

Competition Commission of India

[Case No.61/2010]

Dated: 08.02.2013

In Re: - Sh. Surinder Singh Barmi vs. Board for Control of Cricket in India (BCCI)

As per R. Prasad (Supplementary Order)

Order under Section 27 of the Competition Act

I have read the order of the majority of the members in the case. I agree with the said order as far as the contravention of the section 4 of the Competition Act, 2002 is concerned. However, I am also of the view that there is a contravention of Section 3 of the Competition Act, 2002 in this case. Since the majority order has dealt with the facts, relevant rules, byelaws of the BCCI and ICC, DG's observations and arguments of the parties in considerable detail, I do not consider it necessary to reproduce them. Nevertheless, wherever a need will arise in the analysis, relevant portions of the majority order / DG (Investigation)'s report will be referred to.

2. The allegations levelled by the informant revolves on the following three areas related to organisation of India Premier League (IPL) Twenty 20 professional cricket league tournament conducted by the BCCI. The irregularities are in respect of:

- a. Grant of franchise rights for Team ownership.
- b. Grant of media rights for coverage of the league.
- c. Award of sponsorship rights and other local contracts related to organisation of IPL.

3. The sport related duties and functions of the BCCI and the commercial functions are intricately linked and it is very hard for alayman to figure out when and how the BCCI has crossed the fence from pure sporting activities to a commercial

sphere and in this manner it may have as a regulator violated the principle of competitive neutrality. Accordingly, the various irregularities alleged by the informant for the three rights are seen from the competition lens to make the violation of the Section 3 of Competition Act, 2002 visible even to the layman. I will discuss each issue one by one in the succeeding paragraphs.

4. **Grant of franchise rights:** Though there were a number of allegations levelled in the process of granting franchise rights to the initial 8 teams and later on to the two teams of Pune and Kochi. However, the one feature of the franchise agreement i.e. the franchise agreement entered into between the BCCI and franchise winners are for perpetuity. According to me, this has the effect of creating barriers to new entrants in the market. This feature has raised competition concerns and is therefore in violation of the Competition Act, 2002 and requires modification. The above concerns regarding this part of franchise agreement is dealt in detail in the subsequent paragraphs.

5. In this respect, the DG has observed that the conditions in the Invitation to Tender as well as in the franchise agreement are such that it has left no room for anybody to enter further in the market as the agreement is infinitum and no other franchisee can be engaged either for the same location or for a fresh location. Accordingly there is a barrier to entry and foreclosure of competition by restricting entry for any new franchisee for the said IPL tournament.

6. I agree with the DG's view that the said agreements in perpetuity had foreclosed the competition in the market. Since DG has already put on record the agreements and its various provisions relating to the perpetual elements in the agreement. Thus I need not go into that aspect but how the perpetuity part goes against the competition needs to be emphasized and analysed especially when it relates to a body which acts as the sole authority to regulate the sports of Cricket in India and performing functions as a regulator similar to a Government entity. The importance of the functions of the BCCI is that it has assumed enormous powers and therefore its behaviour in granting rights in perpetuity raises various competition concerns. In order to understand competition, the powers assumed are enumerated below:-

- a) The regulation of the game of cricket and enforcing the laws of the sport of cricket

- b) Laying down the criteria for its membership
- c) Recognized as National Federation by the Union of India for the purpose of sport of cricket
- d) Selection and preparation of players at the grass root level to organize various tournaments / trophies
- e) Select teams and umpires for international events.
- f) Power to regulate the movement of players.
- f) Recognized by the ICC as the National Federation for India

7. Excerpts from the affidavit filed by the GOI in the Hon'ble Supreme Court *Zee Telefilms Ltd. & Anr. Vs. Union Of India & Ors* merits mention as it leaves no shred of doubt about the nature and significance of the functions performed by the BCCI –

“Board was always subject to de facto control of Ministry of Youth Affairs and Sports in regard to international matches played domestically and internationally. The Government of India has granted de-facto recognition to the Board and continues to recognise the Board as the Apex National Body for regulating the game of Cricket in India. It is because of such recognition granted by the Government of India that the team selected by the Board is able to represent itself as the Indian cricket team and if there had not been such recognition the team could not have represented the country as the Indian Cricket team in the International Cricket arena. Board has to seek prior permission and approval from the Government of India whenever it has to travel outside the country to represent the country. Even in regard to Board's invitation to the foreign teams to visit India the Board has to take prior permission of the Government of India and the Board is bound by any decision taken by Government of India in this regard. In the year 2002 the Government had refused permission to the Board to play cricket in Pakistan. The Government of India accepts the recommendation of the Board in regard to awarding “Arjuna Awards” as the National Sports Federation representing cricket. The activities of the Board are like that of a public body and not that of a private club”.

