

Legal Complications Relating to Things Outside Commerce: A Overview from Past to Present Based on the Lottery Case in the State of Mizoram

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Abstract:

“*Res Extra Commercium*” is a Roman law doctrine that translates to “*things outside commerce*”. In *State of Bombay v R.M.D. Chamarbaugwala*¹, Justice Das introduced this doctrine into the Indian jurisprudence. The doctrine was introduced to constrict the scope of freedom of trade and commerce, a fundamental right, guaranteed under Article 19(1)(g)² of the Indian Constitution. It constricts the scope by excluding certain “*immoral*” or “*noxious*” trade activities from the scope of Article 19(1)(g)³ and thereby, depriving them of Constitutional protection.

The doctrine of *res extra commercium* seeks to exclude certain activities from the ambit of freedom of trade and profession guaranteed under Articles 19(1)(g)⁴ and 301⁵ of the Constitution of India.

Tracing back the origin of the doctrine to Roman Law has commented to the effect:

The *res extra commercium* doctrine traces its conceptual roots to Roman law. *Res in commercio*, in Roman law, were things capable of ownership and hence, the subject of property rights, while *res extra commercium* were things incapable of ownership.

In light of this, the doctrine applies to those things that are not objects of commerce i.e., they are *extra commercio*. In Justinian’s *Institutes of Roman Law*, only three classes of entity are conceptually treated as *res extra commercium*.⁶

¹ 1957 AIR 699, 1957 SCR 874

² Article 19(1)(g) in The Constitution of India 1949: to practise any profession, or to carry on any occupation, trade or business

³ Article 19(1)(g) in The Constitution of India 1949: to practise any profession, or to carry on any occupation, trade or business

⁴ Article 19(1)(g) in The Constitution of India 1949: to practise any profession, or to carry on any occupation, trade or business

⁵ Article 301 in The Constitution of India 1949: Freedom of trade, commerce and intercourse Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free

- *res divini* (religious places);
- *res publicae* (State property used for discharging public functions); and
- *res omnium communes* (Commons such as air and water).

Keyword: Trade, Business, Outside, Commerce, Lottery, Cartel, Price Fixing

Introduction:

It is important to note that the prohibition on owning these types of things does not result from an overriding moral justification, but rather from the theoretical embargo on the ownership of these kinds of things. So, it can be said that morality has no role to play in the conceptualization of this doctrine.

Despite this, Das J. used this expression in a completely different sense. In *State of Bombay v. R.M.D Chamarbaugwala*⁷, the Bombay Lotteries and Prize Competition Control and Tax (Amendment) Act⁸ of 1952 was challenged, and herein, Das J. used moral grounds to outcast gambling from the scope of Article 19(1)(g)⁹ and declare it as *extra commercium*. In the subsequent cases, the Supreme Court (“SC”) extended the scope of this doctrine to include activities like the liquor trade. Had the doctrine been applied rightly, these activities would not have been considered as “*res extra commercium*” as both of these activities are capable of private ownership and being sold for private benefit.

Das J. made another flaw in his ruling by equating the status of criminal activities with that of gambling to hold that such activities cannot be given the protection of Article 19(1)(g)¹⁰. There is no doubt that any trade involving crime cannot be permitted. However, crime is something that is expressly penalized by law and it does not need to have a necessary connection with immorality. Something immoral does not become a crime on its own. The problem with Das J.’s reasoning is that it does not use the ground of criminality or illegality to outcast gambling from the scope of Article 19(1)(g)¹¹ but uses immorality as a ground whereas immorality in itself does not constitute illegality and hence cannot be used to constrict the scope of Article 19(1)(g)¹².

