COMPETITION COMMISSION OF INDIA

Case no. 09 of 2011

Dated 08 May 2012

UTV Software Communications Limited Mumbai : Informant

Against

Motion Pictures Association, Delhi : Opposite Party

As Per R. Prasad (dissenting)

Order under Section 27 of the Competition Act

The majority of the Members of the Commission have passed an order stating that Motion Pictures Association, Delhi which is opposite party (OP) in this case in not an enterprise as defined in Section 2(h) of the Competition Act. The same issue came up in the case of Reliance Big Entertainment Ltd. vs. the Opposite Parties in case no. 25 of 2010. My findings in that case are reproduced as under –

> *Before taking the analysis further, it is necessary to discuss the legal issues in this case. Enterprise has been defined in the Competition Act under* ***Section 2 (h)*** *as under:-*
>
> > *"enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control or articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or at a different place or at different places, but does not include*

any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

The important words in this Section are person and activity. Person has been defined in **Section 2(l)** as under:-

> ""person includes:- (i) an Individual; (ii) a Hindu undivided family; (iii) a company; (iv) a firm; (v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India; (vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in Section 617 of the Companies Act, 1956; (vii) anybody corporate incorporated by or under the laws of a country outside India; (viii) a co-operative society registered under any law relating to cooperative societies; (ix) a local authority; (x) every artificial juridical person, not falling within any of the preceding sub-clauses;"

Person includes an association of person. Therefore, a registered society has to be considered as an association of persons whether incorporated or not. But if the society is registered under the Cooperative Society Act has to be treated separately. "Activity" has been defined in the **explanation (a) to Section 2(h)** of the Act as follows:-

> Explanation - For the purposes of this clause, -
>
> (a) "activity" includes profession or occupation;

The definition is inclusive and has therefore has to be given a very wide meaning. The words used in Section 2(h) of the Act is "any activity" relating to carrying on of the activities of business. It does not mean that the enterprise or the person should carry on any business. "Any activity" is qualified by relating to the carrying out

of business. Therefore, a policy guideline, a regulation, a legal activity or any act which effects the carrying on of business is covered. It is evident from the fact that a government department is an enterprise according to the definition but a government department does not carry on any business. Therefore it is not necessary that a person should be carrying out any business to qualify as an enterprise under the Competition Act. This view is also confirmed by a decision of the Delhi High Court in the case of Hemant Sharma vs. Chess Federation, Writ Petition (Civil) No. 5770 of 2011. This decision of the single Member was confirmed by the Division Bench by its order LPA No. 972 of 2011 dt. 22.11.2011. Therefore the associations are covered under the definition of enterprise under the Competition Act.

Another issue to be considered is that when an entity is not an enterprise then it cannot also be a person because enterprise includes a person. If a person is not an enterprise, then under Section 27 no penalty or directions can be given.

2. The next issue is whether the association is hit by the provisions of Section 3 of the Competition Act. Section 3 is under Chapter II of the Act which deals with Prohibition of certain agreements, abuse of dominant position and regulation of Combinations. Under this chapter there is a Prohibition of agreements and the heading of Section 3 is anticompetitive agreements. Under Section 3(1) of the Act no enterprise / person or an association of enterprise / person shall enter into an agreement in respect of business activities, acquisition and control of goods and services which is likely to cause or causes appreciable adverse effect on competition inside India. Section 3(2) envisages that such agreements are void. Section 3(3) is a deeming provision and it envisages a rebuttable presumption.

3. Under Section 3(3) of the Act, three situations are covered. The first is any agreement between enterprises/association of enterprises or person/association of persons. The second is practice carried out and the third is "decision taken". Thus, by the deeming provision, agreement, practices carried out and decisions taken are placed on par with agreements and all these three items have to be treated as anticompetitive agreements. Practice carried on and decision taken has to be by an association of enterprises or by an association of persons. For all the three situations, one condition is that the enterprises/person and their associations should be engaged in identical or similar trade of goods or services. The persons/ enterprises and their associations would be hit by the provisions if they

(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.

It is presumed that if these facts exist they would be presumed to cause appreciable adverse effect on competition. This means that if the presumption is involved, on the strength of the legal provision, then the factors mentioned in Section 19(3) of the Act are not required to be looked into. But if the enterprises discharge the onus cast by the Section then the Commission would have to examine whether the factors mentioned in Section 19(3) would apply to the facts of the case.

4. Before proceeding with this case, it is necessary to examine as to how agreement and practice have been defined in the Act. Agreement has been defined in **Section 2(b)** as under:-

> *"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.*

It is also an inclusive definition and therefore a wide interpretation has to be given to the provisions. The definition encompasses an arrangement or an understanding or action in concert. Thus the static and dynamic elements of agreement are taken into account. <u>But an agreement always envisages more than one person or an enterprise.</u>

5. As far as practice is concerned it is defined as follows:-

> *"Practice" has been defined in **Section 2(m)** of the Act and includes any practice relating to the carrying on of any trade by a person or an enterprise.*

It is again an inclusive definition and has to be given a wide interpretation and the practice has to be related to any activity relating to carrying on of a trade by a person or an enterprise.