8. IPL league / tournament can only be played within the control of BCCI. In view of the powers the BCCI has assumed over a period as a monopoly organiser of cricket events and leveraging of this advantage and power to foray into pure

commercial ventures where no other rival has any opportunity to enter and compete, any selection of business partners and giving it a feature of exclusivity naturally gives rise to competition concern. In this regard, let's see the arguments adduced by the BCCI.

9. The arguments put forward by the BCCI in no way addresses the competition concern i.e. the entry of others desirous of getting into the business of cricket. That the agreement contains a termination clause does not in any manner alter the situation. The termination rests upon various conditions pertaining to non-performance/breach of obligations etc. This shows total control of the sports of cricket in India. Therefore, as long as there are no breaches of the obligations, the agreements would continue forever. The second submission that there was clause which permits sale of franchise rights after the initial lock in period of three years also has the effect of maintaining the status quo. Sale of franchise depends upon the wish of the franchisee owner. It does not by any means introduce a definite duration for ownership of the franchise or IPL seasons. BCCI also stated that the franchise agreement specifically contemplated listing of the franchise on the stock exchange thereby providing an opportunity to public at large to invest in such franchise. It again depends on the discretion of the franchisee owners. But as the franchisee remains the same, the sale of shares does not introduce competition in the cricketing arena.

10. Further the opposing views can come from many quarters which support the present structure of indefinite term on the basis of following—

- 1) The scenario prevailed at that time necessitated the perpetuity.
- 2) Difference between the present sale of franchisee rights through auction as an investment business opportunity and any other investment opportunity and
- 3) Award of franchisees were made through a transparent tender process and opportunity was given to everyone.

11. Let's examine each of the above. There is no denial of the fact that IPL was a new concept and one of its kinds, different from the then already existing formats in which cricket was played and never before in history, playing cricket assumed such a commercial aspect. The only instance is that of ICL which was terminated for the reasons of non-approval of the league and refusal to provide infrastructural support.

Thus, it was a totally new concept- not tested as a business opportunity. In such situations, perpetuity acts as a lucrative factor to attract investors to try the new venture.

12. However, this view is not devoid of flaws. I have already stated in aforementioned paragraphs the defacto authority, role and powers of the BCCI. All the authority regarding the IPL vests with the BCCI as the controller of cricket in India. The concept of IPL was new not only to the investors but also for the BCCI. BCCI also did not have the foresight to predict the fate of the event. Accordingly, in circumstances when somebody is auctioning a license / right and not knowing the fate, rationality leads to along term contract but not for perpetuity. In this case BCCI may further contend that the whole process of auctioning was without any self-interest on its part. However, the core issue is not of self-interest but whether this agreement denies access to market to others. According to me, the answer is yes but in the long run.

13. The above agreement promotes exclusivity which is against competition law. Already due to the dominant and monopolistic position of the BCCI, no rival league can enter the market. I have already cited the instance of failure of ICL in this order. The major resource in the entire IPL i.e. players, are available only to the franchisee. So when players who play the game and the resource on which the entire concept depends cannot move to any other disapproved league / tournament at their desire, the perpetuity only promotes exclusivity to these leagues despite the fact that they are movable among the selected franchisees.

14. Let's deal with the second likely argument - *Difference between the sale of franchisee rights through auction transaction as an investment opportunity or business opportunity and any other investment opportunity.*

15. The argument pertains to comparison of the transaction with the other investment transactions. For the purpose I am considering two extremes one housing (people buying flats and plots under draw of lot made by the Government) and the second one is telecommunications.

16. In the housing, whether a house is purchased for investment or residential purpose, the government agency invites applications and provides opportunity to everyone. Drawing an analogy from (present BCCI situation), one may argue plot of land/flat allotted by Government are also for nearly infinite period. Differences are - government as well as private bodies both are entitled to participate in the development of colonies (plot of land / flats). Here in the case of BCCI, no other entity is entitled to create its own league and there is no freedom to draw players.

17. In telecommunications, imagine a situation the Government i.e. DoT, issues the licenses along with necessary spectrum for operation of Cellular telecommunication services in the country to the limited number of agencies for infinite period and the spectrum allotted in future is available only to those handful of players. In such cases the spectrum sharing is permissible for perpetuity only among those few operators. This situation would naturally attract the ire of the public/stakeholders involved. According to me, this is against public policy and unreasonable restriction on the freedom on trade of other potential participants in the market.

