

COMPETITION COMMISSION OF INDIA

Case No. 17/2011

Date 24 April, 2012

Mrs. Manju Tharad, Proprietress
M/s. Manoranjan Films, Kolkata ... Informant

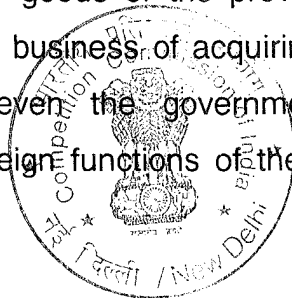
1. Eastern India Motion Pictures Assn.
(EIMPA), Kolkata.
2. The Censor Board of Film Certification
Kolkata ... Opposite Parties

Order

I have had the advantage of going through the judgement of Member (R) and other Members in this case. Except Member (R), other Members have come to the conclusion that Eastern India Motion Pictures Association was not an enterprise within the meaning of Section 2(h) and its conduct cannot be examined under section 4 of the Act since it is only the conduct of an enterprise or a group of enterprises which can be subject matter of examination of the Commission.

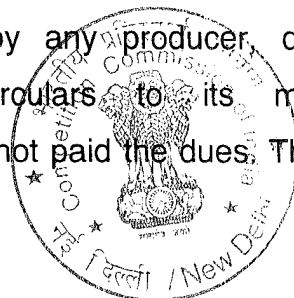
I respectfully disagree with the conclusions of the majority of Members for the reasons given below :-

An enterprise is defined in section 2(h) of the Competition act. In order to be an enterprise, the entity has to be engaged in an economic activity relating to production, storage, supply, distribution, acquisition or control of articles or goods or the provision of services of any kind or investment or in the business of acquiring holding/under-writing etc. etc. In the definition, even the government departments are included. However, the sovereign functions of the government including activities



relating to Atomic Energy, Currency, Defence and Space have been included. 'Activity' has been further defined as inclusive of profession or occupation. Section 2(l) defines a person. The definition is inclusive and it includes an association of persons or body of individuals whether incorporated or not and whether in India or outside India. In order to make definition vast other artificial juridical person not falling within different sub-clauses of 2(l) has been included by clause 2(l)(ix).

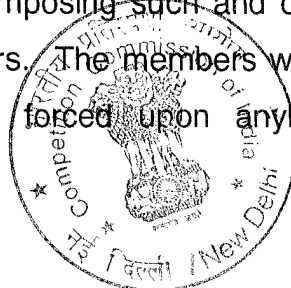
There is no dispute about the fact that all members of the respondent Association are engaged in one or the other economic activity, either of production, distribution or exhibition of the films. There is no dispute that the respondent Association is not one of its kind but there are several similar associations active in different parts of the country and the Commission has been receiving information about alleged anti competitive activities and abuse of their dominant position. These associations have their rules & regulations and these rules & regulations impose several restrictions on its members including restriction not to deal with non members and to do business with only members who are registered with the Association. This provision in the rules practically makes it impossible for a non member to carry business in the line of film production, distribution & exhibition. The rules of these Associations provide for compulsory registration of a film with concerned association and specify that no member of the association shall distribute, supply or screen a movie unless it is registered with the Association. These restrictions are applicable in respect of all films in whatever language they may be. The Articles of association provide for imposition of different penalties against the members who violate the rules. These associations also act as dues recovery medium and in all such cases where alleged dues of a member have not been paid by any producer, distributor or exhibitor, the Association issues circulars to its members informing which distributor/producer has not paid the dues. This is considered a sufficient



signal to the Members not to exhibit his film or not to distribute his film.

The Association also imposes conditions regarding screening of the film on satellite and DTH and provide that for a certain period, the film would not be shown on DTH or through satellite. It is irrespective of the fact whether the film becomes a flop on cinema halls or it is a hit film. These associations require their members to sign producer distributor certificate and an 'acquiring' form for the purpose of registration of films providing therein the hold back period (for which the film cannot be released at other medias). Thus in nutshell, the Associations command and control the entire filed of exhibition and distribution of the films in different areas and without being a member and without abiding by the dictates of the association, no one can do the business in production, distribution and exhibition of the films.

