Competition Commission Of India vs Co-Ordination Committee Of Artists And ... on 7 March, 2017

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Author: A.K. Sikri

Bench: Abhay Manohar Sapre, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6691 OF 2014

COMPETITION COMMISSION OF INDIA	…APPELLANT
VERSUS	
CO-ORDINATION COMMITTEE OF ARTISTS AND TECHNICIANS OF W.B. FILM AND TELEVISION AND ORS.	...RESPONDENTS

J U D G M E N T

A.K. SIKRI, J.

This appeal raises an interesting and important question of law touching upon the width and scope of jurisdiction of the Competition Commission of India (for short, the 'CCI') under Section 3 of the Competition Act, 2002 (hereinafter referred to as the 'Act'). Before we mention the nuances of the issue that has arisen for consideration, it would be apposite to take stock of the background facts under which the issue needs determination, as the factual canvass would provide clarity of the situation that has led to the dispute between the parties. Respondent No. 2 herein, Mr. Sajjan Kumar Khaitan, is the proprietor of M/s. Hart Video having his establishment in Kolkata. He is in the business of distributing video cinematographic TV serials and telecasting regional serials in the States of Eastern India, which includes the State of West Bengal. M/s. BRTV, Mumbai, which is the producer of T.V. programmes, had produced T.V. Serial named 'Mahabharat', original version whereof was in Hindi. The said BRTV entrusted the sole and exclusive rights of 'Mahabharat' to M/s. Magnum T.V. Serials to dub the Hindi version of the said serial in Bangla with further rights to

exploit its Satellite, Pay TV, DTH, IPTV, Video, Cable TV and internet rights till September, 2016. Magnum TV, in turn, appointed Hart Video as the sub-assigner to dub the said serial 'Mahabharat' in Bangla language, which it did. Thereafter, for the purposes of telecasting the said dubbed serial, an agreement was executed for the time slot, on revenue sharing basis, with M/s. Bengal Media Pvt. Ltd., Kolkata, which is the owner of 'Channel 10', as well as with M/s. Calcutta Television Network Private Ltd., Kolkata, which is the owner of CTVN+ Channel. These two channels were given hard disks of four episodes of the serial on 2nd February, 2011 and 12th February, 2011. An advertisement was placed in Daily Newspapers on 19th February, 2011 informing the public at large that serial 'Mahabharat' would be telecast in Bangla on Channel 10 at 10.00 a.m. in the morning and on CTVN+ at 10.00 p.m. every Sunday.

Certain producers in Eastern India have formed an association called Eastern India Motion Picture Association (for short, 'EIMPA'). Likewise, the artists and technicians of film and television industry in West Bengal have formed an association known as 'Committee of Artists and Technicians of West Bengal Film and Television Investors (hereinafter referred to as the 'Coordination Committee').

Telecasting of serial ‘Mahabharat’ in Bangla after dubbing it in the said language from the original produced Hindi language was not palatable to EIMPA or the Coordination Committee. In their perception, serials produced in other languages and shown on the T.V. Channels after dubbing them in Bangla would affect the producers of that origin and, in turn, would also adversely affect the artists and technicians working in West Bengal. The apprehension was that it may deter production of such serials in Bangla because of the entry of serials produced in other languages and shown to the public by dubbing the same in their language. Because of this reason, on 18th February, 2011 CTVN+ received a letter from the Coordination Committee to stop the telecast of the dubbed serial ‘Mahabharat’. Letter dated 1st March, 2011 to the similar effect was written by EIMPA to CTVN+. Identical demands were made to this Channel by the Coordination Committee as well. It was stated in this letter that such a step was necessary in the interest of healthy growth of film and television industry in West Bengal. It was also alleged that for the last thirteen years there was a convention and practice adopted in the said region not to dub any programme from other languages in Bangla and telecast them in West Bengal. Threat was also extended to CTVN+ as well as Channel 10 that in case the telecast is not stopped, their channels would face non-cooperation from these two bodies, i.e., EIMPA and the Coordination Committee.

When Mr. Sajjan Khaitan (Respondent No. 2), Proprietor of M/s. Hart Video, came to know of the aforesaid developments and the threat extended to CTVN+ and Channel 10 and found that these two television channels were going to succumb to those pressures, he informed the CCI of the aforesaid details and requested the CCI to take action in the matter, as according to him, the aforesaid act on the part of EIMPA as well as the Coordination Committee contravened the provisions of the Act. Even an interim relief was sought in the nature of direction from CCI to CTVN+ and Channel 10 not to yield to the threats of EIMPA and Coordination Committee and restart the telecast of the serial which was stopped since 17th April, 2011. Hereafter, Respondent No. 2 shall be described as the ‘informant’.