Things outside Commerce:

In *Krishan Kumar Narula v. the State of J&K*¹³, Subba Rao J. in his majority opinion expressed his reservations about how the doctrine was being applied. The issue, in this case, was whether trade in

⁶ Caesar Flavius Justinian, *Introduction to The Institutes of Justinian* (fifth edn., Thomas Sandars trans 2009)

⁷ 1957 AIR 699, 1957 SCR 874

⁸ 1958MH82.pdf (prsindia.org) Last visited on 08.08.2023

⁹ Article 19(1)(g) in The Constitution of India 1949: to practise any profession, or to carry on any occupation, trade or business

¹⁰ Article 19(1)(g) in The Constitution of India 1949: to practise any profession, or to carry on any occupation, trade or business

¹¹ Article 19(1)(g) in The Constitution of India 1949: to practise any profession, or to carry on any occupation, trade or business

¹² Article 19(1)(g) in The Constitution of India 1949: to practise any profession, or to carry on any occupation, trade or business

¹³ 1967 AIR 1368, 1967 SCR (3) 50

liquor falls under the category of “*trade and business*” under Article 19(1)(g)¹⁴. He observed that the business in liquor does fall under the ambit of Article 19(1)(g)¹⁵ as it can be manufactured and sold just like any other commercial good. This statement of Subba Rao J. makes it clear that he was relying on the original conception of the doctrine “*Res extra commercium*.” Given this, he also critiqued the ‘test of morality’ as used by Das J. in the *R.M.D Chamarbaugwala* case and held that the standard of morality can be used to justify the restrictions but it cannot curtail the scope of any fundamental right. Subba Rao J.’s judgment in *Narula* makes it clear that activities like liquor trade cannot be categorized as “*res extra commercium*” as per the traditional understanding of the doctrine.

However, the final judgment in *Narula* could not overrule *R.M.D. Chamarbaugwala* because both benches possessed the same numerical strength. Additionally, in later cases such as *Nashiwar v. State of M.P.*¹⁶ and *Harshankar v. Deputy Excise & Taxation Commissioner*¹⁷, the SC has held that the judgment of *Narula* cannot be interpreted to mean that there is a fundamental right to trade in liquor and upheld the position of Das J. in *R.M.D. Chamarbaugwala*.

Cartel:

A cartel is where two or more businesses agree not to compete with each other. This conduct can take many forms, including price fixing, sharing markets, rigging bids, or restricting the output of goods and services. This includes such conduct concerning interests in land.

Types of cartel conduct

1. Price fixing

Price fixing is where two or more businesses agree on what prices they will charge to avoid having to compete with each other. Price fixing is not limited to agreements between competitors setting a specific price for goods or services – it also includes competitors agreeing to fix any part of a price or to set the price according to an agreed formula.

2. Bid rigging

Bid rigging refers to conduct when competitors who otherwise would independently and competitively bid in a tender, agree with one another to not compete against each other and to manipulate the process of bidding to distribute the resultant gains. Bid rigging agreements can manifest in the form of a predetermined and collusive bid price, an agreement to refrain from bidding against a fellow cartel member, or even withdrawal from the bidding process altogether. The members of a cartel do not bid independently but with the common object of the cartel in mind. Their modus operandi pertains to the elimination of competition in the bidding process, resulting in a mutual gain to the parties to the arrangement and detriment to the customers, competitors, and the market.

Typically, bid rigging is undertaken through one, or a combination of the enlisted practices:

¹⁴ Article 19(1)(g) in The Constitution of India 1949: to practise any profession, or to carry on any occupation, trade or business

¹⁵ Article 19(1)(g) in The Constitution of India 1949: to practise any profession, or to carry on any occupation, trade or business

