STRIKES & INDUSTRIAL ACTION – CONSTITUTIONAL FREEDOM OR ANTITRUST VIOLATIONS?

Rahul Satyan& Krithika Ramesh[*]

1. INTRODUCTION

On March 7, 2017, the Supreme Court of India ("**Supreme Court**") passed what is arguably the first substantive order under the Competition Act, 2002 ("**Competition Act**"). This order, in *Competition Commission of India* v. *Coordination Committee of Artists and Technicians of W.B. Film & Television*[1] ("**West Bengal Artists case**") upheld an appeal by the Competition Commission of India ("**CCI**") against an order of the Competition Appellate Tribunal ("**COMPAT**") which had held that the act of boycott by an artists' association was not a violation of the Competition Act. The Supreme Court however overturned the COMPAT's verdict and upheld the earlier order of the CCI terming such an act as an anti-competition act. In its order, the Supreme Court, *inter alia*, adjudicated the issue of industrial action by trade unions, and whether they were subject to scrutiny under the Competition Act. This article seeks to dwell on this issue of interface between industrial action and antitrust law in light of the decision of the Supreme Court in *West Bengal Artists case*[2]. The article will also explore whether, and in which circumstances do such acts of collective bargaining can be adjudicated as antitrust violations.

As a nation, India has always proudly embraced its socialist roots. The Constitution of India ("**Constitution**"), in its Preamble, proclaims India to be a *"sovereign, socialist, secular, democratic republic"*. Social justice is an integral part of the Indian political and legal landscape. Industrial action is seen by many as an enabler of social justice in this landscape – whereby a class of persons with less bargaining power can demand and extract social and economic concessions from the economic strata which controls the means of production. However, the very fundamentals of a socialist economy were shaken in 1993 when liberalisation brought with it, to a certain extent, the freedom to take commercial decisions as one saw fit. There were in-built safeguards, of course, but by and large, the Indian industrial space evolved a compromise between sheer free-market 'laissez faire' and the command-and-control pre-liberalised economy. Collective bargaining by unions and associations was an integral part of that compromise. What the government refused to do (for example fix anything more than a minimum wage), the unions stepped in to do by means of collective bargaining. Industrial law took note of the changing ground realities

---

[1] (2017) 5 SCC 17.

[2] (2017) 5 SCC 17.

and changed accordingly. However, the means of industrial action, such as strikes, lock-outs, go-slows etc. continued to keep their place. Boycotts and collective refusals to deal were part and parcel of this landscape. The government and industry struggled to balance the legitimate rights of labour, with the pressing need for industrial efficiency. However, the coming into force of the Competition Act added another layer to this complex equation.

Under the Competition Act, any collective acts by an association of persons or enterprises which had the effect of fixing prices, limiting production, dividing markets or manipulating a bidding process is deemed to cause an Appreciable Adverse Effect on Competition ("**AAEC**") in India, and is thus a violation of the Competition Act. In case after case, the CCI and the COMPAT have come down heavily upon trade associations which have been seen to be boycotting certain enterprises or partaking in acts which limit production. This article seeks to explore the line that divides the constitutional freedom (if not the absolute right) to take part in industrial action against the restraining force contained in the Competition Act. Lastly, the new 'gig' economy proliferating in recent times has placed additional levels of complexity in this debate. In an economic reality where traditional "employment" (the *sine qua non* of protection under labour law) is weakening and being rapidly replaced with independent "gigs", the line dividing the freedom given to industrial action and the restrictions placed by the Competition Actis growing even narrower. This article seeks to explore this new economic reality on the anvil of Indian antitrust law.

2. ANATOMY OF "STRIKE" UNDER LABOUR LAW

Article 19(1)(c) of the Constitution lays down that *"all citizens shall have the right to form associations or unions or co-operative societies"* subject to certain reasonable restrictions such as the operation of any law which places any restrictions in the interest of public order, morality, or the sovereignty or integrity of India. Accordingly, all citizens of India may form a union, association or co-operative society, subject to reasonable restrictions. It would appear that this right to form unions and associations is restricted to natural persons, since companies and other juristic persons are not considered as "citizens", and thus the right of companies to form associations is not a fundamental right, such as the one given to the workmen of an industry to form, say, a trade union. However, such unions are not restricted to workmen alone; employers' unions many also be formed to earn a profit.