The CCI, after receiving the aforesaid information from the informant formed a prima facie opinion that acts on the part of EIMPA and Coordination Committee were anti-competitive. Accordingly, matter was assigned to the Director General (DG) for detailed investigation as per the procedure prescribed in the Act. On investigation, the DG found that the details contained in the information supplied by the informant were factually correct. On that basis, he examined the matter in the context of provisions contained in the Act.

In order to understand with clarity the task undertaken and accomplished by the DG, we deem it proper to refer to some of the relevant provisions of the Act at this stage. Chapter II of the Act deals with 'prohibition of certain agreements, abuse of dominant position and regulation of combinations'. It comprises of Sections 3 to 6. Section 3 deals with anti- competitive agreements and Section 4 prohibits the abuse of dominant position. Section 5, on the other hand, takes care of those acquisitions and mergers which have the potential to become anti-competitive or attain dominant position, with threat to abuse the said position in order to control such acquisition and mergers. Section 6 empowers the CCI to regulate those combinations which are stipulated under Section 5. Thus, this Chapter deals with three kinds of practices which may be anti- competitive, viz., agreements which may turn out to be anti-competitive; abusive use of dominant position by those enterprises or groups which enjoy such dominant position as defined in the Act; and regulations of combination of enterprises by means of mergers or amalgamations so that they do not become anti-competitive or abuse the dominant position which they can attain.

The scheme of this Chapter, therefore, is to ensure fair competition by prohibiting trade practices which cause appreciable adverse effects in competition in markets within India. This task of curbing negative aspects of competition is assigned to CCI. In the present case, since we are concerned with the issue as to whether EIMPA and/or Coordination Committee resorted to any anti-competitive agreement, it will be apposite to scan through Section 3 of the Act and other provisions which revolve there around. Section 3 reads as under :

> " 3. Anti-competitive agreements : (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.
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> (2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.
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> (3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—
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> (a) directly or indirectly determines purchase or sale prices;

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

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

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

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding (4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—

(a) tie-in arrangement;

(b) exclusive supply agreement;

(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation.—For the purposes of this sub-section,—

(a) "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

(b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;

(c) “exclusive distribution agreement” includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;

(d) “refusal to deal” includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;

(e) “resale price maintenance” includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

(5) Nothing contained in this section shall restrict— (i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—

(a) the Copyright Act, 1957 (14 of 1957);

(b) the Patents Act, 1970 (39 of 1970);

(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

(d) the Geographical Indications of Goods (Registration and Protection)

Act, 1999 (48 of 1999); (e) the Designs Act, 2000 (16 of 2000); \

(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export. ” As can be seen from the bare reading of the aforesaid provision, sub- section (1) of Section 3 puts an embargo on an enterprise or association of enterprises or person or association of persons from entering into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provisions of services which causes or is likely to cause an appreciable adverse effect on competition within India. Thus, agreements in respect of distribution or provisions of services, if they have adverse effect on competition, are prohibited and treated as void by virtue of sub-section (2). Sub-section (3), with which we are directly concerned, stipulates four kinds of agreements which are presumed to have appreciable adverse effect on competition. Therefore, if a particular agreement comes in any of the said categories, it is per se treated as adversely effecting the competition to an appreciable extent and comes within the mischief of sub-section (1). There is no further need to have actual proof as to whether it has caused appreciable effect on competition. Proviso thereto, however, exempts certain kinds of agreements, meaning thereby if a particular case falls under the proviso, then such a presumption would not be applicable.

We have already mentioned in brief the contents of letters which were written by EIMPA and the Coordination Committee to the Channel 10 and CTVN+. The DG was to investigate as to whether

this 'agreement' falls within the four corners of Section 3(3)(b) of the Act, namely, whether it limits or controls production, supply, markets, technical development, investment or provisions of services.

Section 2(b) defines 'agreement' and reads as under:

> "2(b) "agreement" includes any arrangement or understanding or action in concert,—
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> (i) whether or not, such arrangement, understanding or action is formal or in writing; or
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> ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings ;" Definitions of certain other expressions and terms which are required to be noted are as follows:
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> "2 (l)"person" includes—
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> (i) an individual;
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> (ii) a Hindu undivided family;
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> (iii) a company;
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> (iv) a firm;
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> (v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India; or
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> (vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);
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> (vii) any body corporate incorporated by or under the laws of a country outside India;
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> (viii) a co-operative society registered under any law relating to cooperative societies;
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> (ix) a local authority;
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> (x) every artificial juridical person, not falling within any of the preceding sub-clauses."
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> xx xx xx