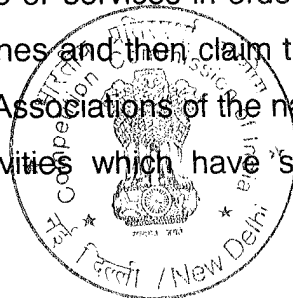
In the case in hand as per DG report, the informant had signed a licence agreement in respect of a foreign film for exhibition in India. This film was not produced in India nor it was produced by informant. The informant applied for title registration with respondent association. Informant also made an application for 'certification' with respondent No. 2. However, there it wrongfully gave the name of producer as Syed Vahidu Hussain. The rules of the Association provided that it shall not enetertain any application for registration of distribution rights in respect of a movie which is dubbed in any language of Eastern India namely Bengali, Assamese, Oriya, Manipuri, Bhojpuri, Nepali etc. originally produced outside eastern circuit in other languages, except in case of an already registered dubbed movie whose distribution rights have expired by efflux of time. Due to this condition, the informant's licenced movie dubbed in Bangla language was not permitted to be exhibited. Respondent's plea had been that it was imposing such and other restrictions to protect the interests of its members. The members were free to leave membership. Membership was not forced upon anybody. It also pleaded that



registration of dubbed films or the films not produced within Eastern Region was denied to protect the interests of local artists and to protect Bengali film industry. According to respondent No. 1, Hindi and south Indian language films have much wider market share, as a result these films absorb higher production costs and provide outdoor shooting at exotic locations engaging services of various technical persons which regional films like Bengali films cannot afford. Thus to protect Bengali film industry & Bengali artists, the respondent association was not allowing films of other languages dubbed in Bengali language being shown in Eastern Region by its members.

In order to come to a conclusion whether respondent association was an enterprise or not, one has to find out whether the activities of respondent No.1 and other similar associations could be called economic activities or not.

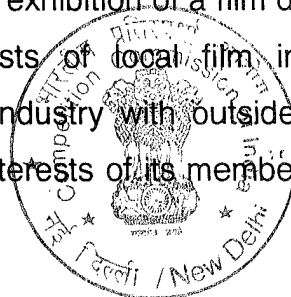
For being engaged in an economic activity, it is not necessary that one should have profit motive. An organization can be engaged in an economic activity without a profit motive or may not have an economic performance. That would not mean that the activity of the organization was not an economic activity. Where an organization of different enterprises who are undeniably engaged in economic activities controls the reins of its members and decides how the members will conduct themselves in the economic activities, I consider the association of such members itself stands indulged in economic activities. It is just like the members of a cartel coming together to decide what they will produce, how much they will produce & when they will produce and at what cost they will sell their produce or services in order to ensure that the markets act according to their wishes and then claim that they were not having an economic purpose. The Associations of the nature of OP1 in this case are indulging in various activities which have serious and deep economic



results. These associations ensure recovery of dues of their members, can block the screening of films thereby controlling economic activity of distribution, can deprive the public of viewing of any good film giving social message on the ground of protecting business of local film industry by simply circulating a letter to their members and they also deprive the population of a particular region from watching the films of other languages dubbed in their language.

Even if such associations are not engaged in trade and economic activities in conventional form, but the activity in which they are engaged cannot be said to be a non economic activity. These associations act in the benefit of their members and charge membership fee from members. Even if they are registered as a Company under section 25, they are to be considered as undertakings involved in economic activities since all these associations act in commercial interest of their members. Protecting economic interests of the members is itself an economic activity. An Association entrusted with the operation of services of general economic interests of its members, even if it is not revenue producing, is definitely engaged in the activity which is an economic activity. They are like trade associations and provide a forum for competitors in film industry so as to decide the matters of mutual interest. And since they represent the trade interests of their members, they per se are engaged in economic activity.