A union is formed for many reasons, but primarily to provide a forum for collective bargaining. The Supreme Court in *All India Bank Employees' Assn.* v. *National Industrial Tribunal* [3], laid down the rights of trade union members which are encompassed within the fundamental right to freedom of speech and

[3] AIR 1962 SC 171.

expression under Article 19(1)(c). These included the right of the members of the union to meet, to move from place to place, to discuss their problems and propagate their views, and to hold property. However, the Supreme Court also went on to hold that that Article 19(1)(c) does not account for a right pertaining to the achievement of all the objectives for which the trade union was formed. Accordingly, industrial actions such as "strikes" have not been granted constitutional protection.

However, while the right to strike has not been designated a fundamental right under the Constitution, the courts have recognised strikes as a mode of redress for resolving the grievances of workers. Justice T.C. Menon in *Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd.* v. *Collector*[4], said that the workers in a democratic state have the right to resort to strikes in order to express their grievances or to make certain demands. Thus, a strike is a necessary safety valve for industrial relations. Further, the right to strike is the very essence of the principle of collective bargaining.

In *Labour Disputes and Collective Bargaining*, Ludwig Teller laid down that a "strike" was a dispute between an employer and his workers in the course of which there is a concerted suspension of employment. In a similar vein, the Industrial Disputes Act, 1947 ("**ID Act**") defines a "strike"to mean "a cessation of work by a body of persons employed in any industry acting in combination or a concerted refusal, or a refusal under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment."

2.1. "Workmen" employed in an "industry"

For the act to become an industrial strike within the meaning of the ID Act, the establishment under which the striking workmen are employed must be an "industry". Section 2(s) of the ID Act makes it clear that unless the person concerned is employed in an activity which is an "industry", he will not be a 'workman'. Once it is established that the activity in question is an "industry" as defined in Section 2(j), the question then arises, as to whether the persons concerned are employed in such industry. The term "employed in an industry" is wide enough to cover operations that are incidental to the main "industry". The plain letter of the definition under the ID Act makes it clear that not only the persons who are actually employed in an "industry", but also those who have been discharged, dismissed or retrenched in connection with or as a consequence of an industrial dispute; and whose dismissal, discharge or retrenchment has led to that dispute, would fall within its ambit. Further, for an employee in an "industry" to be a "workman" under the definition, the employee must be employed to do any of the following:

[4] 1982 Lab IC 367.

- Manual labour;
- Unskilled work;
- Skilled work;
- Technical work;
- Operational work;
- Clerical work; and
- Supervisory work

2.2. Converted refusal to work

For an industrial action to be a "strike", the concerted quitting, cessation, or discontinuance of work is an essential ingredient. Further, a mere cessation of work will not be seen as a "strike" unless it can additionally be shown that such cessation of work was a "concerted" action for the purpose of enforcing an industrial demand. Interestingly, in order to establish such concerted action, there need not be any formal agreement; the same may be deduced from acts and conduct.

2.3. Relationship of employment

Unless there is a contract of employment between the striking persons and the industry in question, there can be no strike as understood in the ID Act. The identifying mark of an employer-employee relationship is that the employee should be under the supervision of the employer in respect of the details of the work. To distinguish between an independent contractor and a servant, the test is whether or not the employer retains the power, not only of directing that work is to be done, but also of controlling the manner of doing his work. In *Short* v. *J&W Henderson Ltd.*[5], a case decided by the House of Lords under the Workmen's Compensation Act, Lord Thankerton recapitulated with approval the four indicia of contract of service derived by Lord Clark J from the authorities referred to by him in the judgment under appeal, viz:

- the master's power of selection of his servant;
- payment of wages or other remuneration;
- the master's right to control the method of doing the work; and
- the master's right of suspension or dismissal;

and further observed that "modern industrial conditions have so much affected the freedom of master in cases in which no one could reasonably suggest that the employee was thereby converted into an independent contractor, that, if

[5] (1946) 62 TLR 427.

and when an appropriate occasion arises, it will be incumbent on this house to reconsider and to restate these indicia". Broadly speaking, there are three tests for discerning the contract of employment', viz:

- The 'Traditional' or 'Control' Test: The traditional control test refers to the control of an employee as to not only what he must do, but also as how and when he must do.
- The 'Organisation' or 'Integration' Test: This test focusses on whether the employee forms part of the organisation. An evolution from the traditional "control test", this test was evolved in *Morren* v. *Swinton and Pendlebury Borough Council*[6], where Lord Parker pointed out that when one is dealing with a professional man or a man of some particular skill and experience, there can be no question of an employer telling him how to work, therefore an absence of control and direction in that sense can be of little use as a test;
- The 'Mixed' or 'Multiple' Test: In *Argent* v. *Minister of Social Security*[7], Roskill J. suggested that all the relevant factors must be borne in mind and one has to look at the totality of evidence and then apply them to the statute.

