

Aamir Khan Productions Private Limited vs Union Of India on 18 August, 2010

Equivalent citations: AIR 2011 (NOC) 143 (BOM.), 2010 (6) AIR BOM R 80 2011 CLC 8 (BOM), 2011 CLC 8 (BOM)

Author: Chief Justice

Bench: Mohit S. Shah, S.C. Dharmadhikari

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 358 OF 2010

ALONG WITH
WRIT PETITION NO. 526 OF 2010

WRIT PETITION NO. 358 OF 2010

1) Aamir Khan Productions Private Limited)
a company incorporated under the Companies)

Act, 1956 and having its registered office at)
Dhairya House, Flat No.1, 7th Road, Khar (West))
ig)
Mumbai 400 052.)

2) Aamir Hussain Khan)

aged 44 years, residing at 5, Marina Apartment)
Pali Hill, Bandra (West), Mumbai 400 050).. Petitioners

Versus

- 1) Union of India)
through Ministry of Company Affairs)
Mumbai.)
- 2) The Competition Commission of India)
through its Secretary Mr. S.L. Bunker)
having its office at "B" Wing, HUDCO)
Vishala 14, Bhikaji Cama Place)
- New Delhi 110066)
- 3) The Director General)
Competition Commission of India)
having his office at "B" Wing, HUDCO)
Vishala, 14, Bhikaji Cama Place)
New Delhi 110066).. Respondents

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Mr. Arshad Hidayatullah, Senior Advocate, a/w Mr. Anand Desai
and Mr. Vivek Shetty i/b DSK Legal for the Petitioners.

Mr. D.J. Khambatta, Additional Solicitor General, with Mr. Gautam
Ankhad for Respondent No.1.

Mr. Joby Mathew and Mr. Deepak Dane for Respondent Nos.2 and 3.

ALONG WITH
WRIT PETITION NO. 526 OF 2010

- 1) UTV Software Communications Limited)
a company incorporated under the)
ig)
Companies Act, 1956 and having its)
office at 7th and 8th Floor)
Solitaite Corporate Park, Bldg. No.11)

Guru Hargovindji Marg, Chakala)
Andheri (E), Mumbai 400 093)
- 2) Mr Ronnie Screwvala)

residing at Breach Candy House)
5th floor, 68, Bhulabhai Desai Road)

Mumbai 400 026)
- 3) Mr Siddharth Roy Kapur)
mresiding at 501-A, Amrit Apartments)

Carter Road, Khar (West))
Mumbai 400 052)

Versus

- 1) Union of India)
through Ministry of Company Affairs)
Mumbai.)
- 2) The Competition Commission of India)
through its Secretary Mr. S.L. Bunker)
having its office at "B" Wing, HUDCO)
Vishala 14, Bhikaji Cama Place)
New Delhi 110066)

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- 3) The Director General)
Competition Commission of India)

having his office at "B" Wing, HUDCO)
Vishala, 14, Bhikaji Cama Place)

New Delhi 110066).. Respondents

Mr. Janak Dwarkadas, Senior Advocate, with Mr. Chirag Mody
i/b DSK Legal for the Petitioners.

Mr. D.J. Khambatta, Additional Solicitor General, with Mr. Ashok
Verma for Respondent No.1.

Mr. Z.T. Andhyarujina for Respondent No.2.

CORAM : MOHIT S. SHAH, C.J. AND
S.C. DHARMADHIKARI, J.

JUDGMENT RESERVED ON : 4TH AUGUST 2010
JUDGMENT PRONOUNCED ON : 18TH AUGUST 2010

JUDGMENT :

(PER CHIEF JUSTICE) In both these petitions under Article 226 of the Constitution of India, the petitioners challenge the separate show cause notices dated 21st December 2009 issued by the Competition Commission of India, Respondent No.2 herein, under Section 26(8) read with Section 3(3) of the Competition Act, 2002.

2. The petitioners in both these petitions have challenged the said show cause notices mainly on the ground that the Competition UPA 4 wp358-10 Commission established under the Competition Act, 2002 (hereinafter referred to as the "Competition Act") does not have any jurisdiction to initiate any such proceedings in respect of films for which the provisions of the Copyright Act, 1957 contain exhaustive provisions.