¹⁶ 1975 AIR 360, 1975 SCR (2) 861

¹⁷ 1975 AIR 1121, 1975 SCR (3) 254

- a) **Collusive pricing** – This can be done in the form of identical bids or pre-determined prices for bids of the colluding enterprises. Although reasonable explanations for multiple parties quoting identical/similar prices could exist, if premeditation or a tacit understanding between the parties is proved, it would be viewed as anti-competitive. Therefore, the onus to justify the identical bids is on the parties.
- b) **Cover bidding** – Deliberately submitting very high quotes that are unlikely to be accepted. This creates an incorrect implication that the bidding process has multiple active participants and is therefore competitive.
- c) **Bid rotation** – Bidders take turns being the winner of tenders in the same sector or by the same authority. The other members of the cartel will increase the prices of their bids, with an implied understanding that in the upcoming bids, they will be rewarded similarly.
- d) **Bid suppression** – Bidders refrain from bidding or retracting their previously submitted bids, under an agreement between them and other colluders. This is meant to eliminate competitive bids so that the pre-decided winner gets the contract.
- e) **Market allocation** – Competitors allocate different segments of a market or different geographical areas amongst themselves. They agree not to compete for certain markets and customers.
- f) **Proxy Bidding** – Proxy bidders merely participate in the process to ensure that the tender is being secured within the particular time window and to a particular participant without the requirement of a recall by the procurer.

3. Market sharing

Market sharing occurs when businesses collude to carve up markets and not compete for the same customers. This could be concerning the sale of a specific product, a geographic area, or a particular type of customer.

4. Restricting output

Restricting output is when two or more competing buyers or sellers agree to prevent, restrict, or limit the goods or services they are buying or selling or the goods or services that would likely be bought and sold.

Why are Cartels a Bad Thing?

As discussed, a cartel is a group of companies or legally independent individual organizations that have agreed to introduce rules that modify competition through the setting of prices, production levels, or marketing techniques. This restricts competition and establishes a monopolistic control of the market. There are production posters (organization of producers of key raw materials in international trade), price placards (uniform prices by all producers), market share posters, and technological posters (no introduction of higher production methods). In practice, the cartels, which are illegal in many countries, usually appear around the commercialization of a homogeneous product, produced by companies that keep their legal personalities separate. It results from formal and explicit common action intending to limit competition among the members of the agreement. The intention is to achieve for them the benefits they would obtain under a monopoly situation. The actors establish formulas that allow them to reduce total production in the market by setting quotas, determining prices, and market distribution. The cartels, by their very nature, tend to limit the production volumes of the companies that are efficient and

preserve the operations of those that are inefficient. In general, the cartel is a type of collusive solution that tends to be unstable. The diversity of interests among the members of a cartel often ends up undermining the basis on which the agreement was formed. The members of the cartel capable of achieving higher levels of productivity often complain about the sacrifice imposed on them in favor of the most unproductive members. Inevitably, in the confrontation between the collective interest of the cartel and the individual interests of its members, they end up choosing the latter. The agreed fees begin to be violated by one of the members of the organization. This serves as an excuse for others to do so too. The next step is that the agreed prices are violated to seize a larger portion of the market. Finally, the poster becomes a simple dead letter and often results in an open price war.

United States & Cartelization:

The conditions that give rise to an oligopolistic market are also conducive to the formation of a cartel; in particular, cartels tend to arise in markets where there are few firms and each firm has a significant share of the market. In the U.S., cartels are illegal; however, internationally, there are no restrictions on cartel formation. The Organization of Petroleum Exporting Countries (OPEC) is perhaps the best-known example of an international cartel; OPEC members meet regularly to decide how much oil each member of the cartel will be allowed to produce.

Oligopolistic firms join a cartel to increase their market power, and members work together to determine jointly the level of output that each member will produce and/or the price that each member will charge. By working together, the cartel members can behave like a monopolist. For example, if each firm in an oligopoly sells an undifferentiated product like oil, the demand curve that each firm faces will be horizontal at the market price. If, however, the oil-producing firms form a cartel like OPEC to determine their output and price, they will jointly face a downward-sloping market demand curve, just like a monopolist. The cartel's profit-maximizing decision is the same as that of a monopolist, as Figure reveals. The cartel members choose their combined output at the level where their combined marginal revenue equals their combined marginal cost. The cartel price is determined by the market demand curve at the level of output chosen by the cartel. The cartel's profits are equal to the area of the rectangular box labeled *abcd* in Figure. Note that a cartel, like a monopolist, will choose to produce less output and charge a higher price than would be found in a perfectly competitive market.

