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The jurisprudence of Locus Standi in Competition law - will the extension of Locus Standi open a pandora's box of frivolous cases?

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*The issue of “who has the locus standi to approach CCI against the anti-competitive practice?” was always into consideration. There was an ambiguity with respect to allowing any person to file information with CCI, irrespective of the fact that the person was “aggrieved” directly by the conduct of an entity. Section 19 empowers the CCI to probe into anti-competitive conduct on receipt of any “information”. It also empowers the commission to take Suo moto cognizance. This paper will be restricted in interpreting Section 19(1)(a) which talks about “receipt of any information”. The legislative intent while incorporating Section 19(1)(a) and the amendment which replaced the term “complaint” with “information” will be looked into. One major concern for extending the scope of locus standi in competition law is that there is possibility of frivolous litigations which will unnecessarily increase the burden of CCI. Several cases including the recent **Samir Agrawal** case, wherein the court has determined the locus of a third party will be discussed in the paper. The paper will compare the position regarding locus standi in different countries such as the European Commission, UK, Korea, South Africa, US, Brazil, etc.*

Keywords: *jurisprudence, locus standi, competition law.*

INTRODUCTION

The term Locus Standi, in general, refers to the right of a party to bring an action in a court of law. The person whose legal right is infringed is said to have the locus to file a suit before the court and any third party who is unrelated to the dispute or whose right is not infringed is ousted from filing a suit in a court of law. However, this paper will determine the right of a party to bring information before the Competition Commission of India about the alleged anti-competitive practice. The Third party's locus who hasn't suffered any direct legal injury by the alleged anti-competitive conduct of the firm will be determined. The Competition Commission of India ("CCI") is the statutory regulator of competition in the Indian market. The Competition Act, 2002 ("Act") was enacted to restrict and regulate the unfair behavior of the firms in the market and to foster competition by all means. CCI, when receiving information regarding alleged unfair practices and cartelization carried on by the firms in the market, probes into the matter and direct the Director General for an investigation into the alleged contravention of the Act. However, the question of who can file information with the CCI against alleged anti-competitive conduct remains a matter of debate.

HISTORY OF THIRD PARTY'S LEGAL STANDING IN INDIAN COMPETITION LAW

The Competition Act was passed by the parliament in the year 2002. Section 19¹ of the Competition Act, 2002 confers CCI with inquisitorial rights into any of the alleged contraventions of the provisions of the Act wherein it can initiate its investigation in any one of the three ways-

- (i) Suo moto investigation;
- (ii) Receipt of any information by any person, consumer, or their trade association, the trade association;
- (iii) Upon reference from the Central or State Government or statutory authority.

¹ Competition Act, 2002, s 19

Originally, when the Act was enacted the term “receipt of a complaint” was used under section 19(1)(a)². However, the term “receipt of complaint” was substituted by the term “receipt of any information” by the *Competition (Amendment) Act, 2007*.³ The recommendation of the 44th *Standing committee on Finance*⁴ gave reason for replacement of the term “complaint” with “information”. The committee was of the view that the term “information” has a wider and more inclusive meaning when compared to the term “complaint”. CCI can effectively regulate the market by receiving any information regarding contravention instead of only on receipt of the complaint. This substitution has significance when it comes to filing information with CCI. Whereas a complaint can be filed only by an aggrieved person who has suffered damage due to the anti-competitive acts of another entity, information can be filed by any person who may or may not be affected personally affected because of the anti-competitive conduct of the entities.⁵ Thus, the object behind including the term “information” is to allow “any person” who is aware of the anti-competitive conduct in the market to bring it to the notice of CCI for conducting a further inquiry. According to experts⁶, the category for receiving information by a person includes the information filed by third parties and other public-spirited individuals.

This change in the terminology of the section emphasizes that previously only the person whose legal right was directly infringed was allowed to file a complaint to the CCI but now, any third party whose right is not infringed directly or indirectly can also bring certain information before CCI. This is because the CCI is conferred with the inquisitorial power i.e., after receiving information, CCI investigates the allegations, and only after finding the allegations to be true, does it proceeds further with the case. Such inquisitorial power is given because the proceedings in the Act are *in rem* which affects the public interest.

