COMPETITION COMMISSION OF INDIA

Case no. 52 of 2010

Eros International Media Limited : Informant

Against

Central Circuit Cine Association, Indore	-	Opposite Party – 1
Film Distributors Association, Kerala	-	Opposite Party – 2
Northern India Motion Pictures Association	-	Opposite Party – 3
Motion Pictures Association	-	Opposite Party – 4

Case No. 56 of 2010

Sunshine Pictures Private Limited : Informant

Against

Motion Pictures Association	-	Opposite Party – 1
Northern India Motion Pictures Association	-	Opposite Party – 2
Central Circuit Cine Association, Indore	-	Opposite Party – 3
Telangana Telgu Film distributors Association	-	Opposite Party – 4
Film Distributors Association, Kerala	-	Opposite Party – 5
Karnataka Film Chamber of Commerce	-	Opposite Party - 6

Date of order: 16-2-2012

R. Prasad (dissenting)

I have seen the majority order and I have a different view and am therefore passing a separate order. The facts in this case are identical with the facts in the case wherein I have already passed an order i.e. case nos. 25, 41, 45, 47, 48, 50, 58 and 69 of 2010. As the issue involved are the same, the same orders are passed in these two cases also.

2. But before dealing with the issue it is necessary to discuss the facts in respect of the film industry. When a film is announced having a particular story and a star cast, the producer requires funds to produce the movie. In the earlier years, as film making was perceived as a risky business, bank and institutional finance were not available to the film producers. Finance was provided by private financiers at exorbitant rates of interest and was also provided by the distributors of the films. The distributors in turn used to get finance from the exhibitors who were the owners of single screen theatres in different regions of the country. By providing the finance the distributors acquired rights to exploit the film normally for a period of normally ten years in the areas where the distributors operated. The country was divided in various zones, initially five, then seven and now twelve zones. A distributor operated in one zone and the distributors distributed the films to the exhibitors in its zone. The agreements entered into by the producers and the distributors were on outright sale or minimum guarantee basis. In the minimum guarantee system, the distributors agreed to provide a minimum guarantee to the producers and if there was an overflow the overflow was to be shared by the producers, the distributors and the exhibitors in different proportions. Sometimes, the producer or the distributors used to the hire the cinema halls of the exhibitors for a certain period at a negotiated price and the producer / the distributor used to negotiate the hiring charges. Thus the distributor and the exhibitor used to provide large chunks of finance for making the movies.

3. In order to have discipline in the entire film industry, the industry organized itself at different levels. First of all, the name of the film was to be registered with one of these agencies so that two films having the same name were not released at the same time. Secondly whenever a producer entered into an agreement with a distributor for a certain zone, this was also registered by an agency. Publicity of this fact was given through various publications such as Trade Guide etc. This was done with the idea that a producer does not sell the same movie to another distributor in the same area and in this manner obtain further finance. Sometimes when the film being produced involved large amount of finance and the distributor could not finance the production another distributor was appointed for the zone or two distributors would form a joint venture to finance the film. In every zone where the distributor operated, the exhibitors and the distributors formed associations to regulate the entire business of film exhibition and distribution. The associations were either societies or companies under Section 25 of the Companies Act. These associations or companies formulated bye-laws and they worked as dispute resolution agencies for disputes between the exhibitors, between the producers and the distributors/exhibitors and between the distributors and the exhibitors. These associations regulated the business in the way that once a producer / distributor had agreed to give the business of exhibition to an exhibitor, the producer/distributor could not then give the rights to another exhibitor. In this manner, the pecuniary interests of the exhibitors were protected. Similarly, when there were similar disputes between the producers and the distributors/exhibitors, these associations protected the interest of their members. All the producers / distributors had to become members of the association by paying a nominal fee before a film could be released in that zone / area. They also had to register the films with the zonal associations so that the names of the producer / distributor / exhibitors were known. These associations had no statutory backing but were created for the regulation of the entire industry and they had evolved

over a period of time. Any regulator in order to be effective has to have penal powers. As no statutory authority was available to the associations, they exercised the power of boycott. These associations took upon themselves the power to levy penalty which was nothing but the failure to honour contractual obligations. Failure to pay the penalty resulted in boycott by the associations and their members.

