7
COMPETITION LAW

*Vinod Dixit**

I INTRODUCTION

SINCE 1990'S, every Indian government, without any doubt, successfully or unsuccessfully is perusing free market economic policies. In the free market policies corporations, national and multinationals, play crucial role in economic development. But as a large section of the people lives below poverty line, even the free market government has to do something for them even if it merely symbolic. In the free market economy welfare state cannot be dismantled completely. How much of welfare state will coexists, though in a subordinate capacity will depend on the relative development of the society. Though the Competition Act, 2002 the Act is avowedly for the protection of the consumer, but what remains unstated is the fact that the interest of the corporates is paramount in a free market economy. This is more so in an under developed economy. It is a well known fact that investing nations often threaten the host nation that they will not invest if the host nation pursues strict policies in terms of environment, fair policies for the consumers and competition. When we analyse the functioning of the competition commission of India, year after year, it becomes absolutely clear that need to develop the market has primacy over the interest of the consumer.

II THE COMPETION COMMISSION OF INDIA-TRENDS

Some of the indices to support the afore mentioned inferences are the following: -

(a) The Competition Commission of India (CCI) has superimposed the requirement of the Contract Act, 1872 that in order to constitute a contract meeting of mind must be proved, on the definition of agreement under the Act though the definition under the Act does not warrant such superimposition. This has resulted in extreme difficulty in proving anti-competition agreements. The corporates, assisted by a battery of experts do not leave such a proof.

(b) One such area is the cases of "follow the leader" wherein every enterprise follow the anticompetitive behaviour of the other without even consulting

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* Former Professor of Law University of Delhi.

the other formally or informally. Though none of them is dominant, collectively they act independent of the market forces, but no action can be taken against them, as there is no proof of meeting of mind.

(c) The CCI has also restricted the scope of abuse of dominant position when it consistently refuses to endorse the concept of 'captive consumer' though R. Prasad, one of the members of the CCI, invited the Commission to subscribe to this view.

III RELEVANT MARKET

Whether an enterprise is dominant or not is dependent on how the relevant market is defined. *V. Senthilnathan* v. *The United India Insurance Company and M/S Meditak (TPA) Services Ltd*.[1] is a case on the definition of relevant market. M/S New India Assurance Co. New Delhi entered into a group healthcare insurance with information provider (IP) and issued Cancard for this purpose. In the year 2005-06 business was transferred from United India Assurance to OP1. Prior to 2005-06, M/S Medi Asst India (P) Ltd. Bangalore was the third party administrator (TPA). When the business was transferred to opposite party OP1, they appointed OP2 their TPA. The institution of TPA was introduced in 2001 by the Insurance Regulatory and Development Authority (IRDA). But the insurer was given the discretion to appoint TPA as well as to decide the terms of the agreement.

The agreement between OP1 and OP2 also provided for the responsibility of OP2 to collect policies data for period prior to 2005-2006. IP alleges that data beneficial to IP was not collected by OP2. The biased collection of data resulted in determination of current status without taking into consideration past insurance policies of paid claim and inclusion and exclusion of members of family of the insured. IP alleged that OP1 was dominant and it abused its dominant position. IP also alleged violation of section 3. But the CCI reached to the conclusion that the allegation of IP that OP1 was dominant is misconceived and there was also no violation of section 3.

CCI referring to sections 2(r), 2(s), 2(t) and 19(5), held that relevant market consists of substitutable and interchangeable services within a geographical area where the conditions are homogeneous. CCI says there is hardly any difference between group and individual insurance as far as the terms of contract are concerned. Therefore, the relevant market is health care insurance offered by insurance companies in India. As OP1 controls only 15% of health care insurance in India, OP1 is not dominant. According to CCI, OP2 is also not dominant as there are 31 TPAs. CCI also did not agree that there was any violation of section 3, as various anti-competitive terms of the agreement between OP1 and OP2 have not been followed by OP2.

It may be argued that instead IP's allegation of abuse of dominant position being misconceived, CCI's denial of dominance may be misconceived. Had the CCI not defined the relevant market so broadly, the dominance could have been

1 2013 Comp LR 698 (CCI).

proved. CCI did not address the allegation of IP that OP2 did not take into account inclusion and exclusion of members of family in past paid claim insurance policies. Contrary to what is decided by CCI, the relevant market for IP was very narrow. Prior to 2005-2006, when Cancard was offered to IP by New India Insurance, the terms were different from what was later offered by United India Insurance. Without discussing the terms, CCI made an uncorroborated assertion that there is no difference between group and individual insurance and that the collection of data by OP2 was biased. It is a well known fact that with the lapse of time and advancement of age, terms become more onerous and costly. When insurance was transferred from New India to United India IP was a captive consumer and as the terms were changed it was the duty of CCI to under take a detailed examination as whether the new terms were more onerous to the IP.

Sponge Iron Manufacturers Association v. *National Mineral Development Corporation*[2] is also a case on the concept of relevant market (RM). IP alleged abuse of dominant position by OP as it charged unfair and discriminatory price for iron ores supplied by OP. In order to determine RM , IP divided the iron ore market into two segments, ores containing more than 60% of Fe content and ores containing less than 60% of Fe. IP contended that ores constitute two RMs as ores containing less than 60% of Fe cannot be used for manufacturing steal. With regard to geographic market, the informant stated that the main producers of iron ore having more than 60% Fe content were the states of Karnataka, Chhattisgarh, Odisha and Jharkhand. Since Goa produced low grade iron ore (usually for export), Goa be excluded from the relevant geographic market definition. Therefore, the relevant market proposed by the informant is 'non-captive iron ore with more than 60% content excluding exports in Indian States except Goa'. Within this relevant market, India produced 162 million tons Iron ore (non-captive) during the year 2010-11 out of which it exported 97.1 million tons, leaving a total of 64.9 million tons iron ore to be sold to domestic steel industry by merchant miners. OP1 exported 2.56 million tons iron ore during year 2010-11 and sold 23.75 million tons in the domestic market. Thus, the total market share of OP 1 was 36.5% out of the total 64.9 million tons sold by merchant miners to steel producers in India. Similarly in the financial year 2011-12, iron ore production in India was 121.7 million tons (Non-captive) out of which 60 million tons was exported, leaving only 61.7 million tons to be sold to the domestic steel producers. OP 1 exported 0.38 million tons of iron ore in 2011-12 and sold 26.91 million tons in domestic market. Thus, the total market share of OP 1, in the relevant market proposed by the informant, increased to 43.61% out of the total 61.7 million tons sold by merchant miners to steel producers in India in 2011-12. On the basis of this data, the informant alleged that OP 1 was in a dominant position in the market for non-captive iron ore production in India (except Goa) which resulted into abusive practices being adopted by OP 1.

However CCI did not agree with the definition of RM given by IP. There is only one RM according to CCI. As ores containing less than 60% of Fe can be

2 Comp LR 0265 (CCI) 2013.

used for making steal by incurring a little extra cost, therefore the RM is 'iron ore for domestic market in India.' In this market the share of OP is only16% in 2011-2012. It is not dominant. But interestingly CCI treated incurring of extra cost in making steal with ores containing content less than 60%, as if it is of no consequence that, is the issue of product interchangeabiliy was not taken into account by CCI. The question, whether after incurring an extra cost, IP would have remained competitive, was not discussed by CCI. In our view the determination of the issue of competitiveness would have crucial in defining RM.

The next case relates to the sport of hockey. This case primarily relates to abuse of dominant position. The case will show that whether there is abuse of dominant position not only depends on how relevant market is defined but also on the sport value as understood by the decision maker as to what is the relation between competition concerns and integrity of the sport.

IV SPORTS AND COMPETITION LAW

Two important cases were decided by CCI relating to competitive sports organised by sport bodies. The first relates to hockey and the other to cricket. The first is *Dhanraj Pillay* v. *M/s Hockey India*.[3] IPs are six hockey players; Dhanraj Pillay is the first among them. Hockey India (HI) OP1 is national federation of hockey in India and is affiliated to Indian Olympic Association (IOC), Asian Hockey Federation (AHF) and International Hockey Federation (FIH). FIH is the international governing body for hockey and is recognised by IOC. FIH is responsible for integrity and development of hockey in the world. Indian Hockey Federation (IHF) is the national federation for the sport of hockey, and is affiliated to IOC but not to AHF and FIH. IHF is co-organiser of World Series Hockey League (WSH) along with Nimbus Sports. Nimbus Sport is a subsidiary of Nimbus Communications, a full time sports management and marketing company.

In December 10, 2010, IHF and Nimbus announced WHS, on franchise model. The tournament would be played between 8 city based teams consisting of Indian and International players. Immediately thereafter, FIH made regulations relating to sanctioned and unsanctioned events. FIH and HI made statements prohibiting players from playing in WHS league as it was an unsanctioned event. HI made code of conduct (COC), prohibiting players from playing in WHS or any other unsanctioned event.