6. A perusal of the above discussion would show that the first issue to be decided is whether an association of exhibitors and distributors have to be treated as a separate person or as a body of enterprises. This association was incorporated as a Section 25 company. In fact this company worked as an association of various exhibitors and distributors

as well as producers. The agreement if any was entered into between the exhibitors or the distributors at the time of the forming of the association which in this case was many years ago. If such a situation is accepted then any share purchase of a limited company for a particular purpose would amount to an agreement for the purposes of this Act. Similarly by becoming a member of society the agreement entered into years ago for becoming a member would have to be treated as an agreement within this Act. A decision taken or practices carried on by this association of enterprises or persons according to the majority view would be hit by the provisions of section 3(3) of the Act. In my view once a person or an enterprise subscribes to the shares of a company or becomes a member of a society then the entity which is found is a company or a society and this entity would be a different body from the association of persons or enterprises. In such a case it would be incorrect to hold that the incorporated company or the society is an association of enterprises. This may be true in some jurisdictions where a person is not defined in the Competition Act but not in India where a person is defined in the Act. In this particular case there was no agreement and as I have already held that the association which was formed a different legal entity from the association of persons and as there was no agreement, Section 3(3) of the Act was not attracted. There is no doubt that large numbers of persons were involved in the association but as the constituted company was a legal entity, the entity could not be treated as an association of persons. As one entity cannot enter into an agreement with self, there was no agreement. As far as practice and decision taken are concerned, it is necessary that the practice or the decision taken should be by an association of enterprises. As there was only one entity in an area, there was an absence of an association of enterprises. Therefore the provisions of section 3 would not be applicable to the facts of the case. I therefore do not agree with the majority view that an association was in existence. Further in the majority view as no new entity was created by the

association of enterprises, no penalty or a direction could be given to this entity.

7. The behaviour of the OP has to be examined with reference to Section 4 of the Competition Act. I have already discussed above that it is not necessary for an enterprise to carry on business and therefore the relevant society or company could be an enterprise which could be covered under Section 4 of the Act. Under Section 4 of the Act in the explanation of the said section dominant position has been defined as under

Explanation:- For the purposes of this section, the expression –

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to –

(i) Operate independently of competitive forces prevailing in the relevant market; or

(ii) Affect its competitors or consumers or the relevant market in its favour.

In the area which has been accepted by the association as its area of operation, most of the exhibitors and distributors operating in the area are members of the society or the company as the case may be. The enterprise which is society or a company is able to operate independently of the competitive forces prevailing in the relevant market. Thus, in the area of its operation, the said associations are dominant. The factors mentioned in Section 19(4) also need to be looked into as to whether the enterprises are dominant with reference to the factors. These enterprises being companies and societies dealing mainly with regulation do not have a market share, size, resources and economic power. There is no question of vertical integration or countervailing buying power, social obligations and social cost or a market structure and the size of market does not require to be seen. But even then they are in position to create

appreciable adverse effect of competition. The consumers in this case are dependent on the enterprises by the virtue of the fact that the different enterprises operating in this business in the area accept the diktat of the societies and the companies and therefore the consumers are totally dependent on these societies and companies. Further the association i.e. the societies and the companies have acquired dominant position as defined in Section 19(4)(g) of the Act under the clause 'otherwise'. These enterprises have acquired this position of dominance because the other enterprises who are members of the enterprise / association of society have given this power to the enterprise. No other association can be formed for the benefit of the different exhibitors and distributors because the distributors and exhibitors would not agree to form to other association. Therefore there is an entry barrier as far as the creation of another association is concerned. The provisions of Section 19(4)(h) are also attracted. Therefore the enterprises have to be treated as dominant players in their field of operation.

8. The next issue to be defined is the relevant market with reference to the relevant product market or the relevant geographical market or with reference to both the markets. In this case the relevant product market would be the exhibition or distribution of films in the geographical area in which those associations operated and the relevant market would be the service of distribution or exhibitors of films. The geographical market would be the area for which the societies or the companies were created.

9. It is now necessary to consider the abuse of dominant position by the OP in its area of operation. The section under which the OP has indulged in abuse of the dominant position is Section 4(2)(c) of the Act. By boycotting the producers for different reasons it has indulged in denial of market access to the producers. They have also hit by the provisions of Section 4(2)(b(i) of the Act as the provision of services is restricted.

10. The OP in this case has violated Section 4(2)(b)(i) of the Competition Act. The role of the OP is anticompetitive and against the spirit of competition. As penalty has been imposed on the OP in case nos. 25, 52 & 56 of 2010. No further penalty is required to be levied. Cease and desist order issued in case nos. 25 of 2010, 52 and 56 of 2010 would continue in this case.

11. The Secretary is directed to serve a copy of the order to the concerned parties.

Sd/-
(R. Prasad)
Member, CCI

Certified True Copy

08/05/2012

S.P. GAHLAUT
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New Delhi