3. The facts leading to issuance of impugned show cause notices are already stated in the show cause notices themselves.

4. The show cause notice impugned in Writ Petition No.526 of 2010 reads as under :-

"COMPETITION COMMISSION OF INDIA ig (Secretariat) By Speed Post 21st December, 2009 F.No.1/1/2009-Sectt./23209 To, SHRI SIDHARTH ROY KAPUR M/S UTV SOFTWARE COMMUNICATIONS LTD.

1181-92, Solitaire Corporate Park, Guru Hargobindji Marg, Chakala, Andheri (East), MUMBAI 400 093.

Sub.:Case No.1/2009-FICCI-Multiplex Association of India.

The FICCI-Multiplex Association of India has filed information before the CCI under section 19(1) of the Competition Act 2002 on 26.5.2009 through their authorized Advocates - Luthra & Luthra, Law Offices, New Delhi against the following enterprises :-

1. United Producers/Distributors Forum (UPDF)
2. Association of Motion Pictures & T.V. Programme Producers (AMPTPP)

3. The Film & Television Producers Guild of India Ltd. (FTPGI) UPA 5 wp358-10 It has been stated in the information that the members of these organizations are perpetrating cartel like activity which is violative of provisions of Section 3(3) of Competition Act 2002. It has also been alleged that these Associations/Enterprises, who jointly control approximately 100% of the market share for production and distribution of Hindi Motion Pictures exhibited in Multiplexes, by organizing themselves under the umbrella of UPDF, took a collective decision not to release films to the Multiplexes from 4th April 2009 onwards with the objective to extract higher revenue sharing ratio from the members of the informant and this cartel like activity has appreciable adverse effect on competition in India.

The Commission took cognizance of the matter under Section 19 of the Act and on forming an opinion under Section 26(1) that there exists a prima facie case, it issued directions to Director General (DG) to investigate into the matter.

After conducting investigation, the DG submitted his report dated 24/9/09 and also a supplementary report dated 27/11/09 to the Commission.

As per the findings of the D.G. in these reports, the allegations made in the information have been found to be substantiated against you.

In these reports, the DG has concluded that you along with other persons named in the report of DG have acted in concert by forming a cartel with a view to extracting higher revenue sharing ratio for the supply of films to the Multiplexes and for achieving your object, you indulged in limiting/controlling supply of films in the market by refusing to release films to Multiplexes for exhibition and succeeded in achieving your objective by raising your revenue sharing ratio and have thus by your conduct and activities contravened the provisions of Section 3(3) of the Competition Act, 2002.

After considering the reports of DG, the Commission has decided to proceed further in the matter in accordance UPA 6 wp358-10 with the provisions of the Competition Act and the regulations framed thereunder.

In view of the above and in compliance to the directions of the Commission, the copies of reports of the DG are being furnished to you for inviting your replies/objections, if any.

You are, therefore, directed to submit your objections/ replies within a period of 15 days from the date of receipt of this notice. If you wish, you may also make request for inspection of the relevant record and may also submit facts and material in support of your contentions. In case you wish to seek an opportunity of oral hearing then you have to make a separate prayer for that purpose.

In case your reply/objections are not received within specified time it shall be presumed that you have nothing to say in the matter and the Commission shall proceed further in the matter as provided under the law.

Sd/-

(S.I. Buriker) Secretary Competition Commission of India Encl.:

(1) Copy of report of DG dated 24.09.2009 with annexures (pages nos.169-329 - total 161 pages) (2) Copy of supplementary report of DG dated 27.11.2009 with annexures (page nos. 1-223)"

5. Similar notice dated 21st December 2009 is issued to the petitioners in Writ Petition No.358 of 2010.

6. The petitioners have challenged the jurisdiction of the Competent Commission to initiate any proceedings under the Competition Act against the petitioners on the following main grounds :-

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(i) The exhibition of a feature film, which is a subject matter of

copyright exploitation alone, is specifically excluded under Section 3(5) of the Competition Act and hence the proceedings initiated against the petitioners are without jurisdiction.

(ii) Issuance of notice dated December 21, 2009 to petitioner No.2 in Writ Petition No.358 of 2010 and of the notice to petitioner Nos.2 and 3 in Writ Petition No.526 of 2010, who are not producers of a feature film in their individual capacity is also without jurisdiction and shows non-

application of mind.