> 2(m) "practice" includes any practice relating to the carrying on of any trade by a person or an enterprise;
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> xx xx xx 2(r) "relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets ;

2(s) "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;

2(t) "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;

2(u) "service" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising;

xx xx xx 2(x) "trade" means any trade, business, industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes the provision of any services; " At this stage, we would like to refer to Section 19 of the Act which permits the CCI to conduct an enquiry into certain kinds of agreements and dominant position of enterprise. Sub-section (1) of Section 19 empowers the Commission to inquire into any alleged contravention of the provisions contained in sub-section (1) of Section 3 (i.e. anti-competitive agreements) or sub-section (1) of Section 4 (i.e. abuse of dominant position). Sub-section (3) deals with the factors which have to be kept in mind by the CCI while undertaking an inquiry into anti-competitive agreements and reads as under:

> "19(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:
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> (a) creation of barriers to new entrants in the market;
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> (b) driving existing competitors out of the market;
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> (c) foreclosure of competition by hindering entry into the market;
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> (d) accrual of benefits to consumers;
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> (e) improvements in production or distribution of services; of goods or

provision

(f) promotion of technical, scientific and economic development by

means of production or distribution of goods or provision of services.

Since the appreciable adverse effect on competition has to be seen in the context of 'relevant market' as defined under Section 2(r) of the Act (already reproduced above), sub-section (5) of Section 19 stipulates that in order to determine whether a market constitutes a 'relevant market' for the purposes of this Act, CCI shall have due regard to the 'relevant geographic market', and 'relevant product market'. The factors which are to be taken into account while determining relevant geographic market are mentioned in sub-section (6) of Section 19. Likewise, the factors which are to be taken into consideration while determining the relevant product market are stipulated in sub-section (7) of Section 19.

Having noticed the relevant provisions postulating the scheme qua prohibited anti-competitive agreements, on the basis of which investigation is to be made by the DG, the first aspect was to determine as to what would be the 'relevant market'. The DG, in his report submitted to the CCI, opined that in the instant case 'relevant market' would be the 'film and television industry of West Bengal'. He further recorded that the Coordination Committee consisted of persons or association of persons who were dealing with identical market of film making. In his opinion any agreement of joint action taken by the constituents, being in the nature of horizontal agreement, could be examined under the provisions of Section 3(3) of the Act. The impugned action of the Coordination Committee and EIMPA threatening non-cooperation in case telecast of the serials was not stopped and holding demonstrations as well as organising strike, which resulted in actually stopping the telecast of the serial by Channel 10 (though CTVN+ continued to telecast), amounted to restricting its commercial exploitation and was, therefore, unjustified. He found that following conduct of the Coordination Committee specifically contravened the provisions of the Act:

> "a. Act of the Co-ordination Committee writing a letter on 18.02.2011 to CCTVN Plus Channel asking it to stop the telecasting of Mahabharata serial.
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> b. Further, act of the Co-ordination Committee writing a letter on 01.03.2011 to Channel 10 and letters on 11.03.2011, 12.03.2011 and 14.03.2011 to CTVN Plus Channel asking them to stop the telecast of Mahabharata serial.

c. Observance of one-day work stoppage on 07.04.2011 against telecast of the Mahabharata serial by the members of all the constituents of Co- ordination Committee and demonstration on the same day from 11.00AM to 02.00PM at Rani Rasoni Road in Kolkata.

d. The Co-ordination Committee approached Shri Mithun Chakraborty, the leading actor of Indian Film Industry and the Chief Adviser of Channel 10 and finally succeeded in getting the telecast of Mahabharata stopped by Channel 10." The DG concluded that the action on the part of Coordination Committee had resulted in foreclosure of competition by hindering entry into the market. The DG also held that by not allowing the dubbed version of the serial, the Coordination Committee

foreclosed the business opportunities for the businessmen engaged in the production, distribution, and exhibition, telecast of such programmes. The DG, therefore, concluded that the actions on the part of EIMPA and Coordination Committee were in violation of the provisions of Section 3(3)(b) of the Act, since they restricted and controlled the market and supply of dubbed versions of serials on the Television Channels through collective intent of all the constituents/associations coming together on one platform.

Certain fundamental objections were taken by the Coordination Committee as well as EIMPA touching upon the jurisdiction of the DG to inquire into the matter as according to them the inquiry was beyond the scope of the Act. In nutshell, it was argued:

> (a) The Coordination Committee comprised of artists and technicians of West Bengal Film and T.V. Industry and consisted of West Bengal Motion Picture Artists' Forum and Federation of Cine Technicians and Workers of Eastern India only. The other members like WATP, ATA and EIMPA were not in the Coordination Committee. It was, in fact, a trade union of the artisans and technicians under the Trade Union Act. Therefore, the Coordination Committee was not an 'enterprise'.