A month before the start of the events IPs moved the CCI. They made the following allegations. (1) HI misused its regulatory powers to promote its own league which resulted in denial of market access to WHS. This amounts to violation of section 4 (2) (c). (2) HI is dominant in organising international hockey events in India. It has abused its dominant position in conducting domestic event in India in contravention of section 4 (2) (e) (3) COC agreements by HI with players amount to exclusive supply agreement in contravention of section 3(4).

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3 2013 Comp LR 0543 (CCI).

The objection raised by HI was with regard to jurisdiction. As it was a regulatory body and is not a profit making commercial organisation, it is not an enterprise. The CCI did not agree with this contention on grounds that HI also engages in commercial activities (such as broadcasting rights, advertising rights, sale of tickets). After citing US and EU cases and CCI decision in Board of Control for Cricket in India (BCCI) case,[4] CCI decided that it is a person and an enterprise.

In these sports, CCI said there are two competing values. (a) Commercialisation of sports is a reality and players play for money. (b) But at the same time there exist non profit institutional forms for promoting values such as team spirit, solidarity and fair play. Sports are organised as pyramid structure to regulate the sport and to ensure team spirit solidarity and fair play. Some of these regulatory measures appear to be against competition concerns. Restrictions against free movement must be balanced against legitimate sport interests to maintain its integrity.

In order to decide abuse of dominant position CCI defined the relevant market. The director general (DG) had defined the relevant market to include conducting and governing activities, national and international hockey. (IP wanted inclusion only of international hockey). However, CCI commented that governing cannot be the part of the market but only of the dominance.

CCI also defined sanctioned and unsanctioned events on the basis of the definition given in the regulations made by FIH and HI. An event is sanctioned if it is organised or sanctioned by national association, open to teams affiliated to national association, and held in the territory of national association.

There are three types of hockey. (a) International is played between the teams of member states. (b) National, is played between the teams of a national association. (c) Private professional leagues. The last one is, according to CCI, is different as it cannot be substituted by the first two. CCI defined relevant market as the market for private professional league in India.

HI is not only dominant in private professional league but a monopoly as well. HI is also a monopoly in the aforementioned national market. It could also have been a case of using dominance in one market to enter into the other. Dominance in national hockey can be used to enter into the private professional market, but CCI did not find any abuse of dominance.

CCI maintained that FIH regulations relating to sanctioned and unsanctioned events do not amount to abuse because they are aimed at maintaining calendar of activities, not cutting across the interest of member states, and preserving the integrity of the sport. According to CCI there must be proportionality between competition concerns and need to preserve integrity of the sport. The proportionality test depends on the actual application of the regulations. As WSH did not apply

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for being sanctioned as stipulated by the regulations, the question of abuse cannot be answered in a hypothetical situation. Though IPs alleged that non consideration of IPs for London and Malaysia was abuse of dominant position, HI denied the allegation and stated that they were not selected because they did not participate in training camp. Because of the aforesaid reasons the allegation of denial of market access fails. CCI found that there was no violation of section 4 (2) (c).

CCI also did not find violation of section 4 (2) (e) that is, HI did not use dominance in one market to enter into another market. On grounds of proportionality this ground also fails. The allegation by the IPs that sections 3(4) and 4(2) (c) have been violated because under the COC the players were denied free movement, was also rejected on grounds that relation between players and HI is vertical and the players were sellers and HI is a buyer. The requirement of NOC for playing elsewhere is necessary for efficiency

One of the members of CCI, Mr. R. Prasad, did not agree with the majority opinion. He prefers to give a dissent. Regulations made by HIF stipulate that they will apply prospectively after 31st March 2011 that is sports played after that date. According to IPs, HI proposed to organise its own league in 2013, with a view to foreclosing WSH. It was argued by HI that relevant market is not international hockey in India but RM should be determined on the basis of supply side substitutability. As market for international hockey is different from domestic hockey, international players are not substitutable by domestic players. A player can display his talents effectively only in international hockey. But it is equally true that by not sanctioning WSH, HI made it commercially unviable, and consequently players will loose money. It was further argued by IHF that it was original national association, but in 2008 it was disaffiliated by FIH and HI was recognised as national association. However IHF continues to be recognised by IOA.

Both HI and IFH provide service as they entertain people, and hence they both are enterprises. If it is necessary to add commercial qualification, they both grant sponsorship and television rights. FIH's argument that CCI lacks jurisdiction because it is located outside India in Switzerland was rejected by Prasad. He maintains that CCI, in view of section 32, has jurisdiction if an entity situated outside India, effects competition in India. Prasad also maintains that in accordance with the provisions of section 18 it is the duty of the CCI to eliminate practices having adverse effect on competition.

In order to invalidate the COC, Prasad invokes the theory that an agreement violating fundamental rights is void. The supreme court of India in Brijonath Gangoli case[5], held that an agreement, violating any of the fundamental rights, is void. Prasad says that if COC violates the right to carry on a profession it must be declared void. Prohibiting players from playing in WSH violates the fundamental

5 AIR 1986 SC 157.

right to carry on any profession. It also amounts to entry barrier and foreclosure of competition, thus violating section 4 (2) (c). Categorisation of the sport into sanctioned and unsanctioned games is also an attempt to acquire monopoly by HI. HI is dominant in international hockey played in India and it is using that dominance to enter into the market of domestic hockey in India, thus violating s. 4 (2) (e).

Prasad orders to modify COC. The terms relating to sanctioned and unsanctioned events must be deleted, and no penalty on players participating in unsanctioned sports should be imposed. Prasad also ordered that FIH shall not penalise national associations participating in unsanctioned sports. Prasad also imposed a penalty of Rs. 25 lakhs on HI at the rate of 5% of the average revenue of the last 3 years.

However Prasad's order being a minority order will remain unenforceable. If we compare the minority and majority orders we reach to an interesting conclusion. Ideologies can also be a source of law. The difference between two orders depends on different evaluation of balance between integrity of the sport and competition concerns. According to the majority to preserve integrity of the sport competition concerns may be pushed to the background. However Prasad thinks differently.

If motives and intentions can be inferred from conduct it is abundantly apparent that when HI came to know that IFH is organising private professional league, only then the idea of COC and organising a parallel league was mooted. The idea of a parallel league makes it clear that the whole exercise was aimed at foreclosing the entry of WSH in the market.

The facts in *Surinder Singh Barni* v. *Board of Control for Cricket in India*[6] are almost similar to the preceding case but the decisions in these cases are different. The difference in decision is because of availability or non availability of some technical evidence, but in both the cases there was attempt to create entry barriers against a competitor.

IP is a fan of cricket and alleges violation of the Competition Act, 2002. BCCI is registered society with the aim of controlling cricket in India. It is affiliated to International Cricket Council (ICC). ICC has three types of members. (a) Full members: National or teams of a geographical area playing test cricket. (b) Associate members: Do not qualify to be full members but cricket is established in their territory. (c) Affiliate members: Nations or territories where cricket is played according to ICC rules.

Allegations were levelled by the IP that in the 20-20 premier league and professional games irregularities were committed in grant of franchise, media rights, and sponsorship rights.

CCI first considered the issue whether BCCI is an enterprise. BCCI organises two types of cricket. (a) First class and international, including domestic first class

6 2013 CompLR 297 (CCI).

cricket, international test matches, one day internationals and 20-20 matches. (b) Private professional leagues on franchisee basis primarily for commercial purposes. BCCI does not have any statutory status, but alternatively it claims to be an organiser, a regulator and a custodian.

In 1928, BCCI was established and 5 months later was affiliated to ICC. It regulates cricket in India and is recognised by the ICC in this capacity. Though not recognised by the government of India as a regulator of cricket but is given de facto recognition. BCCI enjoys monopoly as a regulator as it was the first mover. CCI relying on the Supreme Court's decision in *Hemant Sharma* v. *Union of India*[7] held that BCCI is an enterprise because the organisational aspect of BCCI has an economic content.

After determining BCCI an enterprise, CCI considered the relevant market. Cricket is a unique game not substitutable by any other game because of its revenue generating capacity, its coverage by media. BCCI has a monopoly as a regulator and is dominant as an organiser of the sport. In first class and in private professional games BCCI is a monopoly as it imposes restriction on players to participate in unapproved cricket. Because of the monopoly of BCCI in the sport that Indian Cricket League could not be launched. It was sabotaged by BCCI. Rule 32 of ICC rules prohibits a player from participating in any other private professional cricket when one is playing in IPL and the BCCI has given an undertaking that during IPL it would not organise 20-20 matches. All these arrangements amounts to violation of section 4 (2)(c). Apart from a cease and desist order CCI also imposed a fine of 52.24 crore.