(iii) The petitioners did not delay or withhold releasing of any film from any multiplex nor did they take any action as alleged in the report. The petitioners had merely participated in certain meetings with other film producers to discuss the issue about disputes on revenue sharing, wrongful deductions by the multiplex owners before paying the producers/distributors, delays in payment and non payments by the multiplex owners to the producers/distributors and other matters which adversely affected the producers/distributors with multiplex owners who in fact were acting in concert against the producers/ distributors.

(iv) It is further contended that in the course of such negotiations, the name "United Producers/Distributors UPA 8 wp358-10 Forum (UPDF) was coined to describe the producers who were negotiating with the multiplex owners. However, this was not a registered body nor did it represent all the film producers.

(v) The disputes that had arisen between the multiplex owners and producers of Hindi feature films were resolved in or about June 2009 and thereafter agreements are being signed between each individual producer for its respective films with each individual multiplex and films are being released through multiplexes by Hindi film producers and hence the allegations and the impugned show cause notices have become academic and stale as no grievance remains to investigate.

(vi) The information received by the respondents from FICCI-

Multiplex Association of India, on the basis of which the case was filed against the petitioners, was not disclosed to the petitioners. The petitioners further state that after the petitioners received letter dated 11th August 2009 indicating the information about the alleged violation of the provisions of Section 3(3) of the Competition Act, the petitioners had responded by writing letters dated 17th August 2009 and 1st September 2009 in Writ Petition No.358 of 2010 and letter dated 17th August 2009 in Writ Petition No.526 of 20010. The Director General of Investigation held a hearing on 23rd November 2009. Even thereafter the Competition Commission issued the impugned show cause notices without considering various legal contentions including UPA 9 wp358-10 lack of jurisdiction of the Competition Commission, raised in the petitioners' replies.

7. At the hearing of these writ petitions, learned Senior Counsel Mr.Hidayatullah and Mr.Janak Dwarkadas have challenged the show cause notices mainly on the ground of lack of jurisdiction and made the following submissions :-

(a) Sub-section (1) of Section 3 of the Competition Act prohibits an anti-competitive 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. The right to release a film can never be considered as goods or services and, therefore, the Competition Act, 2002 can never apply to a dispute regarding the distribution rights in relation to films.

(b) Without prejudice to the above contention, it is submitted that sub-section (5)(i)(a) of Section 3 specifically provides that nothing in section 3 shall restrict the right of any person to restrain an 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 the Copyright Act, 1957.

(c) Section 13(1)(b) of the Copyright Act, 1956 confers copyright in cinematograph films and Section 14(1)(d)(ii) provides that copyright means the exclusive right to do or UPA 10 wp358-10 authorise the doing or to authorise to sell or give on hire or offer for sale or hire any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions and under sub-section (iii) to communicate the film to the public. The producer of the film has exclusive right to decide as to whom he shall sell or give on hire any copy of the film for communicating the film to the public.

Section 18 confers upon the owner of the copyright right to assign to any person a copyright either wholly or partially.

Section 30 recognises the right of the owner of the copyright to grant any interest in the right by licence in writing. It is, therefore, submitted that when a producer makes a cinematograph film, he has an exclusive right to sell or give on hire any copy of the film and unless the owner of the copyright has assigned the rights or has given licence in writing and has granted interest in the right by licence any right to a third party, the only other permissible mode or method for any person to acquire any right in respect of such copyright is by making a complaint to the Copyright Board under Section 31 and satisfy the Copyright Board that the necessary conditions stipulated in Section 31 are satisfied. Section 31 provides that if a complaint is made to the Copyright Board that the owner of the copyright in the film has refused to allow the performance in the public of the work and by reason of such refusal, the work is withheld from the public or has refused to allow the communication to the public, such work on terms which the complainant considers reasonable, after giving to the owner of the copyright in the work a reasonable opportunity of UPA 11 wp358-10 being heard and after holding inquiry, if it is satisfied that the grounds for such refusal are not reasonable, the Copyright Board may direct the Registrar of Copyright to grant to the complainant a licence to republish the work, perform the work in public or communicate the work to the public subject to payment to the owner of the copyright of such compensation and subject to such terms and conditions as the Copyright Board may determine.