Once established, cartels are difficult to maintain. The problem is that cartel members will be tempted to cheat on their agreement to limit production. By producing more output than it has agreed to produce, a cartel member can increase its share of the cartel's profits. Hence, there is a built-in incentive for each cartel member to cheat. Of course, if all members cheated, the cartel would cease to earn monopoly profits, and there would no longer be any incentive for firms to remain in the cartel. The cheating problem has plagued the OPEC cartel as well as other cartels and perhaps explains why so few cartels exist.

Lottery Cartelization in the State of Mizoram:

Facts:

The complaint received by the Competition Commission of India was regarding a state lottery that was run by the state of Mizoram. The complaint highlighted instances of bid rigging collusive bidding and cartelization in the tender process for the appointment of selling agents and distributors for lotteries organised in the state of Mizoram. Mizoram invited expression of interest through respondents in

consonance with the Mizoram lotteries (regulations) rules 2011.

The state lottery was conducted through both the conventional paper method and the online system as well. The government had specified a minimum rate which was Rs. 5,00,000 for bumper and 10,000 per draw for others. The bids accepted by the state of Mizoram quoted identical rates the table of the same was given in the judgment. The company/partnerships who were selected as distributors heart to furnish ₹5Cr as security, and the sum of ₹1,00,00,000 as advance payment. Based on these facts responded to number 4 in his complaint that it violates Section 3¹⁸ and 4¹⁹ red light section 19(1)(a). It was alleged

¹⁸ Section 3 in the Competition Act, 2002: Anti-competitive agreements. — (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. (2) Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void. (3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which— (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition: Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. Explanation. —For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding. (4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including— (a) tie-in arrangement; (b) exclusive supply agreement; (c) exclusive distribution agreement; (d) refusal to deal; (e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India. Explanation. —For the purposes of this sub-section, — (a) "tie-in arrangements" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods; (b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person; (c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods; (d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought; (e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices

that the bidders had cartelized and entered into an agreement.

There was an abuse of the dominant position by the state of Mizoram which was the position of administrator of state lotteries as it was expecting exorbitant sums of money towards security and advance payment. It was alleged to be unfair comma discriminatory and illegal which restricts the supply of service lotteries.

Procedural History:

Like other competition law cases, the case also started with CCI prima facie observation and an investigation by DG. The Procedural history of this case is: The information was filed by two private companies on 16.05.2012 to the CCI, alleging that four out of the five bids placed in the Expression of Interest (EOI) for appointment of lotteries selling agents/distributors had quoted identical rates. The CCI, forming its prima facia opinion u/s 26(1)²⁰ of the Competition Act believed there was a cartel,

lower than those prices may be charged. (5) Nothing contained in this section shall restrict— (i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under: (a) the Copyright Act, 1957 (14 of 1957); (b) the Patents Act, 1970 (39 of 1970); (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999); (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999); (e) the Designs Act, 2000 (16 of 2000); (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000); (ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

¹⁹ Section 4 in the Competition Act, 2002: Abuse of dominant position. — (1) No enterprise shall abuse its dominant position. (2) There shall be an abuse of dominant position under sub-section (1), if an enterprise,— (a) directly or indirectly, imposes unfair or discriminatory— (i) condition in purchase or sale of goods or services; or (ii) price in purchase or sale (including predatory price) of goods or service; or Explanation.—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition; or (b) limits or restricts— (i) production of goods or provision of services or market therefor; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or (c) indulges in practice or practices resulting in denial of market access; or (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market. Explanation .—For the purposes of this section, the expression— (a) “dominant position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to— (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour; (b) “predatory price” means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

²⁰ Section 26(1) in the Competition Act, 2002 - On receipt of a complaint or a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information,

the reason behind this as stated by the CCI, were:

- Three bidders made identical bids of the minimum rate of Rs.10,000/- per draw for online lotteries;
- Only one party made a bid for the paper lottery segment, and they quoted the minimum rate for the same.
- Only one party made a bid for the bumper draw and quoted the minimum rate for the same.