In India, while earlier decisions heavily relied upon the test of "control and supervision", the modern version of the law has diluted its importance. The Supreme Court has also held that the definition of "worker" under the ID Act is sufficiently wider to cover part time workers such as tailors working in a part time job. They will also fall within the definition of "workman".

In sum, the treatment of strikes as a method of collective bargaining under labour law is primarily characterised by the following:

- The industrial action is a result of concerted action by workmen in an industry; and
- There workmen are bound to this industry by a contract of employment, i.e. they have no independent mode of action, and is, broadly speaking, subjected to significant control by the employer.

3. ANATOMY OF A VIOLATION UNDER THE COMPETITION ACT

The role and acts of trade associations have been adjudicated by the CCI on multiple occasions. Under Section 3(3) of the Competition Act, any agreement entered into between enterprises or association of enterprises, or persons or association of persons which are actual or potential competitors shall be presumed to cause an AAEC on competition in India if such agreement

[6] (1965) 1 WLR 576.
[7] (1968) 1 WLR 1749.

determines prices, limits production, shares markets or manipulates a bidding process. Such an arrangement is popularly referred to as "cartel", which is defined under the Competition Act as to include an association of producers, sellers, distributors, traders or service providers, who, by agreement amongst themselves, limit, control, or attempt to control the production, distribution, sale or price of, or trade in goods or services.

A trade association, in that sense, is an antitrust powder keg. A group of competitors meeting regularly to discuss industry issues is a supposed ripe scenario for collusion and exchange of commercially sensitive information, such as details of prices and production. For antitrust regulators across the world, trade association meetings are low hanging fruit, and collective acts decided upon in trade association meetings have become causes of action for antitrust investigations. In *Builders Assn. of India* v. *Cement Manufacturers' Assn.*[8], the CCI determined that the exchange of commercially sensitive information between cement manufacturers through the platform of an industry association was akin to an anti-competitive agreement since it reduced the competitive uncertainty in the market for cement in India. The CCI concluded that the cement manufacturers were indulging in a cartel aimed at controlling production and raising prices, and went on to impose penalties amounting to about USD 1 billion, the highest antitrust penalty in India thus far.

However, trade associations do serve legitimate commercial purposes, such as collective representation to government and regulatory authorities, formulating and modernising industry standards, instituting safety and good conduct practices in the industry, etc. When commercially sensitive information is pooled for such purposes, with requisite "Chinese Walls" or informational barriers in place, antitrust authorities refrain from taking action. In *All India Tyre Dealers Federation* v. *Tyre Manufacturers*[9], the CCI assessed whether the sharing of information by certain tyre manufactures in the context of an anti-dumping investigation with common counsel was an exchange of information which qualified as an anti-competitive agreement within the meaning of Section 3(3) of the Competition Act. However, in this case, the CCI concluded that since the information collected and shared with the common counsel was for the purpose of legal proceedings, there was no arrangement which could be called a cartel. It is important to note that in this case, this information was not shared amongst or between the various tyre manufacturers.

Historically, across the world, trade associations have represented the cause of their constituent members to the requisite stakeholders. Such collective bargaining has taken a variety of forms and tactics. In India, trade association tactics such as boycotts and compulsory adherence to certain rules have been so ingrained, that they are rarely questioned. However, the CCI has

[8] 2012 SCC OnLine CCI 43.
[9] 2012 SCC OnLine CCI 66.

frequently seen such practices as contraventions of the Competition Act. Trade associations, especially nodal associations which have the power to approve or disapprove members, have a lot of economic power in any market. Accordingly, the CCI has seen such associations as dominant enterprises, and their actions as abuses of dominant position under Section 4 of the Competition Act. To take a few examples, in several cases dealing with pharmaceutical trade associations, such as *Santuka Associates (P) Ltd.* v. *All India Organisation of Chemists and Druggists Assn.*[10], the CCI came down on standard practices of such associations such as the requirements of no-objection certificates, fixing of dealer margins, etc. and designated them as anti-competitive practices. Further, the CCI has also come down hard on practices such as the collective boycott of third parties. In case after case, such as *Collective Boycott/refusal to deal by the Chemists & Druggists Assn., In re*[11] the CCI held that the prevalent practice of collective boycott of certain entities which did not follow certain diktats, by a pharmaceutical trade association was a violation of the provisions of the Competition Act and imposed penalties accordingly.