Likewise, it was not a ‘person or ‘association of persons’ who were in the business of production, supply and distribution or providing services etc. Therefore, their act would not fall under Section 3(1) of the Act.

(b) It was argued that the Coordination Committee was not in a position to control production programming marketing and uplinking of any serial in the satellite channel and, therefore, provisions of the Act would not apply to it.

(c) According to the Coordination Committee, the action which they had taken was in the form of an agitation against the telecast of Hindi serial after dubbing the same into Bangla in order to safeguard the interest of its members. It was their constitutional right to lodge such protests under Article 19(1)(a) of the Constitution of India.

The DG, however, did not get convinced with the aforesaid defence put by the Coordination Committee and found that the agitation of the Coordination Committee was uncalled for inasmuch as there was a huge potential of local film artists, and the industry was not likely to suffer on account of the dubbed serials shown on the said channels. He also found the industry of television channels in Bangla was growing by leaps and bounds and, therefore, argument of the Coordination Committee was not based on facts. Thus, their action was held to be unjustified, as it had resulted in foreclosure on competition by entering into the market as well as foreclosure of business opportunities for the businessmen engaged in the production, distribution and exhibition/telecast of such programmes. This, according to him, came within the mischief of Section 3(3)(b) of the Act.

Against the aforesaid report of the DG, being adverse to the Coordination Committee as well as EIMPA, both of them preferred their objections before the CCI. These objections were almost on the same lines which were taken before the DG and, therefore, it is not necessary to repeat the same at

this stage inasmuch as we would be turning to the stand of the Coordination Committee at the appropriate stage, in any case.

The CCI, after scanning through those objections, formulated two questions which according to it fell for consideration. These are:

> Issue 1 Whether EIMPA and Co-ordination Committee imposed/attempted to impose restrictions on the telecast of dubbed serial 'Mahabharat'? Issue 2 Whether the act and conduct of imposing restrictions on telecast of the said serial is in violation of provisions of the Act?
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> The CCI gave a fractured verdict on the aforesaid issues. As per the majority, the complainant was able to give clinching evidence thereby proving both the issues. The majority held that Channel 10 stopped the telecast of serial as a direct consequence of the threats extended to it by EIMPA as well as Coordination Committee through their various letters coupled with the agitations and demonstration held by them. In this manner, pressures were exerted on both Channel 10 and CTVN+ not to telecast the dubbed serial, though as far as CTVN+ is concerned it did not succumb to such a pressure. But Channel 10 gave in by discontinuing the telecast of the serial. In this manner, first issue was decided in the affirmative.
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> Taking up the second issue, the majority members held that since the Coordination Committee was not an 'enterprise', question of breach of Section 4 did not arise. However, the activities of the Coordination Committee fell within the ambit of Section 3 of the Act and violated that provision since it had adverse effect on competition. It accepted that the Coordination Committee (and for that matter even EIMPA) were trade unions. Notwithstanding, they were not exempted from the purview of the Act. Qua the Coordination Committee specifically, the CCI was influenced by the fact that even when bodies like WATP, ATA and EIMPA were not members of the Coordination Committee, still it was found that the Coordination Committee takes the measures in consultation with these associations and, therefore, the Coordination Committee must be deemed to be comprised of all the five members.
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> Judicial member in the CCI put discordant note as he differed from the majority opinion. According to him, first mistake committed by the DG was that he did not identify the 'relevant market' correctly. According to him, 'relevant market' was 'broadcast of TV serial' and not 'Film and TV Industry of West Bengal' as found by the DG. After identifying the relevant market as broadcast of TV serials, learned member opined that broadcast of TV serials took place either by way of Direct to Home Services (DTH) or through Cable and, therefore, broadcasting service is altogether a separate market, different from production, exhibition and distribution of films. Insofar as the two channels, namely, CTVN+ and Channel 10 are concerned, they were in the market for telecasting programmes for the viewers of the DTH category or

> Cable TV category and were not in production, distribution or exhibition of dubbed films. According to the minority view, since the offending parties, i,e., Coordination Committee and EIMPA, were not active in the relevant market of broadcast of dubbed TV serials, there was no question of any violation of any provisions of the Act. It was further held that Section 3 of the Act does not take into its fold coercive actions taken by workers' union affecting the various facets or products or service market, affecting production, distribution and supply of goods or services. It was accepted that, as a matter of fact, the Coordination Committee as well as EIMPA had put pressure on these channels from broadcasting the dubbed TV serial in question through various means. However, it could not be treated as an economic pressure. It was an act of trade union putting such pressures which was outside the domain of the Act and not an 'agreement' amongst the enterprises, active in the same relevant market, which resulted in discontinuing the telecast of dubbed serials. Further, the TV channels were at liberty to ignore such coercive facts. The minority opinion went to the extent of expressing that right to hold dharnas, boycotts, strikes etc. was fundamental right of any trade union guaranteed under Article 19(1)(a) of the Constitution which could not be taken away by the Act, unless it is shown that the offending parties were involved in economic activities in the same 'relevant market' and they had entered into an 'agreement' which finds foul with the provisions of Section 3 of the Act.