18. Accordingly, I conclude that in the franchise agreements, the franchisees have been given licence till the IPL tournament continues. Therefore, the agreements so made will have the effect infinitum, until and unless a breach of terms of the contract takes place. Further, no more franchisee (at present 10) are contemplated in future. Therefore, no future teams can be selected or the number of playing teams can be enhanced.

19. The majority has held that BCCI, for controlling the game of Cricket in India has stepped into the commercial zone with powers to ban other rival leagues. This act of BCCI purely arises out of its intention to reserve this revenue stream relating to IPL and such other future leagues only to itself.

20. Accordingly, this exclusion of all other potential entrants is visible in agreements entered into by the BCCI with its business partners, selected either through competitive bidding or otherwise. Therefore, franchise agreements for perpetuity promote exclusion and are in violation of Section 3(1) of Competition Act, 2002 and cause appreciable adverse effect on competition. I am of the view that Commission is duty bound to act against such exclusion.

21. It is important to see how this perpetual feature of the agreement causes appreciable adverse effect on competition. The Section 19(3) of the Act reads -

“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”*

The perpetual franchise agreements undoubtedly create barrier to potential entries in the market. Also the agreements for the longer term promotes market power of the enterprises in terms of being better placed to judge the similar investment opportunity in future (as actually into the business). Accordingly, it discourages the new entry. These perpetual agreements deny certain potential benefits to the consumers like innovation in the game format, benefit of more competition in the sport etc. Perpetual franchise agreements therefore cause appreciable adverse effect on competition.

22. **Grant of Media rights:** The informant has alleged regarding media rights that the BCCI carried out the whole process of tendering and awarding of the contracts without adhering to the norms of fair tendering and restricting the market for the new entrants and foreclosing the market for the existing competitors. In this regard, I am not stating the series of events pertaining to the awarding of media rights as those have already been mentioned in considerable detail in the majority order. However, I will mention the relevant portion wherever necessary in order to make the things more clear. In this connection, the observations made by the DG have to be examined.

23. The DG made following observations:-

- i. The first meeting of tender committee was postponed from 11 am to 1 pm in order to facilitate and allow WSG and Sony to form a consortium.
- ii. Though Sony and WSGI had submitted the bids separately, they were facilitated to form a consortium and the bid was entertained in the capacity of consortium.
- iii. The period of media rights i.e. 10 years is very long and creates foreclosure of market.
- iv. The subsequent agreement (3rd India territory agreement) was entered into with the same party i.e. Sony whose agreement was terminated on very serious irremediable breaches within 11 days without following any tender process. Similar approach was followed for Rest of World (RoW) tender also.

24. The DG in his report has stated that a favour had been granted to the MSM & WSGI to form a consortium by the BCCI. This is further compounded by the fact that only MSM and WSGI were found to be eligible by the tender committee. Thus, by allowing the formation of a consortium, the whole purpose of bidding was defeated. The period of contract was for 10 years. However, subsequently it was terminated and a new agreement was signed, for which no separate tendering process was followed. The subsequent agreements also show that BCCI was negotiating and entering into agreements for a period of 10 years with the same parties *time and again for which no tendering process was followed.*

25. All these agreements have been entered prior to notification of section 3 of the Act. One may argue that due to this, provisions of section 3 are not applicable to the said agreements even if the agreements in respect of media rights were for 10 years period and further no tendering process was followed. However, I would say that the anti-competitive effect of said agreements continue even after the coming into effect of section 3. In this regard, the Bombay High Court has held in the case of *Kingfisher vs. CCI* that the Commission has the authority to investigate any agreement entered prior to 20.05.2009 but which continues to have effect afterwards. An agreement may be of an earlier date but if it causes competition concerns, it can be examined even after the notification.

26. Accordingly, DG carried out in-depth investigation to understand and analyse the whole process of the grant of media rights by the BCCI. DG has further stated

that during the course of initial media rights, extra time was allowed to the MSM and WSG to form a consortium and bid for the tender. It is also seen that though the tender was supposed to be submitted by 8.1.2008 however in order to allow to form a consortium, the bid of consortium was accepted on 14.1.08, which was the date of the opening the tender. This way, by abusing its dominant position the BCCI had not only provided benefits to them but also foreclosed the market for others. Subsequently, being in a dominant position, the contracts were terminated and again entered with the same parties or other related parties. Consequently, after termination of the initial agreements, no further process of tendering was resorted to. The DG has concluded that BCCI had denied any other eligible party of their right to bid and obtain the contract and hence having adverse effect on competition as market was not made open for bidding. The period of contract was for a period of 10 years which clearly reflects that no other party could bid for further 10 years and access to the market was restricted. Further, the terms of the agreements are such that the parties were made to sign on the dotted lines, as the BCCI was in the position of monopoly to provide such rights, having the position of strength. The media rights were terminated abruptly by the BCCI without any plausible cause after one year and re-entered again without tenders.