V RELEVANT MARKET FROM SUPPLY SIDE

Adcept Technologies (P) Ltd. v. *Bharat Cocking Coal Ltd*.[8] is a case on alleged abuse of dominant position and anti-competition agreement. OP is a subsidiary of Coal India Ltd. For monitoring slope stability of open coal mines, there are two methods, Rear Aperture Radar (RAR) and Synthetic Aperture Radar (SAR). OP floated a global tender for installing slope monitoring system for open coal mines preferring RAR technology. IP claimed abuse of dominant position in preferring RAR technology as it was a discriminatory demand. IP insisted that SAR technology was equally suitable for the open coal mines of OP as this technology was successfully used in similar mines in Italy.

When IP made this protest to OP, OP informed him that he should place his case before an independent external monitor. After IP presented his case before the independent external monitor, he was not informed of the findings of the external monitor, but at the same time the specifications of the tender were not changed.

Alleged dominant player, according to CCI, is not a seller but a buyer; therefore the relevant market should be defined from the point of view of supply that is the

7 Writ petition no. 5770/2011, decided on 4,11,2011

8 2013 CompLR488 (CCI).

market for the supply of equipment produced by IP. CCI said that coal mines alone do not use SAS technology but others also use this technology. Therefore RM in this case would be constituted by coal mines and others as well. In this RM, according to CCI, OP is not dominant

CCI also gave an alternative argument, relying on *Pendrol Rahee* v. *Delhi Metro Rail Corporation*[9] that OP is a buyer and when it opts for RAR it exercises buyer's choice. While commenting on Pendrol Rahee in the annual survey of 2011,[10] we commented that to rely exclusively on the concept of buyer's choice is dangerous specially where the buyer is a monopsony or dominant buyer. The Indian Railways, being a monopoly buyer, has the capacity of ousting a supplier from the RM, if it is permitted to discriminate between sellers on grounds of buyers choice. In our opinion CCI should not have relied on the concept of buyers choice even as an additional argument. It is opined that CCI, should have got analysed the absence or presence of dominance of OP in the RM by the DG rather than making an assumption that OP is not dominant.

VI TIE IN ARRANGEMENT

Sonam Sharma v. *Apple Inc. (USA)*, OP1, Apple India (P) Ltd., OP2, Vodafone Essar Ltd., OP3 and Bharati Airtel Ltd., OP4,[11] is a case on alleged tie in arrangement. OP1 is a multi national corporation, which designs and produces electronics. OP2 is the Indian subsidiary of OP1. OP3 and OP4 are reputed mobile service providers of India, and jointly have 52% of GSM market in India.

IP alleges that a particular variety of i-phone, that acts as video camera, camera phone, portable media player, internet client with email and web-browsing facilities and is capable of sending texts and receiving voicemail. Further, more than 350,000 approved third-party as well as apple application software, having diverse functionalities including games, reference, GPS navigation, social networking, security and advertising for television shows, films and celebrities, can be downloaded from the 'App Store' to the i-Phone. Because of its unique features it is not substitutable by any other i-phone.

IP alleges tie in arrangement between OP1 and OP2, on the one hand and OP3 and OP4, on the other, as they have entered into an exclusive agreement, and OP1 enjoys dominant position in Indian market. IP further alleges that OP3 and OP4 have abused their dominant position when they imposed unfair conditions on the buyers of Apple i-phones. They offered expensive subscription and compulsorily locked the handsets to their respective systems at the pain of not respecting warranty if the later condition is violated. OP1 and OP2 have also abused their dominance by imposing discriminatory conditions on buyers of

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9 2011 CompLR 056 (CCI).

10 See Vinod Dixit "Competition Law" XLVII *ASIL* ILI 160-161 (2011).

11 2013 Comp LR 0346 (CCI).

handsets purchased from sources other that OP3 and OP4. IP alleged violation of sections 3 and 4 (2) (a) (b) (c) and (d). It is interesting to note that IP invited CCI to introduce in the Indian law the concept of collective dominance even in the absence of a merger. This is a welcome idea particularly because of refusal of CCI to construe anti competition agreement in the absence of proof of meeting of mind, similar to one required under the Contract Act, 1872. It is our considered opinion stated elaborately in the survey of 2011, that the superimposed condition of meeting of mind is unwarranted and in cases of horizontal agreements meeting of mind if at all is a necessary ingredient, must be inferred from 'practice followed' and 'decision taken'.[12]

CCI did not agree that i-phones are unique phones. It is possible that some people may have preference for i-phones, but they are substitutable with a number of smart phones produced by other companies. Smart phones of Nokia and Blackberry are comparable to i-phones. Therefore the RM in this case is market of smart phones in India. But the RM of cellular telephone service is different. There are two service technologies, GSM and CDMA, but they are not interchangeable. Apple i-phones are GSM service compatible. Therefore RM for cellular telephone service is GSM mobile service in India.

At the time of launching i-phones, Apple did not have its own retail stores in India. Therefore, it might have a conscious decision of Apple to sell i-phones through existing mobile network operators in locked state apart from APR's. This arrangement suited both, Apple and mobile network operators (MNO), to the former because it did not have to incur market expenses, to the latter because they got guaranteed turf clients for the period of lock in. However, the locked in customers have the option of getting handsets unlocked by paying a small fees. Apple follows this arrangement in other countries as well.

It is difficult to understand how CCI came to the conclusion that there is no case of tie in arrangement. The definition of RM as the market of smart phones in India and not as the market of i-phones removed Apple from the category of dominance. Exclusive dealership arrangement between Apple and MNO's of the sale of handsets in locked in condition may be justified in the interest of after market. But it is difficult to understand as to how CCI justified payment of small fees by the consumers to get the handsets unlocked.

CCI asserts that IP has not been able to prove that i-phone is different from other smart phones. Consequently in the market of smart phones, i-phones has a share of only 3%. Argument of dominance fails. CCI rightly refused to accept the allegation of joint dominance of OP3 and OP4 as they are not group companies but horizontal competitors. CCI also rightly rejected the allegation of anti competition agreement between OP3 and OP4 as there exists no agreement between them.

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12 See Vinod Dixit "Competition Law" XLVII *ASIL* ILI, 152-153 (2011).

CCI further made a distinction between tying and bundling. When several products are sold as a price bundling, that is tying. We wish to add that several products can be bundled as price bundle only if these products are incomplete without, and inseparable from, each other. Was locking in the handsets to the service of OP3 and OP4 a case of price bundling? It is difficult to agree with CCI. In our opinion tying in cannot be justified except in the interest of after market.

VII ASSOCIATIONS: ANTI-COMPETITIVE AGREEMENTS

M/S Shantuka Associates (P) Ltd. v. *All India Organisation of Chemists and Druggist, Organisation of Pharmaceutical Producers of India, Indian Drugs Manufacturers Association (IDMA) and US Vitamins (USV)*[13] is a case on violation of sections 3 and 4 of the Act.

IP has alleged, through its Managing Director Mr. S.L.Shantuka, limiting of market and thereby abuse of dominant position by all India Association of Chemists and Druggists (OP1) (AIOCD). IP is a clearing and forwarding agent of various pharmaceutical companies. Shantuka Agencies, a sister concern of the IP, is the sole distributor of US Vitamins, now known as US Vitamins Ltd.

IP alleges that due to an electoral dispute in the election of the Cuttuck Chemist and Druggist Association (DCDA), OP1 (AIOCD) refused to recognise Utkal Chemists and Druggist Association (UCDA). The President of OP1 threatened that unless IP cooperates with him he will ensure that US Vitamins terminates its agreement with IP. IP claims that US Vitamins telephonically informed them that they are under tremendous pressure to terminate agreement with them. The prayer was to direct OP2 (US Vitamins) not to terminate the agency.

CCI in order to decide the case framed the following four issues.

(1) Whether the practice of AIOCD in demanding NOC from the other existing stockist for appointment of a new stockist, fixation of trade margins, collection of PIS (publicity information charges) and boycott of the products of pharmaceutical companies constitute violation of section 3.

In order to decide the issue it is necessary to determine whether AIOCD is an enterprise? Over 7.5 lakh members are associated with AIOCD through retail, district and state level associations. As AIOCD is an association of supplier of drugs to the consumers, all agreements between AIOCD and IDMA and OPPI regarding NOC etc. are practices carried on or decision taken and these practices carried on and decision taken are anti-competitive. After analysing various numbers of evidence, CCI concluded that without obtaining NOC no stockist can be appointed. This insistence on NOC, results in limiting the market and violation of section 3 (3) (b). Boycott of products and requirement of PIS also limit the market, resulting in violation of section 3 (3) (b). Though PIS advertises the product, it

13 2013 Comp LR 223 (CCI).

violates s.3 (3) (b), if the launch of the product is contingent on payment of PIS. Fixing of trade margins amounts to price fixing prohibited under section 3 (3) (a).