Significantly, it is only the Coordination Committee which preferred the appeal before the Competition Appellate Tribunal (hereinafter referred to as the 'Tribunal'). EIMPA, by its conduct, accepted the majority decision of the CCI. It is for this reason the Tribunal did not go into the issue with reference to EIMPA. It discussed the stand of the Coordination Committee and deliberated itself confining to the activities of the Coordination Committee to find out whether majority view of CCI was correct in law. By the impugned judgment, it has held otherwise thereby setting aside the majority view and accepting the minority opinion of the CCI resulting into allowing the appeal of the Coordination Committee and holding that there is no contravention of Section 3 of the Act which could not even be invoked on the facts of this case. In the first place, the Tribunal has affirmed the opinion of the dissenting member of the CCI on the question of 'relevant market' by holding that it was not the ‘Film and Television Industry in the State of West Bengal’, but the relevant market was the ‘telecasting of the dubbed serial on television in West Bengal’. Thereafter, the Tribunal took note of the provisions of Section 3(3) of the Act and concluded that the Coordination Committee was not trading in any groups, or provisions of any services, much less by the persons engaged in identical or similar trade or provisions of services. Therefore, it could not be said that there was any 'agreement' as envisaged in Section 3 entered into. According to the Tribunal, Section 3(3)(b) of the Act applies to the competitors who would be in the same line of commercial activity and by their agreement tend to restrict the competition. No evidence to this effect was available in the instant case. It was merely a protest of the Coordination Committee voicing its grievance for the benefit of its members and even if such a move on the part of the Coordination Committee was wrong and even if its agitation was influenced by foul play in projecting that exhibiting dubbed TV serial would affect their prospects of getting further work, that by itself would not become a competition issue covered by the Act.

Challenging the aforesaid view of the Tribunal, Mr. Chandhiok, learned senior advocate appearing for the CCI, referred to the various provisions of the Act and also extensively read out from the exercise undertaken by the DG and the majority view of the CCI. His submission was that exercise undertaken by the DG and approved by the CCI in its majority decision was correct in law. He questioned the manner in which 'relevant market' has been assigned limited sphere as, according to him, the matter related to film and television industry of the State of West Bengal and the concerted action of the Coordination Committee was to obviously effect the competitiveness in the entire film and television industry of the State of West Bengal. He also read out various definitions from the Act, which we have already reproduced above. His submission was that the definition of 'agreement' contained in Section 2(b) had a much wider connotation and any such agreement which was anti-competitive in nature between persons or association of persons was hit by Section 3.

Learned counsel appearing for the Coordination Committee, on the other hand, heavily relied upon the impugned judgment and submitted that the conclusion drawn therein was correct in law as the Coordination Committee, which was in the nature of a trade union, and not in the business of production, supply, distribution, storage, acquisition or control of goods or provision of services, could not be covered within the scope of Section 3 of the Act. He also submitted that the action on the part of the Coordination Committee had nothing to do with the competition and it was the fundamental right of the Coordination Committee, as a trade union, to lodge legitimate protest. He submitted that even if in this protest the Coordination Committee had exceeded the limits, that may be an action actionable under any other law but would not fall within the domain of Competition Law.

We have given our due consideration to the respective submissions and have minutely gone through the orders passed by various authorities, glimpse whereof is already reflected above.

Two fundamental aspects which need determination are:

> (i) What is the 'relevant market' for the purposes of inquiry into the impugned activity of the Coordination Committee? and
>
> (ii) Whether the action and conduct of the Coordination Committee is covered by the provisions of Section 3 of the Act?

Before we discuss the aforesaid questions, it would be necessary to clear the air on some of the fundamental aspects relating to the Act.

The Competition Act of 2002, as amended in 2007 and 2009, deals with anti- trust issues, viz. regulation of anti-competitive agreements, abuse of dominant position and a combination or acquisition falling within the provisions of the said Act. Since the majority view of the CCI also accepted that the impugned activities of the Coordination Committee did not amount to abuse of dominant position, and it treated the same as anti- competitive having appreciable adverse effect on competition, our discussion would be focused only on anti-competitive agreements. Section 3 of the Act is the relevant section in this behalf. It is intended to curb or prohibit certain agreements.