(d) Assuming, while denying, that the petitioners had insisted upon unreasonable terms for granting the right to exhibit the films in favour of the multiplex owners, the only remedy available to the multiplex owners was to approach the Copyright Board under Section 31 of the Copyright Act, 1957. Anything done otherwise than in accordance with the aforesaid statutory scheme of the Copyright Act, will give the owner of the copyright the right to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights under the Copyright Act. It is, therefore, clear that the Competition Commission has no jurisdiction to initiate any proceedings which will interfere with the rights of the owner of the copyright in the cinematograph film under the Copyright Act. The impugned show cause notices proceed on the assumption that the Competition Commission has such jurisdiction. The impugned show cause notices are, therefore, issued without any jurisdiction and without any authority of law whatsoever.

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(e) The Competition Commission having already taken a particular stand even after the petitioners submitted their reply to the letter of Director General of Investigation, no useful purpose will be served by requiring the petitioners to appear before the Competition Commission, as it has already pre-judged the issue. In support of the said contention, reliance is placed by the learned counsel for the petitioners on the decision in *Siemens Ltd v State of Maharashtra*, (2006) 12 SCC 33 and particularly paragraph 11 thereof, which reads as under :-

"11. A bare perusal of the order impugned before the High Court as also the statements made before us in the counter- affidavit filed by the respondents, we are

satisfied that the statutory authority has already applied its mind and has formed an opinion as regards the liability or otherwise of the appellant. If in passing the order the respondent has already determined the liability of the appellant and the only question which remains for its consideration is quantification thereof, the same does not remain in the realm of a show-cause notice. The writ petition, in our opinion, was maintainable."

8. Mr.Arshad Hidayatullah, learned counsel for the petitioners has placed strong reliance on the decision of the Apex Court in Calcutta Discount Co. Ltd. vs Income Tax Officer, District 1 Calcutta and another, AIR 1961 SC 372, Whirlpool Corporation vs Registrar of Trade Marks, Mumbai and others, (1998) 8 SCC 1 and Siemens Ltd. vs State of Maharashtra and others, (2006) 12 SCC 33 in support of the above contentions.

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9. Mr.Janak Dwarkadas, the learned counsel for the petitioners has also placed reliance on the following decisions :

(a) Ramesh Chandra Sankla and others vs Vikram Cement and others, (2008) 14 SCC 58, is relied upon in support of the contention that if the jurisdictional fact does not exist, the tribunal cannot act. If an authority or tribunal wrongly assumes the existence of such facts, a writ of certiorari lies, because by erroneously assuming existence of jurisdictional fact, a subordinate tribunal cannot confer upon itself jurisdiction which it otherwise does not possess.

(b) Entertainment Network (India) Limited vs Super Cassette Industries Limited, (2008) 13 SCC 30, is relied upon for the purpose of analysing the scheme of the Copyright Act and particularly Sections 14, 30 and 31 of the said Act. Relying on the principles laid down in paragraphs 92 to 96 of the above judgment, it is vehemently submitted that a copyright owner has complete freedom to enjoy the fruits of his labour by assigning the copyright for an agreed royalty through the issuance of licences and that such right is subject only to right of others to obtain compulsory licence as also the terms on which such licence can be granted.

The underlying philosophy of the Copyright Act is that the owner of the copyright is free to enter into voluntary agreement or licences on terms mutually acceptable to him and the licensee. The Act also expressly recognises the concept of the exclusive licence subject only to the grant of UPA 14 wp358-10 compulsory licence by the Copyright Board as also the terms on which such licence can be granted under Section 31 of the Act. It is also contended that what is prohibited by the Competition Act is an agreement by an association of enterprises or by association of persons which cause or is likely to cause an appreciable adverse effect on competition within India but Copyright Act and particularly Sections 33 and 34 thereof specifically provide for the registration of a copyright society and empowers the copyright society to accept from the owner exclusive authorisation to administer any rights in any work by issuance of licence or collection of licence fees or both. It is, therefore,

submitted that in view of the specif exclusion clause provided in sub-section (5) of Section 3 of the Competition Act, the producer's right under the Copyright Act can never be taken away by any authority or even the Competition Commission under the Competition Act, 2002.