(2) Issue II: Whether OPPI and IDMA are also guilty of violating section 3 (3) as they have entered into agreement with AIOCD. In deciding that OPPI and IMDA are not guilty of violating section 3(3), CCI took a technical argument, which in the opinion of the author of this survey, CCI could have avoided. The argument is two fold, OPPI and IMDA are not manufacturer of any thing. They are associations of producers, who produce different unsubstitutable medicines; hence there cannot be any anti-competitive agreement among them. The argument of CCI is not plausible for three reasons. A large number of producers produce a multiple of products. With reference to medicines with similar properties, produced by many producers they are substitutable. Therefore a number of members of both OPPI and IMDA are actually competitors. Secondly, the market, though from production side is not oligopolistic, from supply side to the consumers it is as all the members of OPPI and IMDA have to market their products though AIOCD. As all the members of OPPI and IMDA are party to the agreements made by their associations, they are guilty of anti competitive agreements; in as much as all of them are party to limiting and price fixing. The purpose of these agreements was to restrict the market and fix prices to the disadvantage of the consumers. CCI may better have treated the medicines as health care products for this particular situation as all the medicines have to be canalised through the same oligopolistic association and the issue of substitutability becomes in this particular situation superficial. However, the author of this survey would prefer to bring out OPPI and IMDA from the purview of section 3(3) because rather than being perpetuators of anti-competition activity they are the victims. If they have to remain in the market they must collaborate with AIOCD.

CCI also rejected the application of section 3 (4) in case of OPPI and IMDA. CCI concluded there is no violation of section 3 (4) as OPPI and IMDA are not engaged in any activity mentioned in section 2(h). There they are not enterprises. It is difficult to agree with CCI as OPPI and IMDA are clearly engaged in control of provision of services. It is also difficult to understand as to AIOCD on the one hand can be guilty of being a party to anti-competition agreement but OPPI and IMDA on the other, cannot be. If AIOCD can be an enterprise why OPPI and IMDA cannot be?

However there is substance in the argument that OPPI informed all its members in 2009 when the Act came into force that all the agreements with AIOCD stand terminated. IMDA informed of the termination to its members, in 2011 and 2012. But what is about the period between 2009 and 2011?

(3) Issue III. Whether the office bearers of AIOCD, OPPI and IMDA are also guilty of violating section 3?

The liability of the office bearers of AIOCD shall be decided when requisite information about them is received. However in view of the findings of Issue II the office bearers of OPPI and IMDA are not liable.

(5) Issue IV. Whether the conduct of USV also violates the provisions of section 3? IP alleged that AIOCD threatened USV to terminate agreement with the IP. Therefore an interim order was issued preventing AIOCD and USV not to coerce IP. The order is permanent. As there is no specific allegation against USV no action need be taken against USV. Action against AIOCD has already been taken.

Order of CCI

(i) Cease and desist order is passed against AIOCD and its members not to indulge in anti competitive activities.

(ii) AIOCD has to file an undertaking within 60 days stopping the practice of demanding NOC, PIS, fixing of trade margins and boycott of products

(iii) AIOCD shall write a letter to OPPI and IMDA that there is no requirement of NOC PIS, fixation of trade margins and there would not be boycott of products.

(iv) AIOCD shall write to its members that they are free to give discounts.

(v) AIOCD shall issue a circular that PIS is voluntary.

(vi) A penalty of Rs. 47, 40,613 is imposed on AIOCD.

R. Prasad, in this case gives a dissenting opinion. His main argument is that AOICD and its members cannot be guilty of anti competitive behaviour. Section 3 does not prohibit formation of commercial associations but only prohibits anti competitive agreements. Article 19 of the Constitution of India permits every citizen to form an association. Once an association is formed under the Registration of Societies Act, 1860 it becomes a legal person and a single person cannot enter into an anti-competition agreement with itself. Even according to section 2 of the Act an enterprise is a person and therefore it cannot enter into an agreement with itself. Therefore AIOCD cannot be guilty of anti-competitive behaviour.

It is difficult to agree with the opinion of R. Prasad. First, though, at the stage of its formation, if the formation was legally and constitutionally valid, it cannot be held guilty of violation of section 3(3). In the opinion of R. Prasad, AIOCD, being a legal person, cannot enter into an anti competition agreement with itself. But the fact is that AIOCD through out acted on behalf of its members and remained an active instrument in furtherance of anti competitive objectives of its members. In other words the doctrine of corporate veil should not be allowed to frustrate the implementation of the provisions of the Act. It appears that Prasad fails to appreciate the exceptions to the doctrine of the lifting of corporate veil. If the doctrine of corporate veil results in frustrating the implementation of the provisions of a statute, corporate will have to be lifted to oversee the real conduct of the members of the corporation.

Secondly, the members of AIOCD did not transfer their own business to or merge it with AIOCD and hence they had their own personality for the purposes of their own enterprise. If all the members of AIOCD, even after the anti competitive agreement with AIOCD was revoked by OPPI and IMDA in 2099 and 2011

respectively, persist with the terms of the revoked agreement, why cannot it be maintained that there is an anti competitive agreement among the members on grounds of 'practice carried on or decision taken.'

Prasad also does not consider fixing of margins amounts to violation of section 3 (3). Applying the rule of reason, Prasad says that without reasonable margins no one can remain in the market. The Drug Price Control Order under the Essential Commodities Act, 1955 fixes 8% and 16% margins for wholesaler and retailer respectively for scheduled drugs. For non scheduled drugs the MOU fixes 10% and 20% respectively. That is not unreasonable. However R. Prasad does not take into account the difference between margins being fixed by market forces and fixed by AIOCD, which is in a position to act independent of market forces.

One of the requirements of Drug Price Control Order is that every manufacturer must give information about the drug to the wholesaler and the retailer before introducing the drug into the market. If PIS does this function it does not restrict the market. However, according to Prasad, NOC amounts to denial of market access. As AIOCD enjoys a dominant position in Odisha, insistence on NOC amounts to abuse of dominant position. Prasad proposes a penalty at the rate 10% on annual average of turn over of last three years.

Sandhya Drug Agency v. *Assam Drug Dealers Association*[14] is similar to the preceding case. IP in this case alleges anti-competitive behaviour and abuse of dominant position by Barpeta Drug Dealers Association (BDDA), Assam Drug Dealers Association (ADDA), and All India Organisation of Chemists and Druggists (AIOCD) and Alkem, a manufacturer of drugs. IP is a wholesaler and supplier of pharmaceutical products in the district of Barpeta. BDDA, ADDA and AIOCD are the associations of druggists and chemists at district, state and national levels respectively. IP alleges that BDDA because of certain local political reasons directed Alkem to stop supplying medicines to IP and Alked stopped the supply. As there was prima facie evidence of violation of the provisions of the Act, CCI ordered investigation by the DG.

DG gave the following findings.

(i) Before the launch of every new product the manufacturer has to pay a fee for PIS, product information service to the association. DG concluded that forcing a manufacturer to pay PIS delays the launch of the product and consequently violates section 3 (3).

(ii) Determination of trade margins through an agreement by the association amounts price fixation in violation of s. 3 (3) (b). (3) There is proof that associations gave call for boycott of a product, and product has actually been boycotted. Boycott is anti competitive behaviour in violation of s.3 (30 (b). DG found the behaviour of BDDA and ADDA anti competitive as they determined price and limited the market.

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14 2014 Comp LR 0061 (CCI).

CCI framed three issues in order to determine the violation of the Act.

Issue I. Whether the practice of AIOCD, ADDA and BDDA on grant of NOC for appointment of a stockist, fixation of trade margins, and collection of PIS charges and boycott of product of pharmaceutical companies violates the Act? CCI decided that members of district association are enterprises, whereas state and national associations are associations of enterprises. In accordance with section 3 (3) not only agreements entered between enterprises or associations of enterprises but also practices carried on and decisions taken may come within the definition of anti-competitive agreements if they indulge in behaviour prohibited by section 3 (3). Thus all decisions and practices of AIOCD, ADDA and BDDA including various MOUs with OPPI and IMDA regarding NOC, fixation of margins, charging PIS payments and boycott of products of pharmaceuticals would squarely fall within the meaning of practices carried on and decision taken.

There is no objection with the use of the words 'practice carried on, and decision taken' in the sense in which they have been used in this case, but what we assert is that the words have wider implications. As a matter of fact in this case the associations have taken a decision for the supposed benefit of the members of the associations. In our opinion the words are really useful in the case which is known as 'follow the leader'. It often happens that a practice different from normal trade practice aimed at harming the competition is followed by successive enterprises without consulting each others. When terms of the contract between the builder and the consumers were found to be against the interest of the consumers they were held, in *Belaire Owners Association* v. *DLF Ltd*.,[15] to be abuse of dominant position on grounds of being unfair. But when almost all other builders of Gurgaon followed DLF in imposing similar terms on the consumers, CCI did not take any action against Unitech on grounds of anti-competition agreement as according to them Unitech was not dominant and there was no proof of meeting of mind. In *Jagmohan Chabra and Shalini Chabra* v. *Unitech Ltd*.,[16] CCI did not take any action against Unitech. In our opinion action could have been taken against Unitech as they were guilty of carrying on a practice which resulted in the violation of section 3 (3) (a) (b). If almost all the builders of Gurgaon impose similar unfair terms, they ought to be presumed to be party to an anti competitive agreement on grounds of practice carried on by all. The failure of CCI has been criticised in 2011.[17]

Regarding insistence on NOC for appointment of a stockist CCI agreed with DG that the conduct of AIOCD, ADDA and BDDA attracts the provisions of section 3(3) (b). Regarding payment of PIS fees to the association, though gives information to the consumers, it also attracts the provisions of section 3 (3) (b). CCI also held that fixation of trade margins to wholesalers and retailers results in

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15 2013 Comp LR 0239 (CCI).