Therefore, in the first instance, it is to be found out that there existed an 'agreement' which was entered into by enterprise or association of enterprises or person or association of persons. Thereafter, it needs to be determined as to whether such an agreement is anti-competitive agreement within the meaning of the Act. Once it is found to be so, other provisions relating to the treatment that needs to be given thereto get attracted.

While inquiring into any alleged contravention, whether by the Commission or by the DG, and determining whether any agreement has an appreciable adverse effect on competition under Section 3, factors which are to be taken into consideration are mentioned in sub-section (3) of Section 19, which are as follows:

> "19. Inquiry into certain agreements and dominant position of enterprise. – xx xx xx
> (3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:-
>
> (a) creation of barriers to new entrants in the market;
>
> (b) driving existing competitors out of the market;
>
> (c) foreclosure of competition by hindering entry into the market;
>
> (d) accrual of benefits to consumers;
>
> (e) improvements in production or distribution of goods or provision of services;
>
> (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.
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> xx xx xx" The word 'market' used therein has reference to 'relevant market'. As per sub-section (5) of Section 19, such relevant market can be relevant geographic market or relevant product market. The factors which are to be kept in mind while determining the relevant geographic market are stipulated in sub-section (6) of Section 19 and the factors which need to be considered while determining the relevant product market are prescribed in sub-section (7) of Section 19. These two sub-sections read as under:
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> "(6) The Commission shall, while determining the "relevant geographic market', have due regard to all or any of the following factors, namely:-
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> (a) regulatory trade barriers;
>
> (b) local specification requirements;

(c) national procurement policies;

(d) adequate distribution facilities;

(e) transport costs;

(f) language;

(g) consumer preferences;

(h) need for secure or regular supplies or rapid after-sales services.

(7) The Commission shall, while determining the “relevant product market”, have due regard to all or any of the following factors, namely:-

(a) physical characteristics or end-use of goods;

(b) price of goods or service;

(c) consumer preferences;

(d) exclusion of in-house production;

(e) existence of specialised producers;

(f) classification of industrial products.” It is for this reason, the first and foremost aspect that needs determination is: 'What is the relevant market in which competition is effected?” Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings behaviour and of preventing them from behaving independently of effective competitive pressure.

Therefore, the purpose of defining the 'relevant market' is to assess with identifying in a systematic way the competitive constraints that undertakings face when operating in a market. This is the case in particular for determining if undertakings are competitors or potential competitors and when assessing the anti-competitive effects of conduct in a market. The concept of relevant market implies that there could be an effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market insofar as specific use of such product is concerned.

While identifying the relevant market in a given case, the CCI is required to look at evidence that is available and relevant to the case at hand. The CCI has to define the boundaries of the relevant market as precisely as required by the circumstances of the case. Where appropriate, it may conduct its competition assessment on the basis of alternative market definitions. Where it is apparent that the investigated conduct is unlikely to have an adverse effect on competition or that the undertaking under investigation does not possess a substantial degree of market power on the basis of any reasonable market definition, the question of the most appropriate market definition can even be left open.

The relevant market within which to analyse market power or assess a given competition concern has both a product dimension and a geographic dimension. In this context, the relevant product market comprises all those products which are considered interchangeable or substitutable by buyers because of the products' characteristics, prices and intended use. The relevant geographic market comprises all those regions or areas where buyers would be able or willing to find substitutes for the products in question. The relevant product and geographic market for a particular product may vary depending on the nature of the buyers and suppliers concerned by the conduct under examination and their position in the supply chain. For example, if the questionable conduct is concerned at the wholesale level, the relevant market has to be defined from the perspective of the wholesale buyers. On the other hand, if the concern is to examine the conduct at the retail level, the relevant market needs to be defined from the perspective of buyers of retail products.

It is to be borne in mind that the process of defining the relevant market starts by looking into a relatively narrow potential product market definition. The potential product market is then expanded to include those substituted products to which buyers would turn in the face of a price increase above the competitive price. Likewise, the relevant geographic market can be defined using the same general process as that used to define the relevant product market.

Bearing in mind the aforesaid considerations, we concur with the conclusion of the Tribunal. It is the notion of 'power over the market' which is the key to analysing many competitive issues. Therefore, it becomes necessary to understand what is meant by the relevant market. This concept is an economic one.