27. Regarding media rights agreements, I am of the view that the contracts were awarded through the tendering process and opportunity was given to everybody to participate in the process. However, I agree with the DG and have different opinion as far as the period of the contract is concerned.

28. To some extent one may agree with the submissions of the BCCI that the venture of cricket in Twenty-20 format played under the league name IPL was a new and untested commodity and the future quantum of revenue generation was not known. In this regard, I would argue otherwise that being an untested commodity; whosoever put on the shoes of BCCI would first try to have feel of the market in terms of the risk involved by inviting bids for a shorter period. Though the BCCI held discussions with the prospective bidders, I feel the views of the prospective bidders regarding the reasonable period would always be tilted towards increasing the term of the agreement in order to reap larger benefits over a longer period. This means that BCCI immediately surrendered to the views of the bidders and did not act rationally and given a thought as to what was at stake.

29. Of course the popularity of a sport determines its attractiveness to the purchasers of various rights connected with the sport like media or sponsorships. However, looking at the popularity of cricket in India, the exclusivity for a period of 10 years seems to be on higher side. Therefore, in order to introduce competition, the exclusive media rights for a shorter period would be more desirable. This would have led to a higher revenue for the BCCI, which is a public body and performing certain functions of the state.

30. My view is that the grant of longer duration exclusive agreements leads to anti-competitive consequences such as creation of barriers for new entrants, driving out the existing competitors and foreclosure of competition by hindering entry into the market. The company which holds the media right for a period of ten years surely will be at an advantageous position in comparison to the other players due to the huge income generated by it during a long period of time. In the ten years period many new players would have entered in the market. Thus, granting of the media rights for a long period of ten years has resulted in barriers for entry to such new entrants and also foreclosure of market having appreciable adverse effect on competition. Let's now see the appreciable adverse effect on competition from the lens of section 19(3) of the Act. The Section 19(3) of the Act reads -

“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”

The long term media agreements whether for television or for web undoubtedly creates a barrier to potential entries in the market. Also the agreements for a longer term promotes market power of the enterprises and accordingly, have the effect of driving the existing competitors out of the market and further acts as hindrance to the potential entrants in future. This also denies certain benefits like improvements in technology with better viewing experience till the agreement continues. Accordingly as a side effect this may also lead to suppression of incentive for developments in technologies. Therefore, in view of the foregoing, it can be concluded that long term media agreements create appreciable adverse effect on competition.

31. It is worthy to mention the cases pertaining to the period of media rights decided in other jurisdictions particularly with respect to their period. In a case of KNVB/Sport 7, the European Commission held that though exclusivity per se is not anti-competitive, but grant of exclusive broadcast rights for seven years by the Danish Football Association was anti-competitive. In this case, the EC considered that the granting by KNVB, the Dutch football association, of an exclusive licence to a new broadcaster, Sport7, for the duration of seven years was caught by article 81(1) and could not be exempted because it eliminated competition for the rights for too long a period.

32. In another case, TV Rights of the Union of European Football Associations (UEFA) Champions League (2002), the European Commission (EC) held that granting the sale of the “entire rights” on an exclusive basis for a long period to one broadcaster leads to unsatisfied demand from other broadcasters, and a reduced ability to make an attractive offer to customers. Further, at the end of the exclusivity period, the existing broadcaster is financially better equipped to acquire the rights a second time.

33. In one of the merger cases (*Sogecable and Telefónica de Contenidos, a subsidiary of Telefónica formerly known as Admira Media, had notified an agreement to the Commission in which they pooled forces to acquire and exploit the broadcasting rights to Spanish First League football matches for 11 seasons ending in 2009 through their Audiovisual Sport joint venture*) The European Commission took the view that the agreement amounted to an unacceptable monopolisation of

the rights by the two main TV platforms for a very long period of time and warned that it would impose fines unless the accord was terminated or significantly modified. European Commission informed the parties that it considered a three year period of exclusivity rights to Spanish football in Spain to be acceptable whereas the parties initially wanted the exclusivity to cover a period of up to 11 years. The EC considered this to have foreclosed the market for too long a period.