(c) The decision dated 22nd January 2010 of this Court in the case of Music Choice India Pvt. Ltd. vs Phonographic Performance Ltd., (Appeal No.150 of 2009 in Suit No. 2124 of 2007), is relied upon in support of the contention that it is the Copyright Board alone which has the exclusive jurisdiction to grant compulsory licence to a complainant under Section 31 of the Copyright Act and that no other Court or Commission can grant such a right to a third party. It is submitted that the Competition Commission does not have and cannot have jurisdiction to grant something which would frustrate the provisions of the Copyright Act and that UPA 15 wp358-10 Legislative intent is more than clear from sub-section (5) of Section 3 of the Competition Act.

(d) Mr. Dwarkadas has also placed reliance on the decisions in Vodafone International Holdings B.V. v Union of India, (2009) 179 TAXMAN 129 (SC), Arun Kumar and others vs Union of India, (2007) 1 SCC 732, and Management of Express Newspapers (Pvt. Ltd., Madras v The Workers and others, AIR 1963 SC 569.

10. On the other hand, the petitions are opposed by Mr.Khambatta, learned Additional Solicitor General appearing for the Union of India and the Competition Commission. It is submitted that the matter is still at the show cause notice stage and, therefore, the petitions are premature. All the issues raised in the petitions and the correspondence addressed on behalf of the petitioners can and must be decided by the Competition Commission. The petitioners have participated in the proceedings before the Competition Commission and they have already indicated that they would be filing a reply to the show cause notices and they have also sought a hearing from the Competition Commission. Having accepted the jurisdiction and authority of the Competition Commission to proceed in the matter pursuant to the said notices and having unequivocally appeared before the Commission, the petitioners are now estopped from raising any objection to the said proceedings.

11. Without prejudice to the above submissions, it is further submitted by the learned Additional Solicitor General as under :-

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(a) The Competition Commission can decide constitutional, legal and even jurisdictional issues. In L. Chandra Kumar v Union of India, AIR 1987 SC 1125 (paras 90 and 93) and Special Director and another v Mohd. Ghulam Ghouse, AIR 2004 SC 1467 (para 5), the Apex Court has deprecated the practice of litigants raising constitutional issues to directly approach the High Court and thus subvert the jurisdiction of the tribunals. The tribunal can decide all such issues and even jurisdictional issues can also be decided by the tribunal. The only exception is that the tribunal cannot decide the constitutional validity of the statute under which the tribunal is established.

(b) It is premature to interfere with a show cause notice and stop proceedings. No prejudice is caused by mere issuance of the show cause notice. Even jurisdictional issues can be urged before

and adjudicated upon by the tribunal as held by this Court in Vodafone International Holdings BV v Union of India, 2009 (4) Bombay Cases Reporter 258 (DB) and confirmed by the Apex Court in (2009) 179 Taxman 129 (SC).

(c) In Kingfisher Airlines Ltd. v The Competition Commission of India and others, Writ Petition No.1785 of 2009, this Court has considered a premature challenge to proceedings under the Competition Act and has refused to interfere in its extraordinary jurisdiction under Article 226 of the Constitution of India.

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(d) The forum created by a statute that creates a liability or

obligation should not be disregarded. The Competition Act creates obligations and liabilities which are not common law liabilities or obligations and, therefore, in such cases the High Court should not entertain petitions under Article 226 and ignore the statutory forum. Strong reliance is placed on the decision dated 12th April 2010 of the Apex Court in Raj Kumar Shivhare v Assistant Director, Enforcement, (Civil Appeal No.3221 of 2010).

12. Without prejudice to the above submissions, Mr.Khambatta, learned Additional Solicitor General has also submitted that just for the purposes of prima facie discussion and to indicate that the petitioners do not have a cast iron case on the question of jurisdiction of the Competition Commission, he would make the following submissions :-

What the petitioners are seeking to do is to redraft the language of sub-section (5) of Section 3 of the Competition Act, 2002 to read that nothing contained in this section (Section 3 of the Competition Act) shall apply to the right of any person under the Copyright Act, 1957. All that sub-section (5) of Section 3 provides is that sub-section (1) of Section 3 shall not take away or restrict the right of any person to restrain any infringement of copyright or the right of any person to impose reasonable conditions for protecting his rights under the Copyright Act. Hence all the defences which can be raised before the Copyright Board can be also raised before the Competition Commission.