4. This system was working well till the advent of new technology and the migration of the Indian community to different countries. As a result, the demand for Indian films extended in various countries. Therefore the producers started selling the world rights of films and in this manner got a new source of revenue. With the arrival of communication by satellites, it was possible to send films through the medium of satellites. Thus DTH and satellite communication also become available to the producers. With the advent of internet and broadband technology it became possible to transfer films through internet and broadband services. With the knowhow increasing in the duplicating technology it became easier to duplicate a film and sell them through floppies and compact discs. All this expanded the earnings of the producers. World rights, satellite rights, DTH rights and music rights could be sold and the producers could get large sums of money. But it also led to a situation where the shelf life of a film was reduced to a few months. The new technology also led to an increase in piracy and reduction in the earnings of the producers. This also led to a situation where the period for the exploitation of films got reduced as far as the exhibitors were concerned. This reduced the earning of the exhibitors. Another factor which came up was the arrival of multiplexes where multiple screens were used for screening films in a more congenial atmosphere. Being new in the area, multiplexes got sales tax exemption in some states. These factors and the rising property prices all over India led to closure of many single screen exhibitors all over India. This led to various disputes within the industry and are the subject matter of discussion in these cases.

5. The issue to be decided is whether boycott of a business entity and its products is an anticompetitive behaviour. The next issue is as to whether an association is an enterprise under Section 2(h) of the competition Act. The third issue is whether Section 3 or Section 4 of the Competition Act would be applicable to the facts of this case where a number of associations are involved. But before taking the analysis further, it is necessary to discuss the legal issues in this case. Enterprise has been defined in the Competition Act under **Section 2 (h)** as under:-

> *"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 or 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 at a different place or at different places, but does not include any activity of the Government relatable 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.*

The important words in this Section are person and activity. Person has been defined in **Section 2(l)** as under:-

> *""person includes:- (i) an Individual; (ii) a Hindu undivided family; (iii) a company; (iv) a firm; (v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India; (vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in Section 617 of the Companies Act, 1956; (vii) anybody corporate incorporated by or under the laws of a country outside India; (viii) a co-operative society registered under any law relating to cooperative*

societies; (ix) a local authority; (x) every artificial juridical person, not falling within any of the preceding sub-clauses;"

Person includes an association of person. Therefore, a registered society has to be considered as an association of persons whether incorporated or not. But if the society is registered under the Cooperative Society Act has to be treated separately. "Activity" has been defined in the **explanation (a) to Section 2(h)** of the Act as follows:-

Explanation - For the purposes of this clause, -

(a) "activity" includes profession or occupation;

The definition is inclusive and has therefore has to be given a very wide meaning. The words used in Section 2(h) of the Act is "any activity" relating to carrying on of the activities of business. It does not mean that the enterprise or the person should carry on any business. "Any activity" is qualified by relating to the carrying out of business. Therefore, a policy guideline, a regulation, a legal activity or any act which effects the carrying on of business is covered. It is evident from the fact that a government department is an enterprise according to the definition but a government department does not carry on any business. Therefore it is not necessary that a person should be carrying out any business to qualify as an enterprise under the Competition Act. This view is also confirmed by a decision of the Delhi High Court in the case of Hemant Sharma vs. Chess Federation, Writ Petition (Civil) No. 5770 of 2011. This decision of the single Member was confirmed by the Division Bench by its order LPA No. 972 of 2011 dt. 22.11.2011 Therefore the associations are covered under the definition of enterprise under the Competition Act.

6. The next issue is whether the associations are hit by the provisions of Section 3 of the Competition Act. Section 3 is under Chapter II of the Act which deals with Prohibition of certain agreements, abuse of dominant position and regulation of Combinations. Under this chapter there is a

Prohibition of agreements and the heading of Section 3 is anticompetitive agreements. Under Section 3(1) of the Act no enterprise / person or an association of enterprise / person shall enter into an agreement in respect of business activities, acquisition and control of goods and services which is likely to cause or causes appreciable adverse effect on competition inside India. Section 3(2) envisages that such agreements are void. Section 3(3) is a deeming provision and it envisages a rebuttable presumption.