16 2011 Comp LR 31 (CCI)

17 See *infra* note 12.

price fixation under section 3(3) (a). Boycotting a product also amounts to limiting the market in contravention of section 3 (3) (b).

Issue II Whether OPPI and IDMA are also liable along with AIOCD of anti-competitive agreement? CCI is of the view that OPPI and IMDA are compelled to maintain fixed trade margins by AIOCD under the threat of boycott appears to have some force. The Commission in this regard is of the view that the OPPI, IDMA and its members appear to be victims of the exploitative tactics of AIOCD and their conduct of entering into MOU with AIOCD should not be treated at par with the conduct of the AIOCD. Therefore, IDMA and OPPI cannot be held liable for violation of the provisions of the Act.

Issue III Are members of AIOCD, ADDA and BDDA also liable for anti competitive practices under the Act? CCI did not decide this issue, as details of the conduct of the office bearers of these associations have not been provided to the Commission. However CCI did not found Alkem guilty of anti competitive behaviour as there does not exist any proof against Alkem.

CCI after deciding these issues passed the order. It passed a cease and desist order. AIOCD, ADDA and BDDA were asked to give an undertaking that in future they will refrain from anti competitive practices. ADDA was imposed a penalty of Rs. 5, 61,097/-.

Dr. Geeta Gauri gave a dissenting opinion. She held that (1) no-objection certificate (NOC) from AIOCD before the appointment of stockists/distributors is anti-competitive and that requirement of approval for launching a product in the markets in form of PIS approval and boycotting the pharmaceutical companies for various unjustified reasons by AIOCD and its affiliates results in entry barrier.

However, remaining two allegations *i.e.,* fixing of margins and fixing of PIS charges for dissemination of information regarding new drugs by the AIOCD or its affiliates does not result in price fixing. The office bearers of IDMA and OPPI along with office bearers of AIOCD are responsible for violation of section 3(1) of the Act for signing tripartite agreement with AIOCD which contains clauses which are anticompetitive in nature. Dr. Gauri held ADDA and BDDA, which are state and district level association for chemists and druggists respectively affiliated to AIOCD, and their office bearers responsible for violating the provisions of the Act. Dr. Gauri is in full agreement with the majority order and found no contravention of any of the provisions of the Act by Alkem Laboratories Ltd.

S. N. Dhingra also gave a dissenting opinion. He differed from others on the basis of two empirical studies. Anti-competitive practices and kickbacks are rampant in medical profession. Right from pharmaceutical companies to medical professionals, druggists and stockists, all are part of this racket. Some of the unethical practices are (1) Irrational prescription by doctors motivated by kickbacks. (2) Prescription of expensive medicines (3) Low elasticity of demand to the change of prices (4) Collusive practices between doctors, pharmaceuticals, medical representatives and stockists, (5) Market is rigged. Member Dhingra finds the

existence of cartel. Pharmaceuticals, associations, retailers and stockists are part of this cartel. They all are guilty of anti competitive practices under section 3(3). He suggests imposition of heavy penalty as a deterrent. *M/s Praveer Medical Agencies* v. *All India Organisation of Chemists and Druggists*,[18] is also a case on associations. IP is a partnership firm and is a wholesale drug stockist. IP alleges that OP is dominant and regularly abuses its dominant position. AIOCD controls trading policies, collects Rs. 2000/- per product from every manufacturer. AIOCD is able to pressurise and prevail upon every manufacturer to abide by its directions. In 2010 IP sought to be the stockist of Janssen Cilag (OP2) and after completing all the formalities OP2 began supplying drugs to IP. In 2011 OP2 stopped supplying drugs on ground that the documents supplied by IP, with reference to distributor appointment, were not authentic as per AIOCD and this resulted in non issue of NOC by All Kerala Chemists and Druggist Association (AKCDA), an affiliate of AIOCD.

As the Commission's decision is on the grounds discussed in the preceding case, it is better to avoid the details. On the issue of NOC, CCI held that the conduct of AIOCD and its affiliate AKCDA in the matter of grant of NOC attracts the provisions of section 3(3)(b). On the issue of PIS the Commission held that requiring mandatory PIS approval for launch of any new drug which ultimately results into delay in reaching the drugs to the consumers is in violation of section 3 (3) (b) of the Act. On trade margins the Commission observes that the agreement to give fixed trade margins to the wholesalers and the retailers has the effect of directly or indirectly determining the purchase or sale prices of the drugs in the market. The Commission, accordingly, holds that the said conduct of AIOCD, it constituents and affiliates fall within the mischief contained in section 3(3) (a) of the Act. The Commission is also of the view that the act of boycott by AIOCD and its affiliate AKCDA is in contravention of s. 3(3) (b) of the Act. The dissents given by members Dr. Geeta Gauri and S. N. Dhingra are substantially the same as discussed in the preceding case.

VIII ASSOCIATIONS: ABUSE OF DOMINANT POSITION

Another case relating to associations, *M/S Reliance Big Entertainment Private Ltd*. v. *Tamil Nadu Film Exhibitors Association*[19] (now known as Tamil Nadu theatre Owner Association), is on abuse of dominant position.

Reliance Big Entertainment is a producer and distributor of films. It entered into an agreement with Balaji Real Media (P) Ltd. For distribution of film Oshthe (a Tamil remake of Hindi film Dabaang). IP entered into an agreement with (a) Kural TV for distribution rights in Tamil Nadu, Kerala and Karnataka, and (b) Sun TV for Satellite rights.

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18 2014 Comp LR 0010 (CCI) 2013.

19 2013 Comp LR 828 (CCI).

OP refused to exhibit the film in Tamil Nadu on grounds that satellite rights were given to Sun TV. OP has taken a decision that a film produced or distributed by Sun TV shall not be exhibited by any theatre of any member of the Association because Sun TV owes some money to some members of the Association. IP said it is unfair to affect the rights of OP and Kural TV only because some members of the Association have grievance against a third party Sun TV. Consequently the film was released in a few theatres in Tamil Nadu on compromised commercial terms.

Apart from other evidence that the Association took a decision not to exhibit the film Oshthe in any of the theatres of the members of the Association, the crucial evidence was a video clipping of a press conference addressed by the Secretary General of the Association in which he categorically stated the boycott of the film Oshthe.

CCI in its findings taking note of the evidence also noted that the Association in stead of cooperating with CCI used delaying tactics and gave frivolous arguments. CCI found that OP was dominant in the territory of Tamil Nadu and abused its dominant position in as much as it denied market access to the film Oshthe. CCI gave cease and desist order. CCI ordered that the Association should not compel producers and distributors to become its members as a pre-condition to exhibit films produced or distributed by them. CCI also disapproved the practice of the association of giving preference to exhibition of regional films. It was found to be a discriminatory practice prohibited under section 4. The practice of the association of not allowing simultaneous release of satellite rights of films was also found to be discriminatory. The requirement of compulsory registration of films with the association before their exhibition was also found to be an unfair requirement. CCI imposed an appropriate penalty on the association.

Shri Surendra Prasad v. *M/S Maharashra State Power Generation Co*., *M/S Nair Coal Services Ltd., M/S Karam Chand Thapar & Bros. and M/S Naresh Kumar & Co*.[20] is a case on alleged anti- competitive agreements and abuse of dominant position. It must be made clear at the very outset that the grounds given by the majority in justification of their findings are not very convincing.

IP has filed the information against Maharashtra State Power Generation Co. (OP1), M/s Nair Coal service Ltd. (OP2), M/s Karam chand Thapar & Bros. (OP3) and M/s Naresh Kumar & Co. (OP4) alleging violation of sections 3 and 4. OP1 is a company created by the government of Maharashtra for the purpose of electricity generation and supply of electricity in the state of Maharashtra. For running its seven thermal power stations, it obtains coal from the subsidiaries of M/s Coal India Ltd. For the purpose of procuring quality coal OP1 engages the services of liasioning agents. IP is a practising lawyer. On finding sudden rise in the rates of electricity, he decided to find the reasons and on the basis of his information made these allegations.

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20 2014 Comp LR 0001 (CCI).