² Competition Act, 2002, s 19(1) (a)

³ Competition (Amendment) Act, 2007

⁴ Ministry of Corporate Affairs, Government of India, *Report of Competition Law Review Committee* (Finance Committee No. 44 2019) <<https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>> accessed 09 April 2022

⁵ *Samir Agrawal v Competition Commission of India* (2020) Competition Appeal (AT) No. 11/2019

⁶ Charanya Lakshmikumaran & Neelambara Sandeepan, 'The Private Competition Enforcement Review: India' (*The Law Review*, 25 February 2022) <<https://thelawreviews.co.uk/title/the-private-competition-enforcement-review/india#footnote-069-backlink>> accessed 09 April 2022

INTERPRETATIONS BY THE COURTS

The legal standing of the third person to bring information to CCI who hasn't suffered legal injury has come up before CCI and COMPAT.

In the case of *Shri Saurabh Tripathy v Great Eastern Energy Corporation Ltd.*,⁷ when a question came up before the commission regarding the locus of the informant, the CCI noted that there is no necessity for the person to be personally aggrieved by the anti-competitive conduct of the firm, to bring the information to the CCI.

In the case of *Shri Surendra Prasad v Competition Commission of India & Ors.*,⁸ The COMPAT has observed that the parliament has neither provided any qualification nor specified any conditions for filing information under section 19(1)(a). The plain reading of sections 18 and 19⁹ read with section 26(1)¹⁰ doesn't infer that the CCI can reject the prayer of a party on the ground that the party doesn't have a personal interest in the matter. Nonetheless, the commission shall be satisfied that a prima facie case exists before investigating the matter.

In the case of *Reliance agency v Chemists and Druggists Association of Baroda & Ors.*,¹¹ CCI noted that the proceedings are inquisitorial in nature and the locus of the informant is irrelevant in deciding the case as long as the matter involves an anti-competitive issue. The commission is more concerned with the allegations in the information rather than the locus of the informant.

ANTI-COMPETITIVE PRACTICES AS OFFENCES IN REM

The issues in competition law such as cartelization amongst firms, the dominance of a single entity in the relevant market creating an appreciable adverse effect on the market and restricting other entities in the market, etc., affect not a single person but the market as a whole. The anti-competitive practices are held to be offences in *rem* i.e., against the whole world and not just against the person who is personally affected by the conduct of the entity.

⁷ *Shri Saurabh Tripathy v Great Eastern Energy Corporation Ltd* (2014) Case No. 63/2014

⁸ *Shri Surendra Prasad v Competition Commission of India And Others* (2010)

⁹ Competition Act, 2002, ss 18, 19

¹⁰ Competition Act, 2002, s 26(1)

¹¹ *Reliance agency v Chemists and Druggists Association of Baroda & Ors.* (2013) Case No. 97/2013

Thus, the proceedings carried on by the CCI are the proceedings in *rem* and not in *personam*. CCI has interpreted the same in certain cases.

In the case of *Matrix Info Systems Pvt. Ltd. v Intel Corporation*,¹² when the Intel alleged that the informant has approached the commission with unclean hands, the CCI noted that the informant's antecedent cannot be a ground for not taking into account the abusive conduct of any firm as the proceedings before the CCI are in *rem* and not in *personam*.

In *Indian Motion Pictures Producers Association v Federation of Western India Cine Employees*,¹³ CCI emphasized the fact that all the orders made by them are in *rem* and not *personam*. Its judgment aims at providing "accrual benefits" to the market and society as a whole and not just to the informant who has filed the information.

Delhi High court in the case of *Telefonaktiebolaget Lm Ericsson v Competition Commission of India*¹⁴ observed that the proceedings before CCI are not in the nature of private *lis*. The object of the Act is to curb the Anti-competitive conduct in the market and not necessarily to grant relief to the informant who has filed information with the commission. The aim of the Competition Act is to regulate the market at large and not resolve the dispute between two private parties.¹⁵ Thus, by clarifying that the proceedings before CCI are in *rem*, it is clear that the offences under this Act are not between two private people, rather it affects the whole market and for that reason, the locus of the informant who hasn't suffered personal injury is irrelevant.