7. Under Section 3(3) of the Act, three situations are covered. The first is any agreement between enterprises/association of enterprises or person/association of persons. The second is practice carried out and the third is "decision taken". Thus, by the deeming provision, agreement, practices carried out and decisions taken are placed on par with agreements and all these three items have to be treated as anticompetitive agreements. Practice carried on and decision taken has to be by an association of enterprises or by an association of persons. For all the three situations, one condition is that the enterprises/person and their associations should be engaged in identical or similar trade of goods or services. The persons/ enterprises and their associations would be hit by the provisions if they

(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.

It is presumed that if these facts exist they would be presumed to cause appreciable adverse effect on competition. This means that if the

presumption is involved on the strength of the legal provision, then the factors mentioned in Section 19(3) of the Act are not required to be looked into. But if the enterprises discharge the onus cast by the Section then the Commission would have to examine whether the factors mentioned in Section 19(3) would apply to the facts of the case.

8. Before proceeding with this case, it is necessary to examine as to how agreement and practice have been defined in the Act. Agreement has been defined in **Section 2(b)** as under:-

> *"agreement" includes any arrangement or understanding or action in concert–*
>
> *(i) Whether or not, such arrangement, understanding or action is formal or in writing or,*
>
> *(ii) Whether or not, such arrangement, understanding or action is intended to be enforceable by legal proceedings.*

It is also an inclusive definition and therefore a wide interpretation has to be given to the provisions. The definition encompasses an arrangement or an understanding or action in concert. Thus the static and dynamic elements of agreement are into account. But an agreement always envisages more than one person or an enterprise.

9. As far as practice is concerned it is defined as follows:-

> *"Practice" has been defined in **Section 2(m)** of the Act and includes any practice relating to the carrying on of any trade by a person or an enterprise.*

It is again an inclusive definition and has to be given a wide interpretation and the practice has to be related to any activity relating to carrying on of a trade by a person or an enterprise.

10. A perusal of the above discussion would show that the first issue to be decided is whether there was an Association of exhibitors and distributors or the entities have to be treated as a separate on body because there had a legal existence. Many of these associations were incorporated as section 25 companies or were registered as cooperative societies with the relevant State Acts. But in fact these entities worked as associations of various exhibitors and distributors as well as producers. The agreement if any was entered into between the exhibitors or the distributors at the time of the forming of the association which in many cases was more than 70 years ago. If such a situation is accepted then any share purchase of a limited company for a particular purpose would amount to an agreement for the purposes of this Act. Similarly by becoming a member of society the agreement entered into 50 - 70 years ago for becoming a member would have to be treated as an agreement within this Act. A decision taken or practices carried on by these associations of enterprises or persons according to the majority view would be hit by the provisions of section 3(3) of the Act. In my view once a person or an enterprise subscribe to the shares of a company or become a member of a society then the entity which is found is a company or a society and this would be a different body from an association of persons or enterprises. In such a case it would be incorrect to hold that the incorporated company or the society is an association of enterprises. In this particular case there was no agreement and as I have already held that the association which formed was a different legal entity from the association of persons and as there was no agreement, Section 3(3) of the Act was not attracted. There is no doubt that large numbers of persons were involved in the association but as the constituted societies and the incorporated companies were legal entities the different entities could not be treated as association of persons. As one entity cannot enter into an agreement with self, there was no agreement. As far as practice and decision taken are concerned, it is

necessary that the practice or the decision taken should be by an association of enterprises. As there was only one entity in an area, there was an absence of an association of enterprises. Therefore the provisions of section 3 would not be applicable to the facts of the case. I therefore do not agree with the majority view that an association was in existence.

