) of the act. Let us examine both these scenarios in detail:

The first scenario seems reasonable and to an extent echoes the spirit of the “per se” rule. The opposite party (if this scenario were to prevail) will not be allowed to show the pro-competitiveness of their actions. Thus the only grounds available for rebuttable will be those laid down in clauses (a) to (d) of section 3(3). It is however submitted that a scenario one like situation will not arise because of the language of the sub-section. The sub-section raises a presumption of “AAEC” and therefore logically the grounds for determining “AAEC” should also be the ground for rebutting “AAEC”. Section 19(3) of the act reads as follows:
The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—

(a) Creation of barriers to new entrants in the market;

(b) Driving existing competitors out of the market;

(c) Foreclosure of competition by hindering entry into the market;

(d) Accrual of benefits to consumers;

(e) Improvements in production or distribution of goods or provision of services;

(f) Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

If the opposing parties are permitted to buttress their defense by seeking aid of 19(3) then the whole process will be reduced to a “rule of reason” enquiry and not “per se”. The “rule of reason” clearly mandates an elaborate enquiry into the reasonableness of an agreement and sub-section (3) of section 19 enables the opposite parties to do the same. The language of the statute inadvertently negates the true spirit of the “per se” rule.

6. CONCLUSION

It is apparent from the above discussion that the language used in section 3(3) imposes a limitation on the competition authorities to apply the per se rule in its true spirit. As stated earlier the “per se” rule is not confined to only horizontal agreements but applies also to vertical agreements such as “tie in arrangements” and “RPM”. Section 3 of the Act on the other hand very clearly demarcates horizontal and vertical agreements vide sub-section (3) and (4). Thus Indian Competition law vide Section 3 does not provide for a case-by-case application of the per se
se rule. If the “per se” rule has to be applied in its true spirit then the legislature has to rephrase the language of the section. The words, “shall be presumed” creates considerable doubt in the minds of legal practitioners. It is submitted that there is an absolute need to have a ‘per se’ rule in India especially while dealing with serious offences like bid-rigging. However policy makers must also conceive of a “per se” rule that suits Indian conditions. The rule of “per se” as discussed earlier was an outcome of the US courts interpretation of the Sherman Act. The fundamental question that needs to be answered is, “Whether section 1 of the Sherman Act can be read in pari-materia with section 3 of the Competition act?” While answering this, policy makers must also understand that “per se” rule was shaped out of the experiences in the US economy.

It is recommended that we should explore the option of incorporating an “abbreviated rule of reason” in India. A new rule of evidence has been evolved by the US courts known as “quick look rule”/ “abbreviated rule of reason”. The US court of appeal in the landmark case United States of America v. Brown University71 observed that “In addition to the traditional rule of reason and the per se rule, courts sometimes apply what amounts to an abbreviated or ‘quick look’ rule of reason analysis. The abbreviated rule of reason is an intermediate standard. It applies in cases where per se condemnation is inappropriate, but where no elaborate industry analysis is required to demonstrate the anticompetitive character of an inherently suspect restraint. Because competitive harm is presumed, the defendant must promulgate “some competitive justification” for the restraint, “even in the absence of detailed market analysis” indicating actual profit maximization or increased costs to the consumer resulting from the restraint. If no legitimate justifications are set forth, the presumption of adverse competitive

715 F.3d 658;
impact prevails and “the court condemns the practice without ado”. If the defendant offers sound pro-competitive justifications, however, the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis. In case such a provision is to be made law, there should be very limited scope for discretion and interpretation on the part of the prosecuting and adjudicating authorities.

The “rule of reason” and “per se” rule are without doubt powerful tools of investigation in hands of competition enforcement authorities. If we are to import these rule to Indian anti-trust law, then we should do so by creating conditions that are conducive for the smooth and seamless application of these rules.

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