In March 2005, OP1 invited tenders for coal liasioning. Four companies, M/s B.S.N. Joshi and OP 2-4 submitted tenders. The tender of BSN Joshi was the lowest. However BSN Joshi was not awarded the work. This led to litigation culminating in the decision by the Supreme Court in *BSN Joshi* v. *Nair Coal Services*,[21] holding that OP2-4 have formed a cartel and therefore the contract was awarded in favour of BSN Joshi. Even then the work was not awarded to BSN Joshi. The work however was awarded after a contempt petition, on 03. 01.09. The work continued till 12.09.09. After terminating the work to BSN Joshi OP1 continuously awarded work to OP2-4, in geographically distributed market. IP alleged that OP2-4, in collusion with OP1, geographically divided liaison work of seven power generating units between them. At four occasions OP1 sought to issue tenders for liaison work but one pretext or the other the tenders were withdrawn. The cancellation of tenders resulted in OP2-4 being beneficiary of stop gap arrangements. OP1 is comfortable with OP2-4 and misuses its dominant position. Whenever at the time of tenders a person other than OP2-4 quoted rates lower than OP2-4 they promptly raised one or the other objection resulting in continuance of stop gap arrangement. IP further alleged that OP2-4 have in violation of section 3 (3) divided the geographical market between them at exorbitant rates and are also guilty of collusive bidding.

It would be better to begin with the minority order of CCI as it is more logical and convincing. On the basis of the evidence the minority concluded that;

(i) OP2-4 violated section 3 (3) (c) (d) as they are engaged in collusive bidding

(ii) OP2-4 also entered into anti-competitive agreement in as much as they geographically divided the market between them. They take specific power stations for liasioning work.

(iii) According to the minority OP1 is dominant in electricity generation in the geographical area of Maharashtra and limited the market by limiting the market access to OP2-4. OP1 therefore has abused its dominant position.

The majority in its findings did not take the sequence of circumstances in totality into consideration. Had CCI done so and taken the sequence of circumstances in totality every thing would have become apparent. The sequence of circumstances are, (a) cancellation of tender process on four occasions and award of liasioning to OP2-4 on all these four occasions as stop gap arrangement, (b) challenge of the qualifications of new entrants by OP2-4 and every time stop gap award of liasioning work given to OP2-4. (3) The opinion of the Supreme Court that OP2-4 are a cartel. (d) That OP1 gave liasioning contract to BSN Joshi only on a contempt petition, (e) Termination of BSN Joshi's contract immediately thereafter on grounds of poor performance and stop gap award of work to OP2-4, (f) Findings of the Director Finance that OP2-4 are a cartel. (g) Award of liasioning

21 (2006) 11 SCC 548.

work at the same stations again and again to OP2-4, (h) Narrow range of rates quoted by OP2-4. (i) On the one hand OP1 was not able to finalise contract with OP2-4 as their quotations were not lowest, and on the other stop gap awards were always given to OP2-4 and also allowed OP2-4 to geographically divide the market. Had the majority considered all these circumstances in totality, the majority would have come to the conclusion (a) that OP2-4 have entered into anti-competitive agreement to divide the market and rigged bids in violation of sections 3(3) (c) and 3 (3) (d), and (b) that OP1 was dominant in Maharashtra and denied access to players other than OP2-4.

However, the majority, taking circumstances in isolation, rejected the allegations of anti competitive agreement on grounds that bids given by OP2-4 are in a narrow band but are not identical, and also rejected the violation of s. 4 on two grounds that OP1 is a government company and allegations of favouritism and corruption are not within the jurisdiction of CCI. Dominance of OP2-4 can also not be proved because they are not group companies.

It must be asserted here that the reasons given by the majority are not plausible. The fact that OP1 is a government company does not deprive CCI of jurisdiction because under section 2 (h) CCI lacks jurisdiction only if 'activity of the government (is) relatable to the sovereign functions of the government including all activities carried on by the departments of central government dealing with atomic energy, currency, defence and space'. It is also not a question of favouritism and corruption but of 'unfair and discriminatory conditions' within the meaning of section 4. The issue before CCI was whether OP1 was dominant in the commercial, non sovereign activity of electricity generation in the state of Maharashtra, and whether it abused its dominant position by imposing unfair and discriminatory conditions in sale of services and their price.

IX ENTERPRISE AND ABUSE OF DOMINANT POSITION

Shubham Srivastava v. *Department of Industrial policy & Promotion (DIPP) Ministry of Commerce and Industry* [22] is a case on the meaning of enterprise and scope of abuse of dominant position. IP, a citizen of India, alleged abuse of dominant position by the Department of Industrial Policy & Promotion. DIPP is responsible for formulating policy of Foreign Direct Investment. IP alleges that DIPP is an enterprise and abused its dominant position by reverse discrimination against Air India and consequently against the tax payers in the relevant market of 'formulation, promotion, approval and facilitation of FDI policy in civil air transport services in India'.

According to DIPP policy airlines were allowed to participate in the equity of companies (including Air India) operating cargo airlines, helicopter and sea

22 2013 Comp LR 868 (CCI).

plane services but not in the equity of air transport undertaking operating scheduled and non-scheduled transport services. On September 20, 2012, DIPP made relaxations in FDI policy and allowed foreign airlines to invest in Indian companies engaged in scheduled and non scheduled transport up to a limit of 49%. But this time FDI investment could not be made in favour of Air India. Air India alone was excluded from this relaxation. IP alleged that this amounted to abuse of dominant position within the meaning of sections 4 (a) (i), 4 (b) (i), and 4 (c).

CCI agreed with IP that DIPP was an enterprise in as much as policy pronouncement on FDI amounted to control of provision of services within the meaning of section 2 (h). However CCI did not agree that it abused its dominant position. CCI observed that DIPP is constitutionally empowered body to decide policy on FDI. This revision only gave an additional option to all private airlines to finance their capital needs through foreign direct investments from foreign airlines, which does not affect their interest inter-se. Moreover, the same may promote competition in the relevant market by facilitating cash crunch airlines to avail FDI for their operations, growth and expansion. Not allowing FDI from foreign airlines in Air India does not appear to be hampering competition in the relevant market in any way. As such, this action does not prima facie seem to create any appreciable adverse effect on competition in markets in India. Hence there is no violation of section 4.

It is difficult to appreciate this line of argument for two reasons. Either CCI should have held that DIPP is not an enterprise as policy decision on FDI is a sovereign function and a private or commercial body is incompetent to decide policy on FDI. As a matter of fact CCI observed that,' in exercise of powers conferred on the President under article 77 (3) of the constitution DIPP is empowered to make policy pronouncement on FDI.' It is strange that this function does not appear to be sovereign function to CCI. Secondly, assuming, though not conceding, that DIPP does not perform sovereign functions, and if it is an enterprise, it must be dominant as it alone can perform this function of 'formulation, promotion, approval and facilitation of FDI policy in civil air transport services in India' in the relevant market. If it makes discrimination between Air India and other airlines it violates section 4.

M. L. Tayal, gives a concurring finding but on different ground. He is of the opinion that DIPP is not an enterprise as according to him the word 'activities' mentioned in section 2(h) are clearly of economic and commercial nature. A bare perusal of the role and functions of DIPP as noted above would indicate that the same are in the realm of policy formulation and monitoring of such policies. By no stretch of logic, such functions can be said to fall within the meaning of the term enterprise which would require an entity to engage in economic and commercial activities. Furthermore, an entity while formulating policies cannot be said to operate in some market with inherent desire to acquire more market power or earn higher profits.

It would have been better for M.L. Tayal simply to say that DIPP is not an enterprise because it performs sovereign functions.

X COMPETITION APPELLATE TRBUNAL

Ajay Devgan Films v. *Yash Raj Films*[23] is an appeal against the decision of the Commission which held that there was no violation of sections 3 (4) and 4(2) (a). The appellant is the proprietor of a film and a reputed actor. The respondent is also a producer and distributor of films. Movie films are a three stage ventures, production, distribution and exhibition. There are two types of theatres, single screen and multiplexes. The respondent released film ' Ek Tha Tiger'(ETT) on 15th August 2012 and planned to release another film 'Jab Tak Hai Jahan'(JTHJ) on Diwali. According to the informant the respondent included a condition in agreement with the single screen theatres that if they exhibit ETT, they will also have to exhibit JTHJ on Diwali. According to the informant this agreement was a vertical agreement at different levels of production and hence violative of section 3 (4) (a) (b) and (d), and the respondent was also dominant in production and distribution; therefore they are also guilty of abuse of dominant position in as much as they imposed an unfair condition. Because of the conduct of the respondent the informant could not get adequate number of single screens for the release of his film on Diwali.

CCI did not agree with the allegations of the informant primarily on grounds that that there was no AAEC as the single screens only contributed 35 % of revenue whereas multiplexed generate 65%, and even all the single screens were not booked by the respondent. In addition to this not a single screen owner complained about the agreement. The Commission found that the agreement was a business agreement. If it was a commercial agreement then there was no reason for the Commission to decide on AAEC. There is need to decide AAEC only if there is a vertical agreement. Regarding the dominance of the respondent, it appears that the IP did not supply any evidence. The Tribunal practically agreed with the findings of the Commission. The only point it added was that the tribunal refused to issue an injunction against the exhibition of JTHJ in single screens, as demanded by the appellant; later the tribunal noted the fact that both the informant and the respondent secured a fair number of single screens for the exhibition of their respective films. The tribunal also did not agree with the informant that festive occasions (in this case the occasion of Diwali) are different markets as on such occasions the consumers have more spending power.

