

Competition Commission of India

[Case No. 17 of 2011]

Dated: 24.4.2012

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

- Informant

1. Eastern Indian Motion Picture Association (EIMPA), Kolkata
2. The Censor Board of Film Certification, Kolkata

- Opposite Parties

As per R. Prasad (dissenting)

Order under section 27 of the competition act

The majority of the members of the Commission have passed an order and all the facts have been discussed in their order but I am not in agreement with certain views and therefore I am passing a separate order.

2. The facts of the case are that the informant in this case submitted a registration certificate issued by the Eastern India Motion Picture Association (EIMPA) to the Central Board of Film Certification (CBFC) before the release of the film. Subsequently, EIMPA issued a show cause notice to the informant stating that as she had submitted a wrong declaration in the application for registration of the title as to why the registration should not be cancelled. Subsequently EIMPA deregistered the title and informed the CBFC. CBFC also issued a show cause notice for the cancellation of the censor certificate issued to the informant. Thus the movie could not be released and therefore the informant has stated



that EIMPA and CBFC have denied market access to the informant. The Commission considered the information furnished by the informant and directed in investigation by the Director General.

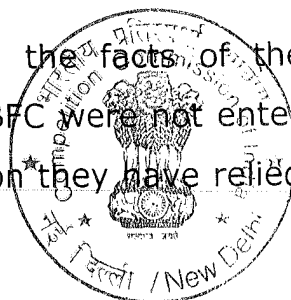
3. The Director General on the basis of enquiry found anti-competitive provisions in the bye-laws of EIMPA which are reproduced as under:

- (i) *Restricting its members to deal with non-members.*
- (ii) *Making compulsory the registration of each film before release in their territory.*
- (iii) *For registration of a title, membership of EIMPA is compulsory.*
- (iv) *Clause 12 of Registration rules regarding registration of dubbed films according to which dubbing of films in Bengali language are permitted only if the originals are produced in any of the languages specified in bye-laws.*

The DG came to the conclusion that the rules and regulations of EIMPA are in violation of section 3(3)(b) of the Act and that these rules led to a foreclosure of Competition. The DG held that EIMPA had contravened Sections 3(3)(b) and 3(4) of the Competition Act.

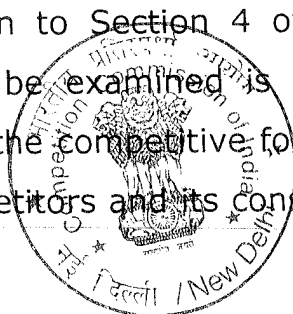
4. The Commission took a hearing of the informant as well as EIMPA and CBFC. EIMPA stated that it had registration rules in respect of the dubbed films so as to offer of protection to Bengali Films. For this reason EIMPA did not allow films in Hindi and South Indian languages which were dubbed in Bengali. The informant stated that CBFC should not have cancelled the censor certificate of the film which was dubbed in Bengali on the basis of the letter issued by EIMPA.

5. The majority examined the facts of the case and came to the conclusion that EIMPA and CBFC were not enterprises under Section 2(h) of the Act. For this proposition they have relied in their order in case no.



25 of 2010. In that case I had held a different view which was that an association of producers and distributors such as EIMPA was an enterprise under Section 2(h) of the Competition Act. Therefore EIMPA and CBSE are both treated as enterprises for the purposes of this Act. It is not necessary that an enterprise should carry out business. If an enterprise or person carries on any activity which effects the carrying on business in any manner then the enterprise or the person has to be treated as an enterprise. This is view which I have held in my order in case number 25 of 2010. This view has been approved by the Delhi High Court in the case of Hemant Sharma vs. Chess Federation writ petition (Civil) no. 5770 of 2011. This view of the single-member of Delhi High Court was confirmed by the Division Bench of the Delhi High Court vide its order in MPA number 972 of 2011 on 22.11.2011. Therefore I do not agree with the majority of the Members that an association is not an enterprise under the Competition Act. Further CBFC is an authority whereas EIMPA is a company though called an association. Further the DG has made out a case under Section 3(3)(b) and 3(4) of the Competition Act. Section 3 deals with anti competitive agreements. One cannot enter into agreement with oneself and therefore Section 3 could not be applicable in this case. Further if an entity is not an enterprise it could not be a subject matter of the Competition Act either under Section 3 or 4 of the Act.