FEAR OF FRIVOLOUS CASES FILED WITH ULTERIOR MOTIVE

One fear that lingers while expanding the locus standi to any person is that of frivolous cases. The locus of the informant and the motive behind bringing information before CCI has always been an issue. There is the constant terror that if the locus standi is extended to any party to

¹² *Matrix Info Systems Private Limited Informant v Intel Corporation and Another* (2019) Case No. 05/2019

¹³ *Indian Motion Picture Producers' Association v Federation of Western India Cine Employees* (2020) Case No. 45/2017

¹⁴ *Telefonaktiebolaget Lm Ericsson (Publ) Petitioner v Competition Commission of India And Another* (2016) Writ Petition (Civil) No. 464/2014

¹⁵ Parumita Pal & Mr Rahul Jain, 'Locus Standi Vis-à-vis Nature of the Competition Act: An Analysis of its Changing Frontiers' 6 (4) *Indian Competition Law Review*, 14

file information, then the party may with malafide intention file frivolous complaints to harass the genuine competitors in the market.

In *L.H Hiranandani Hospital v Competition Commission of India*,¹⁶ COMPAT has suggested that even though the Competition Act doesn't prescribe any qualification for the person to bring information, the commission must be cautious enough in case of third-party information to determine if the person has come with an ulterior motive. For keeping a check on vexatious cases, the Act contains certain Sections which prevent fraud litigation. At first, for filing information with CCI, there is a fee prescribed ranging between Rs. 500 to Rs. 50,000. Apart from the filing fees, Section 45¹⁷ of the Act provides for penalties in respect of furnishing information wherein if any person who willingly and knowingly furnishes false information or omits to state material facts or alters, suppress, destroys any document then the commission may impose a penalty up to Rs. 1 Crore. Section 26 of the Act states that if the commission finds that the complaint has no prima facie case, then it can dismiss the complaint along with the cost, if necessary.

In *Competition Commission of India v Steel Authority of India and Anr.*,¹⁸ the Supreme Court observed that the commission only after satisfying itself with the existence of a prima facie case shall probe into the matter for further investigation. However, if there is no prima facie case, then the commission can close the matter. Court also noted that the functions of the CCI are inquisitorial, regulatory, and adjudicatory in nature.

Supreme Court in the *Samir Agrawal*¹⁹ case highly relied upon Section 45 of the Act to act as a deterrent against mala fide, reckless information. Supreme Court noted that the hefty penalty of Rs.1 crore along with the other costs will keep in check such frivolous cases.

¹⁶ *L.H Hiranandani Hospital v Competition Commission of India* (2012) Case No. 39/2012

¹⁷ Competition Act, 2002, s 45

¹⁸ *Competition Commission of India v Steel Authority of India & Anr.*, (2010) Civil Appeal No. 7779/2010

¹⁹ *Samir Agrawal* (n)

LEGAL CONTROVERSY

The position regarding the locus standi of any third person to file information before CCI was somewhat settled through the judicial pronouncements, However, a controversy arose when NCLAT stepped into this matter and pronounced its judgement on locus standi.

In *Samir Agrawal v Competition Commission of India & Ors.*,²⁰ the question for consideration before the NCLAT was whether the term “person” under Section 19 of the Act would include any natural person to bring information notwithstanding the fact that person has suffered from any legal injury as a consumer by the alleged anti-competitive agreement or abuse of dominant position. In this matter, the informant i.e., Samir Agrawal who was an independent law practitioner filed an information with CCI alleging contravention of section 3 of the Act by Ola and Uber. Wherein, Ola and Uber challenged the locus of the informant as an “aggrieved party” as he was not a consumer who has suffered any personal injury. NCLAT observed that a “person” under section 19(1)(a) necessarily has to be a person whose legal rights have been invaded as a consumer or beneficiary of healthy competitive practice.