The appellate tribunal broadly agreed with the decision of CCI in *M/s Exel Crop Care Limited.*[24] A number of cases involving similar issues were disposed of by the CCI in a common judgement. One member, however wrote a separate

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23 2013Comp LR 903(Comp AT).

24 2013 Comp LR 799 (Comp AT).

minority judgment, but concurred with majority, though for different reasons. In majority judgment, the CCI came to the conclusion that all the appellants had indulged in collusive bidding and had contravened the provisions of section 3(3) (d) of the Act. It is also held that all the appellants had also violated the provisions of section 3 (3) (b) of the Act. One Member R. Prasad, however, did not agree that these appellants had contravened the section 3(3) (b), though he agreed that section 3(3) (a) and 3(3) (d) of the Act were contravened. He, however, held that there was no applicability of section 3(3) (b) in the matter and the appellants could not be penalised on that count.

The proceedings before CCI were initiated after the receipt of a letter from the Food Corporation of India, dated 4.2.11 alleging that the cost of aluminium phosphate tablets (ALP) has gone up due to anti competitive agreement between the manufacturers of ALP. It was alleged that there are four manufacturer of ALP (three appellants in this appeal and the fourth M/s Agrosinth Chemicals Ltd). FCI alleged that during the last eight years all the four have quoted identical rates for tenders floated by FCI. It seems that they are a cartel and because of cartelisation the cost of ALP has doubled during 2007-2009. As the demand of ALP is increasing the prices may further rise. A thorough examination by DG revealed that government institutions are the biggest procurer of ALP. DG noted that during 202-2009 all the four manufacturers quoted identical rates except in 2007. The last eight tenders considered by the DG and the pricing pattern definitely showed the practice of quoting identical pricing at times by all the three appellants or at some other times by two appellants including M/s. Agrosynth Chemicals Limited. Even when the phosphorous prices had fallen, no reflection thereof was seen in the high prices quoted by the appellants. The DG also found that at the tender dated 08.05.2009 and also in the earlier tenders, there was a joint boycott at the instance of the appellants. On that basis, the DG concluded that the appellants had contravened section 3(3) (a), 3(3)(b) and section 3(3)(d) read with section 3(1) of the Act.

The appellants also raised jurisdictional issues. On the date of the tenders section 3 was not yet notified. Therefore CCI does not have jurisdiction. The argument was refuted on grounds that the tender process begins with floating of tender and lasts till agreement is finalised. As on the date of finalising the tender s.3 was already notified CCI has jurisdiction. The Tribunal found the appellants guilty of violating section 3. The tribunal further observed that 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. Therefore, the words 'manipulating the process for bidding' assume a very great importance. It is not only the act of offering an identical price which is complained of. What is complained of is the act of bid rigging or the act of collusive bidding, which understood in the light of the language of explanation, has resulted firstly in eliminating or reducing competition for bids or secondly adversely affecting or manipulating the process for bidding.

One of the arguments of the appellants is that the DG and CCI took into consideration the fact of identical pricing from 2007 to the later period. The taking of tender pricing of pre-Act period of 2007, vitiates the entire finding that there is bid rigging. In the opinion of the tribunal even if there may be some reservations about the pre Act quotations, still the practice continued between the four manufacturers even after 20th May, 2009, and it was actually a pattern of quotations.

One of the arguments of the appellant was that the investigation by the DG of tenders floated in 2011 was without jurisdiction as the order for investigation was passed by CCI before the date of the tender of 2011. The DG has the power to investigate only on the basis of the order passed by the Commission under section 26(1). The attention of the tribunal was also invited to sub-section (3) of section 26 under which the DG, on receipt of direction under sub-section (1) is to submit a report of its findings within such period as may be specified by the Commission. The argument of the parties is that if on the relevant date when the Commission passed the order, even the tender notice was not floated, there was no question of DG going into the investigation of that tender. The tribunal does not have any quarrel with the proposition that the Director General shall record his findings on each of the allegations made in the information. However, it does not mean that if the information is made by the FCI on the basis of tender notice dated 08.05. 09, the investigation shall be limited only to that tender. The tribunal was of the opinion that DG can investigate tenders floated even after the IP gives information and CCI passes the order of investigation.

Three respondents seriously argued that the coincidence that tender pricing of all the three appellants were identical does not prove that there was an anti competitive agreement among them. In the absence of any other evidence a horizontal agreement cannot be inferred. The tribunal rebutted the assertion stating that the fact of boycott of the tender by all the three and identical bidding prices for a number of years prove that it cannot be a mere coincidence. Considering that the number of manufacturers of ALP tablets in India is only 3 or 4, as the situation was then, such identical pricing and such boycott viewed on the backdrop of consistent practice of offering identical price bids, only confirms that all this was made with a common design, which amounts to an agreement. The respondents relied on a judgment of European Court of Justice ("ECJ") in A. *Ahistrom Osakeyhito* v. *Commission.*[25] The observation relied upon was "where parallel behaviour can be explained by nature of the market, conscious parallelism is not sufficient evidence to justify a charge of cartelization". In the opinion of the tribunal, the reliance is wholly uncalled for, for the reason that the parallel behaviour of the appellants in this case, cannot be explained by the nature of the market. The Tribunal agreed with the opinion of the CCI.

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25 [1993] ECR 1 1307 (*Wood Pulp* case)

26 2013 Comp LR 743 (Comp AT).

Director General of Investigation and Registration v. *M/s Pioneer Friction Ltd*.,[26] Is a case on parallel tender pricing. The main defence against the charge of cartelisation appears to be that all of them had quoted the base price of Rs. 350 and added the element of various taxes like Excise Duty, Sales Tax *etc*. According to all the respondents if the percentage of the taxes are added to this common base price which was Rs. 350/- then the final price would certainly come to Rs. 423.40 in all the five cases. The tribunal held that mere identical pricing was not be all and end all. There ought to be something more than mere identical pricing.

Lafarge India Ltd. v. *CCI* ,[27] is an appeal against the order of CCI. The appeal is on merit of the case and a prayer for stay of realisation of penalties imposed by CCI. The Tribunal did not decide the appeal on merit but granted stay on realisation of penalties. In this case the IP, Builders Association, alleged violation of sections 3 and 4 by the Cement Manufacturers Association (CMA) and a number of cement manufacturers, on grounds that they formed a price cartel, indulged in monopolistic practices, limited and restricted production, and divided the market in five zones to manipulate the market.

The main allegation in the appeal was that CCI violated certain rules of natural justice and the considerations of procedural aspects cannot be separated from the considerations of merit. The interpretation and impact of the amended section 22 on the issue of judicial discipline was also an issue before the Tribunal. Before the amendment, section 22 provided that one of the members of a bench of CCI must be judicial member but after the amendment CCI functioned as a committee. But the appeal was not decided on merit. The tribunal stayed the realisation of penalty imposed by CCI on grounds that it was imposed on net profit rather than on turn over. However the Tribunal refused to interfere with the cease and desist order.

M/s Jindal Steel and Power Ltd. v. *CCI*[28] is an appeal on the scope of appeal to the Competition Appellate Tribunal from CCI. The appeal is to determine the meaning of s.53A and more specifically the true import of the words, 'order, direction and decision'. It is an appeal against the majority order of CCI. The Director General found the allegation of violation of the provisions of the Act correct but the majority decided that contrary to the allegations of the IP and findings of the DG, OP, M/s Jindal Steel, has not violated any of the provisions of the Act, though the minority consisting of R. Prasad and S. N. Dhingra held that the OP has violated the provisions of the Act. Other appeals of similar nature were also disposed of by the tribunal along with this appeal. The respondent, CCI, maintained that only those orders, directions and decisions of the Commission are appeal able to the tribunal which are specifically mentioned in section 53A(1)(a). Therefore, only orders, directions and decisions of the Commission which are given under sections 26 (2) and 26 (6) are appeal able as they are included in

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27 2013 Comp LR 439 (Comp AT).

28 2013 Comp LR 0531 (Comp AT).

29 (2010) 10 SCC 744.

section 53A (1) (a). In support of this contention the Commission primarily relied on the judgement of the Supreme Court in *CCI* v. *Steel Authority of India*.[29] In this case the Supreme Court observed that "no appeal would lie from any decision, order or direction of the Commission which is not made specifically appeal able under Section 53A (l) (a) of the Act and thus the appeal preferred by SAIL ought to have been dismissed by the Tribunal as not maintainable." It was further observed by the Supreme Court, "it is not necessary for the Court to implant, or to exclude the words, or over emphasize language of the provision where it is plain and simple. The provisions of the Act should be permitted to have their full operation rather than causing any impediment in their application by unnecessarily expanding the scope of the provisions by implication."