4. THE THIN RED LINE

The order of the Supreme Court in *West Bengal Artists case*[12] has shed fresh light on the dividing line between the rights of a trade union to collectively bargain, and the diktat of competition law that collective action by a person or enterprise or collection of persons or enterprises is an anti-competitive act.

In *Competition Commission of India* v. *Coordination Committee of Artists and Technicians of W.B. Film and Television*[13] (**"West Bengal Artists case"**) the Supreme Court upheld an appeal by the CCI against an order of the COMPAT in a case of alleged cartelisation by members of a film and television artists' trade union in the state of West Bengal. Arguably the Supreme Court's first substantive order under the Competition Act, it arose out of a complaint that the holder of a rights to dub and telecast the serial "Mahabharata" in Bengali was unable to do so due to the opposition and pressure from two associations, namely the Eastern India Motion Picture Association (**"EIMPA"**) and the Committee of Artists and Technicians of West Bengal Film and Television Investors (**"Co-ordination Committee"**). The Co-ordination Committee is a joint platform comprising the Federation of Cine Technicians and Workers of Eastern India, and West Bengal Motion Pictures Artists Forum. As a result of this opposition, it was alleged that one of the two television channels which had formally contracted to broadcast the serial refrained from doing so. Upon the complaint, the investigative branch of the CCI, the office of the Director General (**"DG"**), initiated an investigation and concluded that the joint action

[10] 2013 SCC OnLine CCI 16.
[11] 2014 SCC OnLine CCI 135.
[12] (2017) 5 SCC 17.
[13] (2017) 5 SCC 17.

by the persons who were the members of the Co-ordination Committee, to restrict the telecast amounted to an anti-competitive agreement within the meaning of Section 3(3)(b) of the Competition Act.

In response to the DGs conclusion, the Co-ordination Committee argued that they were merely a *trade union of artists and technicians* of West Bengal and, as such, were not an "enterprise". Accordingly, it was argued their acts were merely industrial action protected under Article 19(1)(a) of the Constitution of India.

Interestingly, the CCI, while agreeing with the findings of the DG that, by their conduct, the Co-ordination Committee and EIMPA had restricted the telecast of the dubbed television serial, held that the two associations were not 'enterprises' for the purpose of the Competition Act. However, the CCI held, this only absolved them from adjudication under Section 4 of the Competition Act, which deals with unilateral conduct, and not for concerted conduct under Section 3 of the Competition Act. Accordingly, the CCI went on to hold that by restricting the telecast of the serial, the Co-ordination Committee and EIMPA has violated the provisions of Section 3(3)(b) of the Competition Act.

Upon appeal, the COMPAT held that the members of the two trade unions, being artists, technicians, etc., were not competitors in the market for "telecasting of dubbed serials on the television in West Bengal" (which would ideally be direct to home/cable operators). Further, since one of the two channels continued to telecast the serial despite the industrial action by the trade unions, there was no evidence to suggest that the industrial action in question actually limited or controlled the production, supply, markets, technical development and investment or provision of services. Accordingly, the COMPAT allowed the appeal and held that the Co-ordination Committee was not guilty of a contravention under Section 3(3)(b) of the Competition Act.

The Supreme Court, before whom this order of the COMPAT was challenged, took a divergent view. It held that that the Co-ordination Committee did not act as pure trade unionists. Any entity engaging in an economic activity constitutes an enterprise within the meaning of Section 3 of the Competition Act. The constituent members of the Co-ordination Committee, as per the Supreme Court, were 'enterprises' which were engaged in the production, distribution and exhibition of films. Accordingly, by engaging in concerted action which boycotted a fellow competitor and deprived consumers from exercising their choice and hindered competition in the market by barring dubbed television serials from exhibition on television channels in West Bengal, the Supreme Court held that the Co-ordination Committee had violated the provisions of Section 3(3)(b) of the Competition Act.

In sum, the argument of the unions that there were pure trade unionists engaged in collective bargaining was shot down by the Supreme Court because the members of the union were enterprises engaged in economic activity.