The reason given by the Tribunal is that the commission has enough Suo motu powers to inquire into the matter along with the reference made to it by the competent government. To allow any other person would result in unscrupulous cases which may be filed against any entity with the oblique motive of the person. NCLAT then dismissed the appeal preferred by Samir Agrawal stating that he doesn't have locus standi to initiate the present proceedings as he did not bring the case as a consumer of either ola or uber. This judgement of NCLAT has created uncertainty in the jurisprudence of locus standi of informants in competition law. The narrow interpretation with regard to locus standi had limited the rights of the third party to bring information which could have severely impacted the market as well as restricted the commission to eliminate such practice.²¹

²⁰ *Ibid*

²¹ Niti Richhariya, 'Unsettling the Settled: Who Has The Locus Standi To Approach Competition Commission of India? NCLAT Answers' (*Kluwer Competition Law Blog*, 17 July 2020) <<http://competitionlawblog.kluwercompetitionlaw.com/2020/07/17/unsettling-the-settled-who-has-the-locus-standi-to-approach-competition-commission-of-india-nclat-answers/>> accessed 05 April 2022

On Appeal, the Supreme Court in the case of *Samir Agrawal v Competition Commission of India*,²² set aside the decision of NCLAT stating that it has construed a narrow interpretation of section 19 of the Act with regard to locus standi of the Appellant. Supreme Court was considering two main issues regarding locus standi- (i) Whether a person from the public can file information to CCI for the alleged contravention of the Act, (ii) If the person is aggrieved by the decision of CCI, can he prefer an appeal against such decision?²³

The Supreme Court after examining the provisions of the Act and 2009 Regulations held that the term “person” in section 2(l)²⁴ of the Act is a wider term including individuals, HUF, etc., and every artificial juridical person when compared to the term “consumer” in section 2(f)²⁵ of the Act which specifies recognizes a person who has availed goods or services. CCI along with Suo motu powers, can receive information from any person and not merely from the person aggrieved. For the question of appeal before NCLT or Supreme Court after the person is aggrieved by CCI order, the Court held that under Section 53B and Section 53T²⁶, the term “any person” thereby means that ‘all persons’ who bring the information to CCI and is aggrieved by the CCI’s decision are entitled to file an appeal.

Thus, Supreme Court in its decision has settled the law and extended the locus standi to any person including the third party who may be unrelated to the dispute to file information to CCI. In the meantime, before Supreme Court has settled the matter of locus standi, taking note of NCLAT’s order in the Samir Agarwal case, in the case of *Harshita Chawla v WhatsApp and Facebook*,²⁷ the respondents i.e., WhatsApp and Facebook questioned the locus of the informant i.e., Harshita Chawla and alleged that as the informant was a law practitioner and didn’t have any personal or legal injury as a consumer of WhatsApp, she doesn’t have the locus standi to approach the commission and the information needs to be dismissed at the very threshold. However, the commission rejected the argument and held that the preamble of

²² Samir Agrawal (n 5)

²³ Umakanth Varottil, 'Supreme Court Affirms Expansive Locus Standi under Competition Law' (*Indi Corp Law*, 26 December 2020) <<https://indiakorplaw.in/2020/12/supreme-court-affirms-expansive-locus-standi-under-competition-law.html>> accessed 07 April 2022

²⁴ Competition Act, 2002, s 2(1)

²⁵ Competition Act, 2002, s 2(f)

²⁶ Competition Act, 2002, ss 53B, 53T

²⁷ *Harshita Chawla v WhatsApp Inc. and Ors.* (2020) Case No. 15/2020

the Act gives inquisitorial powers to CCI wherein it is expected to carry out investigation to protect the interest of consumers and sustain the market. The fact that information is filed by the person aggrieved doesn't make the case in *personam* rather it continues to be a case in *rem* involving larger market interest.

COMPARISON WITH OTHER COUNTRIES

The locus standi to approach the appropriate jurisdiction for anti-competitive behavior is different in different countries. In *European Union*, there is a mechanism for filing a formal complaint by the complainant for the alleged anti-competitive conduct. Along with the formal complaint mechanism, the European commission allows 'any person' to inform the commission about the anti-competitive conduct via e-mails. Such e-mails can become the source of investigation of the allegation.²⁸ Thus, the EU allows both formal and informal ways of receiving information by allowing any third party to file information.

In the *UK*, The Competition and Market Authority gathers information from various means including research functions, whistleblowers, and other sources to investigate into anti-competitive conduct.

In *Canada*, The Competition Bureau may start the investigation on receipt of information or complaint from consumers, whistle-blowers, etc., about the anti-competitive activities.