The Commission has to apply a functional approach while considering the issue of economic activity and an association of undertakings is to be considered in the same way as an individual undertaking which is a member of the Association. When such an association does not allow exhibition of a film dubbed in local language so as to protect the interests of local film industry, it effectively kills competition of local film industry with outside film industry and thereby promotes the economic interests of its members at the cost of free trade,



competition and consumer interests. In fact the challenge before the Competition Commission is to uncover such covert operations and to condemn the behaviour of such associations which results into anti competitive actions. If the Articles of Association, the conditions of membership & the decisions taken by the Association of undertakings and their concerted tactics affect free trade between members and have the effect of preventing or restricting consumer interest and distort the competition within the market, such associations of undertaking have to be considered involved in economic activity and be hauled up for anti competitive acts.

It is also to be kept in mind that refusal to supply articles or services or making supplies conditional or supply only on discriminatory and unfair conditions falls within the purview of Competition Act. If an Association by its action and by circulating letters to its members restricts the supply of films or denies exhibition of film into an area, this would definitely be an economic activity and would be concern for the Competition Commission. One cannot but hold that such practices are likely to affect the structure of market and weaken competition. The members whose films are denied theaters and denied exhibition are deprived of the fruits of substantial investment and this denial by the Association has to be considered nothing but an economic activity.

I am, therefore, of the opinion that the respondent and such like other Associations are to be categorized as enterprises within the meaning of section 2(h).

The next question which arises is whether the opposite party 1 was in a dominant position. Dominance has been defined in section 4(2) of the Act as under :-



Abuse of dominant position

“4.(2)

Explanation - For the purpose 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;

.....”

There is no dispute about the fact that the OP 1 is the only Association of the producers, exhibitors in the geographic area of West Bengal and it has no competitor. The relevant market in this case would be distribution and exhibition of films in the geographic area of West Bengal. Since there is no other competitor and no individual member can practically operate without being a member of the OP 1, OP 1 is definitely in a dominant position having a position of strength in the relevant market. It has no competitor in that area where OP 1 allegedly abused its dominant position.

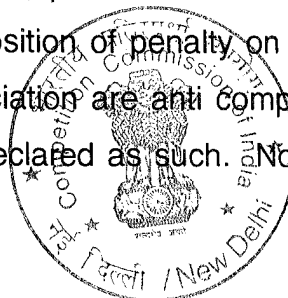
Examples of abuse of dominant position have been given in section 4 sub section 2. Abuse of a dominant position is per se prohibited under section 4. Indulging in practices resulting in denial of market access is one of the grounds of abuse of dominant position. and using dominant position in one relevant market to protect another relevant market is another example of abuse of dominant position. The Associations who are active in the market of dues recovery as well as in the market of



exhibition, use their dominant position in the market of exhibition and distribution of films to protect the market of dues recovery and make it a pre condition that no film will be exhibited unless the dues are paid. This amounts to abuse of dominant position. Printing a condition that no dubbed film of other languages dubbed in Bangla language will be permitted to be exhibited in Eastern region amounts to denial of market access to the films in that area and is definitely an abuse of dominance.

Section 3 of the Competition Act prohibits anti competitive agreements whether horizontal or vertical. Formation of an Association and approval of bye laws by its members amounts to entering into an agreement by the Members inter-se and if the bye laws contain such clauses which are likely to cause appreciable adverse effect on the competition, such clauses shall be void in terms of section 3(2) of the Competition Act and shall not be binding on the members. If the association enforces such clauses against the members or the members inter se enforce such clauses, they shall be liable for action under the Competition act.

The facts in this case disclose that although OP 1 had cancelled the registration but OP 2 did not cancel the certificate of exhibition granted by it to the informant. Despite the restrictive clause, the film could be exhibited by the informant. Therefore, the abuse of dominant position by OP 1 in terms of its clause in the Article of Association, of non exhibition of films dubbed in bangla did not materialize. However, this clause and other similar clauses by which OP 1 restricts the members not to deal with non members, make it compulsory for producers to register each film with the association before release, puts restrictions regarding hold back period and rules regarding imposition of penalty on members who do not follow the dictates of the Association are anti competitive, violative of section 3 and thus void and are declared as such. No member shall be bound by



such clauses and the Association is directed to remove these clauses and similar other clauses from its Memorandum of Association and inform the members accordingly.

Secretary is directed to inform all concerned accordingly.

Sd/-
Member (D)

Certified True Copy