11. The behaviour of the said associations have to be examined with reference to Section 4 of the Competition Act. I have already held as discussed above that it is not necessary for an enterprise to carry on business and therefore the relevant society or company could be an enterprise which could be covered under Section 4 of the Act. Under Section 4 of the Act in the explanation of the said section dominant position has been defined as under

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.

In the area which has been accepted by the association as its area of operation, most of the exhibitors and distributors operating in the area are members of the society or the company as the case may be. The enterprise which is society or a company is able to operate independently of the competitive forces prevailing in the relevant market. Thus, in the area of its operation, the said associations are dominant. The factors mentioned in Section 19(4) also need to be looked into as to whether the enterprises are dominant with reference to the factors. These enterprises being companies and societies dealing mainly with regulation do not have a market share, size, resources and economic power. There is no question of vertical integration or countervailing buying power, social

obligations and social cost or a market structure and the size of market does not require to be seen. The enterprises do not lead to any economic difference. But even then they are in position to create appreciable adverse effect of competition. The consumers in this case are dependent on the enterprises by the virtue of the fact that the different enterprises operating in this business in the area accept the diktat of the societies and the companies and therefore the consumers are totally dependent on these societies and companies. Further the association i.e. the societies and the companies have acquired dominant position as defined in Section 19(4)(g) of the Act under the clause 'otherwise'. These enterprises have acquired this position of dominance because the other enterprises who are members of the enterprise / association of society have given this power to the enterprise. No other association can be formed for the benefit of the different exhibitors and distributors because the distributors and exhibitors would not agree to form to other association. Therefore there is an entry barrier as far as the creation of another association is concerned. The provisions of Section 19(4)(h) are also attracted. Therefore the enterprises have to be treated as dominant players in their field of operation.

12. The next issue to be defined is the relevant market with reference to the relevant product market or the relevant geographical market or with reference to both the markets. In this case the relevant product market would be the exhibition or distribution of films in the geographical area in which those associations operated and the relevant market would be the service of distribution or exhibitors of films. The geographical market would be the area for which the societies or the companies were created.

13. It is now necessary to consider the abuse of dominant by these enterprises in the area of their operation. The section under which the associations have indulged in abuse of the dominant position is Section 4(2)(c) of the Act. By boycotting the producers for different reasons they

have indulged in denial of market access to the producers. They have also hit by the provisions of Section 4(2)(b(i) of the Act as the provision of services is restricted.

14. With this view we have to examine the behaviour of different associations. For example Karnataka Film Chamber of Commerce did not allow to release films in more than 14 screens in the entire states. This was done only in the case of non Kannadiga films. The restriction was imposed in order to promote the films made in the language of the state of Karnataka. Thus the association of KFCC has not only enforced unfair and discriminatory conditions in the provision of service but also has limited and restricted the provision of services in the market. Thus the provisions of Sections 4(2)(a)(i) and 4(2)(b)(i) are attracted . There is no doubt that this was done to promote Kannadiga Films but this cannot be done at the cost of denial of market access to other players in the market. The only way to promote Karnataka films is to produce quality films so that they are able to compete with the Hollywood and Bollywood films. There cannot be a discrimination on the basis of language, cast, sex and creed. This is a constitutional guarantee and it is enshrined in the Competition Act. Therefore the boycott of the films and limiting them only to fourteen screens amounts the denial of market access besides being discriminatory. KFCC has therefore contravened the provisions of Section 4(2)(a)(i) and Section 4(2)(b)(i) of the Act.

15. The next issue is in respect of satellite rights, DTH rights and video rights. As already discussed above, the shelf life of a movie is quite low. Though some producers and distributors agree to the release of these rights within a period of three months of the release of the films, the different associations have different periods some of the associations agree to the release of these rights within six months of the release of the films but some others insist on a period of five years. Though some of the distributors agree to the release of these rights within three months of the release of the films, they do not take into account the interest of the

exhibitors. In the small mofussil cities and towns of India, many new movies come to the theatres after a period of three to four months or even later. If the satellite, DTH rights and video rights are sold prior to the exhibition in the cinema halls, the exhibitors are put to loss as the majority of the persons would have seen the movies on T.V. either through satellite broadcasts or cable T.V. The industry should decide this issue amicably keeping into mind the interest of the producers, the distributors and the exhibitors.