In *Hungary*, the Hungarian Competition Authority, and in *Korea*, the Korean Fair Trade Commission give rewards to the informants and whistle-blowers for their indispensable information provided to the authorities regarding cartelization or anti-competitive conduct.²⁹

In *South Africa*, information filed by 'any person' is taken into consideration, and investigation can be based on further such information.

On the other hand, In the *USA*, any private party who is "directly" injured can only bring the claim.³⁰ Section 4 of the Clayton Act authorizes any person who has suffered injury by reason

²⁸ 'Conflicting Views on 'Locus Standi' under the Competition Act, 2002?' (*AZB Partners*, 19 October 2020) <<https://www.azbpartners.com/bank/conflicting-views-on-locus-standi-under-the-competition-act-2002/>> accessed 07 April 2021

²⁹ Sakshi Shairwal & Sampurna Chatterjee, 'Whistle-Blower Informant and CCI - United or Divided?' (*Lexology*, 17 February 2021) <<https://www.lexology.com/library/detail.aspx?g=dd4d4a13-d9f1-4057-bfa9-aa4ad1cb1b6f>> accessed 07 April 2022

of anti-trust actions to file a suit to recover damages. In the *Illinois Brick*³¹ case, the Supreme Court of the US has laid down the principle of “direct antitrust injury” for bringing the claim. Thus, US law allows only the “consumers and competitors” to file a suit for damages which narrows down the standing in private antitrust actions.³² However, several states have passed statutes allowing the “indirect purchasers” to sue by rejecting the principles laid down in *Illinois Brick’s* case.

In **Japan**, any person who suffered damage is only entitled to bring an action under the Antimonopoly Act. Even indirect purchasers will have locus to file a suit if it suffers damages.

In **Brazil**, any person who is directly or indirectly injured by anticompetitive conduct has the locus standi to sue. However, actual injury to the plaintiff is essential for bringing an action.

Thus, the Locus of the Third party to file information/complaint differs from one jurisdiction to another. Mainly because in the U.S, the anti-trust law provides criminal conviction as opposed to India where it is civil in nature. In other countries where ‘direct legal injury’ is essential, the competition law follows an adversarial system whereas, in India, CCI is empowered with inquisitorial powers.

CONCLUSION

The Supreme Court has settled the question of the locus of the informant and allowed “any person” who may or may not be personally affected by the anti-competitive conduct of the firms in the market to file information with CCI. Offences like cartelization are generally secretive in nature and CCI may not be aware of such behavior for taking Suo motu actions. It is the gravity of the information regarding contravention of the Act which was looked into rather than the locus of the informant. Thus, by allowing any person including a third party who is aware of the anti-competitive behavior to bring it to the notice of CCI, the market can be regulated efficiently. However, such wide expansion of locus standi to any person may open the floodgates to a multiplicity of proceedings. The CCI may be over-burdened with

³⁰ *Blue Shield of Va. v McCready* (1982) 457 U.S. 465

³¹ *Illinois Brick Co. v Illinois* [1977] 97 S.Ct. 2061

³² C Douglas Floyd, ‘Antitrust Victims without Antitrust Remedies: The Narrowing of Standing in Private Antitrust Actions’ (1997) 82 (1) *Minnesota Law Review*, 73

irrelevant information filed by parties whose motive may be malafide to harass entities in the market. By expanding the locus standi, there are possibilities of frivolous, vexatious information filed with CCI which may consume the time and resources of CCI. Although CCI has the right to dismiss the complaint if it is prima facie immaterial, it does not deter the informants from filing frivolous complaints.

Alternatively, as compared with other jurisdictions, an informal approach can be taken wherein information may be gathered from any party via emails, messages, posts, etc., and then CCI can take Suo moto action upon receiving the information. The informant instead of filing a formal complaint just brings the information of the anti-competitive conduct to the notice of CCI and that information will serve as the first evidence to probe into the alleged violation by CCI. As of now, in India, the locus standi has been extended to a third party as well who has no personal interest in the complaint. It will now depend upon the CCI to handle such cases in an efficient manner. The CCI must be cautious enough to penalize the informants who file frivolous and vexatious information so as to deter the general public from filing false information.