The CCI then ordered the Director General (hereinafter referred to as the DG) to investigate the case. The DG in its report found evidence of bid-rigging and cartelization prohibited u/s 3(3)²¹ of the Competition Act, 2002. The report dated 14th January 2013 which was submitted on 17th January 2013 concluded that respondent number 5 and 6, along with M/s Teesta distributors and M/s E-cool gaming solutions Pvt limited hardcoded formed cartel and indulged in the practice of betraying which is a clear violation of the provision of section 3(1)²² read with Section 3(3)²³ of the Competition Act.

under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter.

²¹ Section 3(3) in the Competition Act, 2002 - Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which— (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition: Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. Explanation. —For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

²² Section 3(1) in the Competition Act, 2002- No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

²³ Section 3(3) in the Competition Act, 2002 - Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which— (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on

The DG's observation against responses number one and 2 was that they ought to have been more vigilant in restricting unfair trade practices and their lapses have now raised suspicion of favoritism and collusion. The DG opined that it was a case of collusive bidding and respondent number 2 had an instrumental role, the case against respondent number one under Section 4 of the Competition Act was dropped.

The complaint against the State of Mizoram for abuse of dominance u/s 4²⁴ of the Competition Act was dropped as it was noted in the CCI order that 'the State' is not covered under the meaning of either 'an enterprise' or 'a group', and therefore, provision of the Competition Act, 2002 would be inapplicable. After receiving the DG Report, CCI then sent copies of the report to the parties so that they could file their reply, The state in unknown haste filed a writ petition.

The State under a misconception filed a writ petition before the Guwahati High Court to defend its officers the Director IF&SL, whose conduct was not favorably commented on in the DG report. Respondent 6 filed another writ petition in the Guwahati High Court, praying for the quashing of the DG report and all proceedings pending before the CCI The HC taking cognizance in the matter ordered setting aside the DG report on the ground that as the subject of lottery comes under the purview of Res

competition: Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. Explanation. —For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

²⁴ Section 4 in the Competition Act, 2002: Abuse of dominant position. — (1) No enterprise shall abuse its dominant position. (2) There shall be an abuse of dominant position under sub-section (1), if an enterprise,— (a) directly or indirectly, imposes unfair or discriminatory— (i) condition in purchase or sale of goods or services; or (ii) price in purchase or sale (including predatory price) of goods or service; or Explanation.—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition; or (b) limits or restricts— (i) production of goods or provision of services or market therefor; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or (c) indulges in practice or practices resulting in denial of market access; or (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market. Explanation . —For the purposes of this section, the expression— (a) “dominant position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to— (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour; (b) “predatory price” means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

Extra Commercium, the ambit/ jurisdiction of the Competition Act, 2002 would be inapplicable.

Issues:

- a) Whether the distribution of lotteries amounts to "Service".
- b) CCI's Jurisdiction to entertain issues relating to lotteries?

Rule Of Law:

Definition of "Service":

The expression 'service' would mean service of any description which is made available to potential users and includes the provision of services in connection with the business of any industrial or commercial matter. In the aforesaid context, it was urged that the sale or distribution of lottery tickets to a prospective buyer on behalf of the State for consideration should be construed as "service".

The expansive definition of 'Service' under Section 2(u)²⁵ of the Competition Act means "service of any description", which is to be made available to potential users. It was also argued that if the parliament wanted to exclude any service from the Competition Act, then they would have specifically stated so under Section 2(h)²⁶ or Section 54²⁷ of the Competition Act. Section 54 forms part of Chapter IX of the Competition Act under the general heading 'Miscellaneous' and it specifically empowers the Central Government to exempt from the application of the Act or any provision thereof and for such period as it

²⁵ Section 2(u) in the Competition Act, 2002 - "service" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising;

²⁶ Section 2(h) in the Competition Act, 2002 - "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space. Explanation. —For the purposes of this clause, —

²⁷ Section 54 in the Competition Act, 2002 - Power to exempt.—The Central Government may, by notification, exempt from the application of this Act, or any provision thereof, and for such period as it may specify in such notification— (a) any class of enterprise if such exemption is necessary in the interest of security of the State or public interest; (b) any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries; (c) any enterprise which performs a sovereign function on behalf of the Central Government or a State Government: Provided that in case an enterprise is engaged in any activity including the activity relating to the sovereign functions of the Government, the Central Government may grant exemption only in respect of activity relating to the sovereign functions.

may specify in such notification.