34. Also in one of the article of European Commission's Principle Administrator, it is stated that *the Commission will not normally accept exclusivity periods exceeding 5 years.*

35. The above explanation sufficiently removes every shred of doubt as to how the period of ten years rights can be anti-competitive. Accordingly, I am of the opinion that the exclusive media rights for IPL should have been granted for a shorter period which would have kept the windows open for other competitors to enter into the market. This is grossly against the provisions of Section 3 (1) of the Competition Act, 2002 and above agreements cause appreciable adverse effect on competition in India.

36. **Award of associate sponsorship rights:** According to DG, BCCI has already admitted that the some associate sponsorship rights were awarded by IPL without following the tendering process. The agreements pertaining to these rights were signed with various parties for different period and different amount. These agreements were worth Rs. 444.00 crores and were awarded without any advertisement and without giving any chance to other competitors in the market. As per the factors of section 19 (3) of the Competition Act, 2002, such granting of rights without tendering process and on nomination basis had foreclosed the market for other entrants. Accordingly, it leads to conclusion of appreciable adverse effect on competition. I concur with the view of the DG.

37. Thus, according to me, the conduct of the Board of Cricket Control of India has led to the contravention of section 3(1) of the Competition Act, 2002 regarding franchise agreements, Media Agreements and associate Sponsorship rights.

38. Sports play major role in the life of the human beings from time immemorial. The sports have played important role in development of society. Following roles played by sport adequately depicts its importance to the people of any country:

- **A health-promotion role:** playing sports help to maintain and improve the health.
- **An educational role:** sport help in a number of ways in the education and training of children, young people and adults. The social and educational values of sport also play an essential role, e.g. learning to be part of a team and *to accept the principle of fair play*.
- **A social role:** provides a ground for social inclusion.
- **A recreational role:** There is no doubt that sports have significant recreational value and increases the happiness of the people.
- **A cultural role:** It need not to be emphasised that the sport has a role in and bringing people together.

39. Cricket is the most popular sport in India and citizens of the country identify themselves with this sport. The people of all ages whether children, young or old, watch and play cricket in our country. The above mentioned roles of a sport are truly played by the Cricket. It actually binds the people of the country and I can say that I also help in maintaining external relations with the neighbouring countries. In this background, there is no need to emphasise the role played by the BCCI as a national federation for the game of cricket in India. Although the board is not a Government of India enterprise, due to the huge popularity of Cricket in India, the role played is akin to any other national regulator.

40. There is no federation other than the BCCI which is recognized by the Government of India as a national sports body for regulating the game of cricket in the country. The Government has, in one of affidavit submitted before the Hon'ble Supreme Court stated that the team selected by the Board is the Indian cricket team only because of its recognition as such by Government. By reason of said recognition only, an enormous power is exercised by it from selection and preparation of players at the grass root level to organize Duleep Trophy, Ranji Trophy etc. select teams and umpires for international events. The players selected

by it represent India as their citizen. They use the national colour in their attire. The team is known as Indian team. It is recognized as such by the ICC.

41. There is no dispute to the fact that the BCCI is defacto regulator. When performing such functions as stated in above paragraph, it acts as a public body and accountable to the people of the country for its various activities. It cannot be considered at par with any other league entering the market.

42. Agency performing the regulatory and social functions, if also get involved in the commercial functions has to, according to me be more proactive in promotion of competition at every step and stages in every respect be it sport related or commercial. However, BCCI through its conduct has compromised not only with the basic objective to promote and develop the game of cricket but also denying access to other players in commercial arena by entering either in to perpetual franchise agreements or long term media agreements as the case may be.

43. According to me BCCI, deserves penalty as per Section 27 of the Competition Act, 2002. I concur with the majority members as far as monetary penalty is concerned for contravention of Section 4 of the Competition Act, 2002. However, in respect of contravention of section 3 of the Act, in exercise of powers under Section 27 of the Act, I direct BCCI to -

- Fix a reasonable time frame for franchise agreements say 10 years and not to re-enter in to perpetual franchise agreement in future,
- Fix a period of say 3-5 years for future Media agreements and
- Scrap the associate sponsorship contracts given to various parties without following tendering process and resort to fair and transparent competitive bidding process in future.

The Secretary is directed to communicate this order as per regulations to the party.

Sd/-
(R. Prasad)
Member, CCI