UPA 18 wp358-10 In support of this submission, reference is made to the provisions of Sections 60, 61 and 62 of the Competition Act, 2002.

Section 61 provides for exclusion of jurisdiction of civil Courts in respect of any matters which the Commission or the Appellate Tribunal is empowered by the Competition Act to determine. Section

60 gives the Act overriding effect over other laws. Section 62 of the Competition Act, 2002, reads as under :-

62. Application of other laws not barred - The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force."

(emphasis supplied) Relying on the preamble of the Competition Act that the Act has been enacted to provide "for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto", it is, submitted that the protection of interests of consumers is an important object for enactment of the Competition Act, 2002 and, therefore, if the Competition Act has provided for an additional forum for protection of consumers' rights in addition to the forum of Copyright Board provided under the Copyright Act, 1957, it cannot be said that the Competition Commission is acting without jurisdiction.

(emphasis supplied).

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13. Having heard the learned counsel for the parties, we have given anxious consideration to the rival submissions.

14. It is vehemently contended on behalf of the petitioners that issuance of notices by the Competition Commission proceeds on the basis of incorrect assumption of certain facts and issues. It is, therefore, necessary to discuss the power of the Commission to determine jurisdictional facts. It is true that the jurisdictional fact is a fact which must exist before a Court, Tribunal or an Authority assumes jurisdiction to decide a particular matter.

ig In *Chaube Jagdish Prasad and another v Ganga Prasad Chaturvedi*, AIR 1959 SC 492 (para 17), the Apex Court quoted with approval the following observations of Lord Esher M.R., in the *Queen v Commissioner for Special Purposes of the Income-tax*, (1888) 21 QBD 313, 319 :

"When an inferior Court or tribunal or body, which has to exercise the power of deciding facts is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary

state of facts exists as well as the jurisdiction on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction they give them, whether there shall be any appeal from their decision, or there will UPA 20 wp358-10 be none. In the second of two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

The Apex Court then stated as under :

"These observations which relate to inferior Courts or tribunals with limited jurisdiction show that there are two classes of cases dealing with the power of such a tribunal (1) where the legislature entrusts a tribunal with the jurisdiction including the jurisdiction to determine whether the preliminary state of facts on which the exercise of its jurisdiction depends exists and (2) where the legislature confers jurisdiction on such tribunals to proceed in a case where a certain state of facts exists or is shown to exist. The difference is that in the former case the tribunal has power to determine the facts giving it jurisdiction and in the latter case it has only to see that a certain state of facts exists."

Whatever may be the debate about the scope of review by the Writ Court of the decision of a Tribunal on a jurisdictional fact, every Tribunal has the jurisdiction to determine the existence or otherwise of the jurisdictional fact, unless the statute establishing the Tribunal provides otherwise.

On a bare reading of the provisions of the Competition Act, 2002, it is clear that the Competition Commission has the jurisdiction to determine whether the preliminary state of facts (on which the further exercise of its jurisdiction depends) exists. There is nothing in the UPA 21 wp358-10 Competition Act, 2002 to indicate that the Competition Commission is not invested with the jurisdiction to determine such jurisdictional fact.

15. The question whether the Competition Commission has jurisdiction to initiate the proceedings in the fact situation of these cases is a mixed question of law and fact which the Competition Commission is competent to decide. The matter is still at the stage of further inquiry. The Commission is yet to take a decision in the matter. There is no reason to believe that the Competition Commission will not consider all the contentions sought to be raised by the petitioners in these petitions including the contention based on sub-section (5) of Section 3 of the Competition Act.

16. The submission of the respondents that the Writ Court would not entertain a petition challenging a show cause notice, is sought to be countered on behalf of the petitioners by relying on the decision in Calcutta Discount Co. Ltd., (supra).

The contention which appealed to the Apex Court in the above case was the following :-

"26. Mr. Sastri next pointed out that at the stage when the Income Tax Officer issued the notices he was not acting judicially or quasi-judicially and so a writ of certiorari or prohibition cannot issue. It is well settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where UPA 22 wp358-10 such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences."