Hence, these were more aptly characterised as 'trade associations' and not pure trade unions. It stands to reason that had this been a pure trade union, the members of such a union would not be competitors and hence, any collective action would likely be seen as collective bargaining, and not anti-competitive concerted acts. The key takeaway appears to be that the actions of a legitimate trade union comprising individual workers may still enjoy the protection of Article 19 of the Constitution, and legislation such as the ID Act. However, where the trade union in question operates more like a trade association – in that their members are enterprises, or represent enterprises – any industrial actions such as boycotts may be adjudicated under the relevant provisions of the Competition Act.

It is interesting to note that the definition of "strike" under the ID Act has most of the ingredients of a cartel under Section 3(3)(b) of the Competition Act. The conduct in question is as a result of concerted action, and does result in cessation of work thus affecting production of goods or services. However, as seen from the discussion above, the crucial difference if that a cartel offence is committed by a group of enterprises (which include both natural and juristic persons) which are engaged in independent economic activity. On the other hand, the contract of employment required under the ID Act ensures that the "workmen" in question do not have independence of commercial conduct, and are thus not "enterprises".

5. THE PATH AHEAD

The fundamental distinction between the treatment of collective bargaining and industrial action, as seen above, hinges around employment. If one is an employee, an act of collective bargaining would be protected from antitrust action. Whether labour laws protect such an act depends on the facts and circumstances of the case. However, for all practical purposes, the legitimate contract of employment stands a bulwark against the imposition of antitrust law. This protection allows workers in any industry to unionise and organise legitimate industrial action to seek redressal of their demands.

In February 2017, the city of New Delhi witnessed a strike call by the Sarvodaya Drivers Association of Delhi ("**SDAD**"). The SDAD, a union of Ola and Uber drivers in the city, called for lakhs of cars to be off the streets for almost two weeks, demanding better remuneration and incentives. As almost three lakh vehicles stayed off the roads, millions of commuters were inconvenienced but Ola and Uber refused to budge. Amidst reports of sporadic violence, the Delhi High Court stepped in to direct that the SDAD or any other union could not force any driver opting to continue to work from doing so. Finally, under a peace brokered by Delhi Government, the strike was called off and cabs returned to the roads. The question to ask is whether this strike by the SDAD and other drivers unions would enjoy the benefits of legitimate industrial

action. The answer is clearly a resounding negative. Cab aggregators such as Ola and Uber maintain (across the world) that they are but a software company which provides a platform for customers and independent driver-contractors to get in touch with one other. Thus, in the eyes of cab aggregators, such drivers are entrepreneurs and not employees, hence not eligible for protection under traditional labour law. In a cruel twist, such strikes will most likely be seen as a collusive act between "enterprises" and be liable for antitrust action.

This is a peek into the future of labour relations in India. Across the world, the economy is increasingly becoming a "gig" economy. This economy is characterised by freelance or short term jobs, as opposed to permanent, fixed ones. The gig economy priorities access over ownership - hence the rise of Uber and Ola, which don't own a single cab, and Airbnb, which doesn't own a single room. The participants in a gig economy, such as Uber divers or Airbnb housekeepers, are considered as entrepreneurs and independent contractors, as opposed to employees. As such, any collective action by them may be seen as a collusive act by independent enterprises and thus actionable under the Competition Act. The rise of the gig economy across the world is being mirrored in India. Businesses are increasing outsourcing key aspects of their operations to contractors. With employment in the traditional sense fading away, the protections of labour law cease to be effective as well. The gig economy not only leave its participants bereft of the benefits under labour law, but also subjects the same to antitrust action under competition law.

In sum, under traditional labour law, a legal strike is inherently protected from antitrust action by the employer-employment relationship. Collective bargaining within this employer-employee framework is considered safe rom action under the Competition Act since a workman lacks independent power of action and thus is not an "enterprise". However, the moment collective bargaining includes "enterprises", any co-ordinated bargaining action is likely to be seen as cartel activity and thus proscribed by the CCI. The order of the Supreme Court in *West Bengal Artists case*[14] does not make the extent of such disqualification clear, in that it is unclear whether *all* the participants in the collective bargaining act should be enterprises for the defence of trade unionism to fail. Arguably, even if a percentage of the same may be said to be enterprises, the action loses the protection of labour law.

In the new economy, it is thus important for stakeholders to know exactly where they stand with respect to collective industrial action. While employees are protected by their status, independent contractors most certainly would face antitrust liability for such acts. Legitimacy of the cause itself is irrelevant, and it is important for market participants to understand on which side of this legal divide do they stand.

[14] (2017) 5 SCC 17.