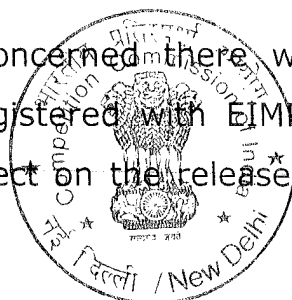
6. The next issue to be examined is whether there was an abuse of dominance under Section 4 of the Competition Act. For this purpose the first aspect to be looked into is as to what was the relevant market in this case. The relevant market would be the market of exhibition of films in the geographical market of West Bengal. It has to be examined whether EIMPA and CBFC were the dominant players in the market. Dominance is defined in the explanation to Section 4 of the Competition Act which states that the issue to be examined is whether an enterprise could operate independently of the competitive forces in the market and is in a position to effect its competitors and its consumers in the relevant market



in its favour. In this particular case CBFC and EIMPA could act independently of competitive forces and were also in a position to affect the consumers by not certifying or registering a film for exhibition. Thus the consumers were deprived of seeing a film which had not been certified. The other factors mentioned in Section 19(4) also have to be looked into in order to establish dominance. No film can be exhibited in India without a certificate from CBFC. In the state of West Bengal film cannot be released in most of cinema halls if it is not registered with EIMPA. Therefore the viewers of the films i.e. the consumers were dependent on the enterprise. Further CBFC enjoyed a dominant position due to a statute. Thus clause (f) & (g) of Section 19(4) are applicable to the facts of the case. Another factor to be considered which has not been mentioned in Section 19(4) is that due to the collective bargaining power of EIMPA, no exhibitor could show films in the theatres of West Bengal if not registered with EIMPA. Therefore the conditions specified in Section 19(4) are applicable in this case. Thus EIMPA and CBFC are dominant in the relevant market.

7. The next question to be decided as to whether there was an abuse of dominance in this case. To decide this issue we have to consider the facts in this case. The film in this case was an imported film and the informant was a distributor of the film. Accordingly to the rules of CBFC, for a foreign film registration of the title of the film with an association of producers is not necessary. But for a film produced in India even if dubbed in the local language, registration of the film by association of producers is necessary. In this case, CBFC knowing the facts of the film did not cancel the censor certificate and the film as exhibited in the theatres of West Bengal. There was no abusive conduct on the part of CBFC.

8. As far as EIMPA is concerned there was no necessity for the informant to get the film registered with EIMPA. EIMPA cancelled the registration. This had no effect on the release of the film as the censor



certificate was not cancelled by CBFC and the film was exhibited in the theatres in West Bengal. The informant was registered as a distributor of the film. But there are certain elements mentioned in Para 3 of this order which can be treated as anticompetitive. These conditions in the bye laws can lead to the denial of market access under Section 4(2)(c) of the Act in the form of practice. Such clauses in an agreement or in the byelaws were treated as anticompetitive by the MRTP Commission in the case of Hindustan Lever Ltd. Hindustan Lever took up the issue in appeal and Supreme Court in the case of Hindustan Lever Ltd. AIR 1971 SC 1285 held that such restrictive clauses are anticompetitive. It is for the Commission to approve redrafted clauses which are not anticompetitive in consultation with the party. The Supreme Court also held that such anticompetitive clauses are practices and need to be deleted or modified.

9. Therefore, as EIMPA is an enterprise which follows practices which may result in denial of market access through the exercise of such practices, is directed to modify its bye laws. I therefore agreed with the majority order that cease and desist order is necessary for the purpose of stopping anti competitive conduct in the market. I also agree with the other directions given in the majority order.

10. After change of bye laws in the regulations, EIMPA should submit a compliance report within 3 months of this order.

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



sd/-
(R. Prasad)
Member, CCI