The High Court when passing the judgment, delivered the same in consonance with the arguments raised by the respondent which were:

The judgment of this Court in *Union of India v. Martin Lotter Agencies Ltd.*²⁸ opined those lotteries, being akin to gambling activities, came under the purview of the doctrine of *res extra commercium*. The Competition Act was opined, applied to legitimate trade and goods, and was promulgated to ensure competition in markets that are *res commercium*. Thus, lottery activity being like *res extra commercium* could not be covered by the Competition Act and consequently, the CCI did not have jurisdiction.

The CCI in response to this allegation raised that as lotteries are a regulated commodity under the Regulation Act, the CCI would continue to have jurisdiction over the competition law aspect of a such regulated commodity. On this behalf, he referred to the judgment of this Court in *CCI v. Bharti Airtel*²⁹, which examined the contours of the Telecom Regulatory Authority of India Act, 1997³⁰ (hereinafter referred to as the 'TRAI Act') and the Competition Act in the context of the exercise of power by the Telecom Regulatory Authority of India (for short 'TRAI') and the CCI. It was observed in that context that the Competition Act frowns on anti-competitive agreements.

The appellant also raised the point that a petition under Article 226³¹/227³² of the Constitution of India

²⁸ CIVIL APPEAL NO. 3239 OF 2009

²⁹ Civil Appeal No(S). 11843 of 2018 (Arising Out of SLP (C) No. 35574 of 2017)- Edition-11-Analysis_of_Competition_Cases_in_India.pdf (cuts-ccier.org) last visited on 10.07.2023

³⁰ The_TRAI_Act_1997.pdf last visited 11.07.2023

³¹ Article 226 in The Constitution Of India 1949 - Power of High Courts to issue certain writs (1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose (2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories (3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without (a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and (b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may

as an order passed under Section 26(1)³³ of the Competition Act was like an administrative direction. There were no adverse civil consequences. The proceedings were akin to a show cause notice and even the DG's report did not amount to a final decision.

Reasoning:

The Supreme Court, relying upon its judgment in Competition Commission of India v. Bharti Airtel³⁴, quashed the order of the Hon'ble Guwahati High Court and noted that 'any agreement contravening the provisions of the Competition Act, 2002 would necessarily come under the ambit of the CCI'. The Apex court observed that lotteries may be a regulated commodity and may even be *res extra commercium*, however, that would not take away the aspect of something which is anti-competition in Further, on the question of whether the business of lottery being *res extra commercium* comes under the ambit of 'service' u/s 2(u)³⁵ of the Competition Act, 2002, the Supreme Court noted the expansive definition of 'Service' which means: "Service of any description, which is to be available to potential users". The Court observed that 'the lottery business can continue to be regulated by the Regulation Act. However, if in the tendering process there is an element of anti-competition which would require investigation by the CCI, that cannot be prevented under the pretext of the lottery business being *res*

be, the expiry of the aid next day, stand vacated (4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme court by clause (2) of Article 32

³² Article 227 in The Constitution Of India 1949 - Power of superintendence over all courts by the High Court (1) Every High Court shall have superintendence over all courts and tribunals throughout the territories interrelation to which it exercises jurisdiction (2) Without prejudice to the generality of the foregoing provisions, the High Court may (a) call for returns from such courts; (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and (c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts (3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein: Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor (4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces

³³ **Section 26(1) in the Competition Act, 2002** - On receipt of a complaint or a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information, under section 19, if the Commission is of the opinion that there exists a *prima facie* case, it shall direct the Director General to cause an investigation to be made into the matter.