On the other hand the Appellant gave a number of plausible arguments in support of the contention that the matter was appeal able. The appellant distinguished the judgement of the Supreme Court from the facts of this case. The appellant contended that Supreme Court's judgement in reality means that right of appeal is restricted only to final orders of CCI. As in this case CCI order is final order appeal should be maintainable. The appellant also contended that if the court's observation is literally applied the appellants would be left with no remedy at all. The appellants further urged the Tribunal to give a purposive interpretation to section 53A and section 53 B. As DG and two minority members in minority judgement found violation of the Act and a penalty has also been imposed by the minority order, the order of CCI must be deemed to have been passed under section 27, and then it would be appeal able.

The appellant also relied on another Supreme Court's case, *Shri Mandir Sita Ramji* v. *Lt. Governor of Delhi*,[30] where the court observed 'that where the words used in the statutory provision are vague and ambiguous or where the plain and normal meaning of its words or grammatical construction thereof would lead to confusion, absurdity, repugnancy with other provision, the courts may, instead of adopting the plain and grammatical construction, use the interpretative tools to set right the situation, by adding or omitting or substituting the words in the Statute.' The prayer was to add suitable words so that to make the case appeal able. Another contention was to bring the case within the ambit of section 27 (g) which provides that CCI 'may pass such other order or issue such directions as it may deem fit' so as to make it appeal able. The last contention was to read section 53B as providing for appeal against any direction or decision or order. The words in section 53 B 'any direction, decision or order referred to in clause (a) of section 53A may prefer an appeal to the Appellate Tribunal'. Prayer was to treat 'or' as disjunctive and the words 'referred to in clause (a) of section 53A should qualify only 'order' and not direction or decision.

However the Tribunal preferred to agree with the Supreme Court's observation in *Steel Authority* case. The tribunal rejected all the arguments of the Appellants and held that the case is not appeal able. The tribunal's basic reliance was on

30 2013 Comp LR 0531 (Comp AT).

Supreme Court's observation in *Steel Authority* case. The substantive issue in the *Steel Authority* case was the vacation of an interim order by the tribunal against the order of CCI, which directed the SAIL (Steel Authority of India) to file its reply before the DG and not before it. While dealing with the vacation of this interim order passed by the tribunal, the Supreme Court decided to answer question of 'public importance though 'not strictly arisen from the memorandum of appeal'. That means the observations relied by the Tribunal in disposal of the present appeal, is an obiter. It is well known that Supreme Court insists that, even its obiter shall be taken seriously and will have the force of law; nevertheless an obiter is nothing but an obiter. Subordinate courts in all common law countries except in India, are free not to follow an obiter. There is a scientific reason for not treating obiter as a binding rule of law. An obiter is a rule given in violation of natural justice in as much as the parties to the case are not interested in contesting the law declared in the obiter. An obiter is declared by a court without the advantage of contest between the parties as they are not directly affected by the declaration of the obiter. But for reasons unknown to us in India it is almost binding. However the rebuttal of other arguments of the appellant need not be discussed as there is nothing of great importance in them.

We would prefer to agree with the arguments of the appellant in this case rather than with the Supreme Court in *CCI* v. *Steel Authority of India* and the tribunal in this case. Supreme Court's two judgements, *Steel Authority* and *Shri Mandir Sita Ram*, appear to be leading us in two different directions. The former judgement takes an extreme position. The relevant order of the court is qualified only by the words 'where the provision is plain and simple'. Some times even the plain and simple words may lead to absurdity and injustice. Commonsense observation is plain and simple. If an allegation of anti-competitive practices is made against an enterprise and is found to have substance by the DG and minority of the members of the Commission but not by the majority, why should it become not appeal able specially when CCI is the court of first instance.

M/s Gulf Oil Corporation Ltd. v. CCI,[31] is an appeal on CCI decision holding that Appellants are a cartel and are guilty of entering into a horizontal anti competitive agreement. In this case the information was provided by Coal India Limited (CIL) against ten explosive supplying companies and two associations of explosive manufacturing companies. CIL and its subsidiaries require explosives to work their mines and they procure explosives through public tender. The IP alleged that the appellant, in this case controlled 75% of the supply of explosives and cartelisation by them has resulted in AAEC. Cartelisation began from 2007 and continues till the filling of information. The auction of 2008 was for a period of three years with a provision of adjustment of prices through a price variation formula. When reverse auction, with a provision of ceiling price, was introduced in 2010, on the suggestion of Central Vigilance Commission (CVC), in order to bring transparency in tender process, all the appellants boycotted the process, and

31 2013 Comp LR 409 (Comp AT).

only two companies, not parties to this proceeding, gave bids. All the appellants have also written identical letters to IP. According to IP the activities of the appellants amounted to violation of section 3 (3) of the Act.

The Commission framed the following three issues:-

a) Whether the explosive suppliers had indulged in fixation of bid prices under an agreement as has been alleged in the information?

b) Whether the explosive suppliers under an agreement also had engaged in the act of controlling and limiting the supply of explosives to the Informant Company?

c) Whether the explosive suppliers had caused manipulation of the bidding process in contravention of the provisions of section 3(3) read with section 3(1) of the Act?

As regards the first issue, CCI found that there was no proof of meeting of mind between the appellants. The letter written by EMWA, the association of explosive manufacturers, cannot be treated as evidence to fix prices. Regarding the second issue CCI observed that the suppliers supplied more that 90% of the supplies. Three identical letters expressing concerns of the explosive manufacturers cannot amount to limiting the supply in contravention of section 3 (3) of the Act. However CCI found that there was a concerted action on the part of the appellants to collectively boycott the bidding in contravention of section 3 (3) (d) of the Act and imposed a penalty at the rate of 3% of the average of three years turnover of the named explosive suppliers under section 27 (b) of the Act.

The tribunal after disposing of objection relating to procedure and violation of rules of natural justice, agreed with the findings of the Commission, but decided to dilute the penalty imposed by the Commission for violating the provisions of section 3(3) (d). The commission reduced the penalty because of certain mitigating circumstances. This was the very first breach on the part of the appellants. They were guilty of the breach of only under sub-clause (d) of section 3 (3) and were exonerated of the violation of sub-clauses (b). As a matter of fact, only intention of the appellants was to postpone the auction. Even during the period of boycott the appellant did not interrupt the supply of coal.

Motion Pictures Association v. *Reliance Big Entertainment* [32] is a case of anti competition agreements. A number of appeals were disposed of in this judgement as similar issues had to be decided in all these appeals. All these appeals are against the order of CCI holding the appellants guilty of violating section 3 (3), though one of the members R. Prasad in minority decisions held that section3 has no application in those cases but found them guilty of abuse of dominant position. In the appeal relating to Motion Pictures Association, the majority found the members of the association guilty of violating section 3 because the association, before exhibiting a motion film insisted on registering the film with the association,

32 2013 Comp LR 466 (Comp AT).

forcing them to abide by their discriminatory rules, directing the members not to deal with non members, limiting the number of cinema houses for exhibition of films, discriminating between regional and non regional films, and imposing restriction on satellite, video and DTH rights and even gave calls for boycotting films.

The Commission framed the following issues.

Issue 1: Whether KFCC and other associations are 'enterprise' within the meaning of section 2(h) of the Act and if the answer to this is in affirmative, can their acts and conduct be said to be violative of provisions of section 4 of the act as has been alleged by the informant?

Issue 2: Whether the rules and regulations, acts and conduct of associations are subject matter of examination under section 3 of the Act?

Issue 3: Whether various acts and conducts of associations are anti-competitive as alleged in the information in terms of section 3(3) read with section 3(1) of the Act?

Issue 4: Has the action of KFCC and other associations caused appreciable adverse effect on competition in the market? Has the action of KFCC and other associations caused appreciable adverse effect on competition in the market?

CCI found that except in issue. no1, there is violation of section 3 (3). The tribunal substantially agreed with the opinion of the majority but not with the opinion of R Prasad. It is not necessary to discuss the details of the opinion of the tribunal as it did not add any significant point to the opinion of CCI. We also would refrain from criticising the opinion of the tribunal as we already covered these points in criticism of the decision of CCI in the Survey of 2012.[33]

XI CONCLUSION

Since 1990's successive Indian governments are progressively following the policy of laissez faire. Governmental functions are being transferred to corporates and private players. From an extensive state of pre 1990s, it is fast becoming a minimal state. Development of economy is being transferred to Corporates. State primarily has become a facilitator in developmental work. The biggest concern of the state is to invite investment from multi national and trans national corporates. In the midst of intense competition for investment of capital, a number of compromises have to be done by the state. One of them, unwritten and unspoken, is not so soft implementation of laws. Our organs of the state with reference to consumer protection laws have to make a fine balance between protection of the consumers and the need to uninterrupted development by the powerful multi nationals on whose behalf often the patronising powerful foreign governments successfully twist the arms of the host governments. Certain compromises have to be made at the cost of the consumers for the cause of development.

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33 See *infra* note 12.