In the instant case, the geographic market is the State of West Bengal and to this extent there is no quarrel inasmuch as activities of the Coordination Committee were limited to the said State. The dispute is as to whether relevant market would cover ‘broadcast of TV serial’ or it would take within its sweep ‘film and TV industry of the State of West Bengal’. TV serial in question was produced in Hindi. It was thereafter dubbed in Bangla. When the two channels, namely CTVN+ and Channel 10, decided to broadcast this TV serial in dubbed form, i.e. in Bangla language, this move was opposed by the Coordination Committee and EIMPA. The Tribunal has upheld the minority view of CCI in saying that nature of the information does not show anything which could even be distinctly connected with the whole 'film and television industry in the State of West Bengal'. The information is only against showing the dubbed serial on the television and it has no relation whatsoever with production, distribution, etc. of any film or any other material on the TV channels.

We feel that this is a myopic view taken by the Tribunal which ignores many other vital aspects of this case, most important being the width of the effect of the aforesaid cause on which the agitation was led by the Coordination Committee. The effect is not limited to the telecast or broadcast of the television serial. No doubt, the Coordination Committee was against the 'broadcast of the television serial 'Mahabharat' on the aforesaid two channels, in the dubbed form. However, even as per the agitators, the said broadcast was going to adversely affect the TV and Film Industry of West Bengal and the alleged purport behind the threats was to save the entire TV and Film Industry. The Coordination Committee itself mentioned so in its letter dated February 18, 2012 as under:

> "We came to know that you are publicizing in your channel that Bengali dubbed version of "Mahabharat" will be telecasted in your channel, shortly this is for your kind information that the whole TV and Film Industry had fought back ruthlessly against telecast of Bengali dubbed versions of Hindi serials in DD-1 slot in 1997 and since that agitation DD National Network has stopped telecasting any Bengali dubbed version of Hindi programs. At the same time, it is to be noted that the film industry was also successful in debarring the release of Bengali dubbed version of Hindi Movie "Luv Kush" produced by Mr. Dilip Kankaria of Deluxe Films in the year 1997.
>
> We have done this to stop withering away of the prestigious and internationally acclaimed Bengali Film and Television Industry, thereby creating job for artistes, workers and allied people associated with this industry.
>
> Hence we would request you to stop telecast of dubbed Bengali version of "Mahabharat" in your channel.
>
> (emphasis added)" The relevant market was, therefore, not limited to the broadcasting of the channel but entire film and television industry of West Bengal. Whether it was the misgiving of the Coordination Committee that telecast of dubbed version of 'Mahabharat' is going to affect Bengali film and television industry or it was a genuine concern, is not the relevant factor while defining the 'relevant market'[1]. It is the sweep of the aforesaid action which is to be considered. Even in the perception of the Coordination Committee, telecast of Bengali dubbed version of 'Mahabharat' was going to affect the whole Television and Film Industry. In view thereof, it was hardly a matter of debate as to what would be the relevant market.
>
> With this we advert to the central issue that bogs the parties, namely, whether the activities in which the Coordination Committee indulged in can be treated as 'agreement' for the purpose of Section 3 of the Act.
>
> At the outset, it may be noticed that the entities which are roped in, whose agreements can be offending, are enterprise or association of enterprises or person or association of persons or where the agreement is between any person and an enterprise. The expression 'enterprise' may refer to any entity, regardless of its legal

status or the way in which it was financed and, therefore, it may include natural as well as legal persons. This statement gets further strengthened as the agreement entered into by a 'person' or 'association of persons' are also included and when it is read with the definition of 'person' mentioned in Section 2(l) of the Act. Likewise, definition of 'agreement' under Section 2(b) is also very widely worded. Not only it is inclusive, as the word 'includes' therein suggests that it is not exhaustive, but also any arrangement or understanding or even action in concert is termed as 'agreement'. It is irrespective of the fact that such arrangement or understanding is formal or informal and the same may be oral as well and it is not necessary that the same is reduced in writing or whether it is intended to be enforceable by legal proceedings or not. Therefore, the Coordination Committee would be covered by the definition of 'person'. However, what is important is that such an 'agreement', referred to in Section 3 of the Act has to relate to an economic activity which is central to the concept of Competition Law. Economic activity, as is generally understood, refers to any activity consisting of offering products in a market regardless of whether the activities are intended to earn a profit. Some examples may be given which would not be covered by Section 3(3) of the Act. An individual acting as a final consumer is not an enterprise or a person envisaged, as he is not carrying on an economic activity. We may also mention that the European Union Competition Law recognises that an entity carrying on an activity that has an exclusively social function and is based on the principle of solidarity is not likely to be treated as carrying on an economic activity so as to qualify the expressions used in Section 3. The reason is obvious. The 'agreement' or 'concerted practice' is the means through which enterprise or association of enterprises or person or association of persons restrict competition. These concepts translate the objective of Competition Law to have economic operators determine their commercial policy independently. Competition Law is aimed at frowning upon the activities of those undertakings (whether natural persons or legal entities) who, while undertaking their economic activities, indulge in practices which effect the competition adversely or take advantage of their dominant position.