16. But presently the sale of satellite, DTH and video rights have led to difficulties for the producers, the distributors and the exhibitors. Presently most of the associations insist that before the release of a film, a producer should become a member of their associations and that they should register their films with the association. Registration and membership creates no difficulty as the fees charged is very nominal. There is a clause in most of the associations that no member should deal with a non member. If a member deals with a non member he is heavily penalised. Thus a producer has to become a member of the association or otherwise it would not be able to release its film in the area of the association. But when a producer becomes a member of the association he is made to sign an undertaking that it would not release the satellite, video rights etc. for a period of five years from the date of release of the film. The producers sign such undertakings for the simple reason that their film would not be released if they do not sign such undertakings. But thereafter the producers sell the satellite, video rights etc. much before the expiry of the period of five years sometimes within a period of three months or even earlier. In such cases, the associations levy a charge on the producer for the failure to honour the contract entered into with the association. But when the producer does not pay the liquidated damages for the violation of the contract, when the producer / distributor comes with the distribution of a subsequent film, the association do not allow the release of the film by refusing to register the film. This again

amounts to a denial of market access in violation of Section 4(2)(c) of the Act.

17. The denial arises mainly due to the collective bargaining strength of the exhibitors / the distributors who act through the association. If there is a contractual liability on account of liquidated damages, then the correct course for the association is to go to the courts for recovery but they cannot deny market access to the producers. Another issue which appears is that though there are hundreds of producers, complaints have come only from a handful of producers. There producers do not believe in following the earlier norms and would like to increase their profits at the cost of the exhibitors.

18. In any case it is a contentious issue and the trade has to sort it out. In any case taking into account the small shelf life of films, a period of six months from the release date would be a reasonable period for the sale of satellite, video rights etc. A period of five years is totally unreasonable. A period of six months would take care of the interest of the producers and the exhibitors. But in any case, boycott of a film is anticompetitive act under the provisions of Section 4(2)(c) of the Act.

19. Similarly when some disputes arose between producers and the exhibitors and some amounts were due from the producers the association stepped in to support the exhibitor and as usual boycotted a subsequent film of the producer by not allowing its registration and release. In such cases also, the exhibitor could have filed a civil suit for recovery and the association should not have boycotted the film. This is also a violation of Section 4(2)(c) of the Act.

20. The D.G. also found during investigation that some associations have clauses which restrict dealing with non members. This is especially true of KFCC, CCCA, BJMPA, EIMPA, NIMPA and MPA. This restricts and limits the provision of services for the members in view of Section 4(2)(b)(i) of the Act. On the other hand some associations allow such

dealings. Such restrictive and anticompetitive behaviour should be stopped by the associations by amending their laws.

21. Another issue raised by the D.G. is compulsory registration of the films. In my view, registration of films is necessary to bring some definitive in dealings and transparency. But if any other conditions are put which has no relationship with the contract or registration is violative of Section 4(2)(d) of the Act. Such supplementary obligations at the time of registration should be stopped by the associations.

22. The associations have done exceptional work during the years by setting disputes and running the industry in a good manner. But over time certain anticompetitive behaviour is bound to arise. The associations are doing the work of regulation without a statutory authority and therefore the only authority which the association is that of boycott and denial of market access. But then boycott falls foul of the Competition Act as discussed above.

23. I have not discussed the facts of the case because they are discussed in the majority order.

24. Considering the abuse of dominance by the association, which are either companies or societies, in my view the distortion created out in the market is not large as far as competition is concerned. Therefore a penalty at the rate of 2% of the turnover of each association as discussed in the majority order would be sufficient for the contravention would be sufficient. The associations should comply with the directions issued in the order within three months of the order.

25. The Secretary is directed to communicate the order to the concerned parties.

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S. P. GAHLAUT
ASSISTANT DIRECTOR
Competition Commission of India
New Delhi

23/02/2012

Sd/-
Member (R)