³⁴ Civil Appeal No(S). 11843 of 2018 (Arising Out of SLP (C) No. 35574 of 2017)- Edition-11-Analysis_of_Competition_Cases_in_India.pdf (cuts-ccier.org) last visited on 15.07.2023

³⁵ Section 2(u) in the Competition Act, 2002 - "service" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising;

extra commercium, more so when the State Government decides to deal in lotteries."

With aforesaid observations, the Apex Court allowed the continuation of the proceedings before the CCI and noted that the intervention by the High Court was extremely premature and ought to have waited for the CCI's conclusions. It was noted that even if the contracts in the matter about cartelization and bid-rigging have ended, the continuation of the CCI proceedings would have a future impact on the market.

Holding:

Finding the conduct of the State "very non-appreciable" and intervention by the High Court "extremely premature", the Bench stated that the State ought to have cooperated with the CCI and the High Court ought to have waited for the CCI to conclude but on the other hand what had happened was that the CCI proceedings had been brought to a standstill while the High Court opined based on some aspects which may or may not arise.

The Bench remarked A simple aspect of anti-competitive practices and cartelization had been dragged on for almost ten years in what appears to be a misapplication by the High Court of the interplay of the two Acts, i.e., the Competition Act and the Regulation Act.

Hence, holding that the proceedings before the CCI ought to have been permitted to conclude with the right available to the affected parties to avail of the appellate remedy under Section 53(B)³⁶ of the Competition Act, the Bench set aside the impugned judgment and directed to close the proceedings in the case filed by the State while the proceedings against the other parties were directed to continue. In short, the court held that:

CCI contended that it is concerned about potential bid rigging in the tender process, cited the case of CCI v Bharti Airtel³⁷ to highlight that CCI can find out whether a particular agreement has an appreciable adverse effect and definition of services should be read with the widest amplitude.

Respondent No. 1 sought deletion from the array of parties as the CCI opined that there was no fault on its part and sought aid. Respondent No.5 argued that the lottery does not fall under the defection of

³⁶ Section 53B of the Competition Act, 2002 - Appeal to Appellate Tribunal (1) The Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order referred to in clause (a) of section 53A may prefer an appeal to the Appellate Tribunal. (2) Every appeal under sub-section (1) shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State Government or a local authority or enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed: Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period. (3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against (4) The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal. (5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal. [Omitted by the Finance Act, 2017, w.e.f. 26th May, 2017]

³⁷ Civil Appeal No(S). 11843 of 2018 (Arising Out of SLP (C) No. 35574 of 2017)- Edition-11-Analysis_of_Competition_Cases_in_India.pdf (cuts-ccier.org) last visited on 18.07.2023

goods and lottery business is a res extra commercium.

The court opined that based on the report of CCI and DG not to proceed against Respondent No.1, the State could have closed the proceedings at that stage itself instead of approaching the High Court.

The definition of 'Service 'under the Act means "service of any description", which is to be made available to potential users and there was no need for the Hon'ble High Court to have proceeded in the matter was highlighted by the Court.

In the event the tendering process has an anti-competition element, CCI can investigate the same, and affected parties can avail the remedy of appeal under Section 53B³⁸ of the Competition Act.

The Hon'ble Supreme Court allowed the appeal.

Conclusion:

It is pertinent to opine that the clash between the regulatory bodies and the watchdog of the economy growing in many sectors of the economy, where the court and as well as tribunal have been indulged to solve the issue in action. As in the Bharti Airtel case the Supreme Court has made out the difference of operation to clear the duties and liabilities of each i.e., Competition Act, 2002 and TRAI, 1997. Similarly, the court said the lottery does not fall under the defection of goods and the lottery business is res extra commercium.

³⁸ Section 53B of the Competition Act, 2002 - Appeal to Appellate Tribunal (1) The Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order referred to in clause (a) of section 53A may prefer an appeal to the Appellate Tribunal. (2) Every appeal under sub-section (1) shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State Government or a local authority or enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed: Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period. (3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against (4) The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal. (5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal. [Omitted by the Finance Act, 2017, w.e.f. 26th May, 2017]