The notion of enterprise is a relative one. The functional approach and the corresponding focus on the activity, rather than the form of the entity may result in an entity being considered an enterprise when it engages in some activities, but not when it engages in others. The relativity of the concept is most evident when considering activities carried out by non- profit-making organisations or public bodies. These entities may at times operate in their charitable or public capacity but may be considered as undertakings when they engage in commercial activities. The economic nature of an activity is often apparent when the entities offer goods and services in the marketplace and when the activity could, potentially, yield profits. Thus, any entity, regardless of its form, constitutes an 'enterprise' within the meaning of Section 3 of the Act when it engages in economic activity. An economic activity includes any activity, whether or not profit making, that involves economic trade.

In the instant case, admittedly the Coordination Committee, which may be a 'person' as per the definition contained in Section 2(l) of the Act, is not undertaking any economic activity by itself. Therefore, if we were to look into the 'agreement' of such a 'person', i.e. Coordination Committee, it may not fall under Section 3(1) of the Act as it is not in respect of any production, supply, distribution, storage, acquisition or control of goods or provision of services. The Coordination Committee, which is a trade union acting by itself, and without conjunction with any other, would not be treated as an 'enterprise' or the kind of 'association of persons' described in Section 3. A trade union acts as on behalf of its members in collective bargaining and is not engaged in economic activity. In such circumstances, had the Coordination Committee acted only as trade unionists, things would have been different. Then, perhaps, the view taken by the Tribunal could be sustained. However, what is lost in translation by the Tribunal i.e. in applying the aforesaid principle of the activity of the trade union, is a very pertinent and significant fact, which was taken note of by the DG as well as the CCI in its majority opinion. It is this:

The Coordination Committee (or for that matter even EIMPA) are, in fact, association of enterprises (constituent members) and these members are engaged in production, distribution and exhibition of films. EIMPA is an association of film producers, distributors and exhibitors, operating mainly in the State of West Bengal. Likewise, the Coordination Committee is the joint platform of Federation of Senior Technician and Workers of Eastern India and West Bengal Motion Pictures Artistes Forum. Both EIMPA as well as the Coordination Committee acted in a concerted and coordinated manner. They joined together in giving call of boycott of competing members i.e. the informant in the instant case and, therefore, matter cannot be viewed narrowly by treating Coordination Committee as a trade union, ignoring the fact that it is backing the cause of those which are 'enterprises'. The constituent members of these bodies take decision relating to production or distribution or exhibition on behalf of the members who are engaged in the similar or identical business of production, distribution or exhibition of the films. Decision of these two bodies reflected collective intent of the members. When some of the members are found to be in the production, distribution or exhibition line, the matter could not have been brushed aside by merely giving it a cloak of trade unionism. For this reason, the argument predicated on the right of trade union under Article 19, as professed by the Coordination Committee, is also not available.

When the lenses of the reasoning process are duly adjusted with their focus on the picture, the picture gets sharpened and haziness disappears. One can clearly view that prohibition on the exhibition of dubbed serial on the television prevented the competing parties in pursuing their commercial activities. Thus, the CCI rightly observed that the protection in the name of the language goes against the interest of the competition, depriving the consumers of exercising their choice. Acts of Coordination Committee definitely caused harm to consumers by depriving them from watching the dubbed serial on TV channel; albeit for a brief period. It also

hindered competition in the market by barring dubbed TV serials from exhibition on TV channels in the State of West Bengal. It amounted to creating barriers to the entry of new content in the said dubbed TV serial. Such act and conduct also limited the supply of serial dubbed in Bangla, which amounts to violation of the provision of Section 3(3)(b) of the Act.

Resultantly, the instant appeal of CCI stands allowed.

No costs.

.....J. (A.K. SIKRI) .....J. (ABHAY MANOHAR SAPRE) NEW DELHI;

MARCH 07, 2017.

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[1] It may be observed that majority view of CCI has rejected the plea of the Coordination Committee as well as EIMPA that allowing the dubbed film will take away jobs from Bengali artistes according to CCI: “If the Bengali films and TV serials are preferred over the non-Bengali content as a result of competitive process, ultimately the Bengali artists will get benefited. The protectionist policies which are being followed will not come to the aid of Bengali artistes, if on content they cannot compete. Such policies are anti-thesis of the principles of free market.”