(emphasis supplied)

17. In the facts of the instant case, it cannot be said that requiring the petitioners to appear before the Competition Commission will subject the petitioners to lengthy proceedings and unnecessary harassment. Sections 8 and 9 of the Competition Act provides that the Commission shall consist of a Chairperson and two to six Members having special knowledge of, and professional experience of at least fifteen years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy. The Chairperson and Members of the Commission are to be appointed by the Central Government from a panel of persons recommended by a Selection Committee headed by the Chief Justice of India or his nominee.

In case the final decision of the Competition Commission is adverse to the petitioners, the petitioners will have right to challenge the same in an appeal before the Competition Appellate Tribunal established under Section 53A of the Competition Act and the said Appellate Tribunal is headed by a former Judge of the Supreme Court of India. It, therefore, appears to us that the decision of the Apex Court in *Calcutta Discount Co. Ltd.* (supra), in which the challenge was to the show cause notice issued by an Income Tax Officer for re-assessment, cannot be UPA 23 wp358-10 applied to a case where a show cause notice has been issued by the Competition Commissioner under the Competition Act. Against the decision of the Commission an appeal would lie before the Appellate Tribunal headed by a sitting or a former Judge of the Supreme Court of India or a Chief Justice of a High Court as provided in Section 53D of the Competition Act. Sub-section (2) of Section 53D of the Competition Act also provides that Members of the Appellate Tribunal shall be persons of ability, integrity and standing having special knowledge of and professional experience of at least twenty-five years in competition matters, including competition law and policy, international trade, economics, business, ig commerce, law, finance, accountancy, management, industry, public affairs, administration. As provided in Section 53E of the Competition Act, the Chairperson and Members of the Appellate Tribunal are appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of the Chief Justice of India or his nominee as the Chairperson, and the Secretary in the Ministry of Corporate Affairs and the Secretary in the Ministry of Law and Justice as the Members of the selection committee.

18. The contention that the Competition Commission has already pre-judged the issue also cannot be accepted. Under sub-

section (1) of Section 26, the Commission directed an investigation by Director General into the complaint of FICCI-Multiplex Owners' Association. Under sub-section (3) thereof, the Director General submitted a report of his findings that there is contravention of Section 3(3) of the Act and under sub-section (4), the Commission forwarded a copy of the report to the petitioners. After consideration of the petitioners' objections, the Commission has formed an opinion under UPA 24 wp358-10 sub-section (8) that further inquiry is called for. Hence all that the Commission is doing is to hold an inquiry into such contravention as reported by the Director General. All the authorities including disciplinary authority in service matters initiate departmental inquiries upon receiving preliminary inquiry report of subordinate officer indicating misconduct having been committed, but once the inquiry is held by observing the applicable statutory provisions and the principles of natural justice, the concerned disciplinary authority takes a final decision in the matter in accordance with law. Hence, mere issuance of a show cause notice under Section 26(8)/Section 27, like issuance of a charge-sheet in a departmental inquiry, cannot be treated as pre-judging the issue, merely because the petitioners had raised some of the legal contentions in the replies to the notice issued by the Director General of Investigation and thereafter also the Commission has issued show cause notices. That can never mean that the Competition Commission will not consider the petitioners' objections against maintainability of the proceedings.

19. Since we are inclined to dismiss the petitions only on the ground that the petitions challenge show cause notices and that it is open to the petitioners to raise all available contentions, including preliminary objection against legality or otherwise of initiation of the proceedings against the petitioners, we do not express any opinion on merits of controversy between the parties and, therefore, we do not think it fit to deal with those contentions on merits, as we do not wish to express any opinion either way even on the merits of the preliminary objections raised by the petitioners about jurisdiction of the Tribunal to initiate the proceedings against the petitioners. All contentions are kept open.

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20. If the petitioners wish to submit any reply/further reply to the impugned notices, the petitioners may do so within one month from today and the Commission shall accept the same and give the petitioners an opportunity of personal hearing before taking any decision in the matters.

21. Subject to the above clarifications and directions, the petitions are dismissed.

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CHIEF JUSTICE

S.C. DHARMADHIKARI, J.

