

Competition Commission of India

Case No. 54/2011

Dated : 30th Nov. 2011

Shri Debapriyo Bhattacharya

- Informant

- 1. State of Andhra Pradesh, through the Principal Secretary, Home (General- A) Department, AP Secretariat, Hyderabad**
- 2. Galaxy Entertainers Private Limited (Easy Cinema), Plot No. 17, 3rd Floor, Mithilanagar, Road No. 10, Banjara Hills, Hyderabad**

- Opposite Parties

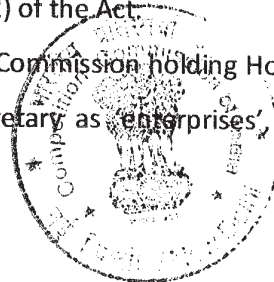
Order under Section 26(2) of the Competition Act, 2002

Per M.L. Tayal, Member (Supplementary)

1. The present information has been filed under Section 19 (1)(a) of the Competition Act, 2002 (the Act) on 08.09.2011 by Shri Debapriyo Bhattacharya (Informant) against State of Andhra Pradesh, through the Principal Secretary, Home (General- A) Department, Andhra Pradesh Secretariat, Hyderabad (Opposite Party-1), and Galaxy Entertainers Private Limited (Easy Cinema), Plot No. 17, 3rd Floor, Mithilanagar, Road No. 10, Banjara Hills, Hyderabad (Opposite Party-2) alleging that the conduct of the Opposite Parties is in violation of the Act.

2. The Commission has passed an order under section 26(2) of the Act in respect of the above information and I am in overall agreement with the reasoning given and conclusions drawn therein that there does not exist a prima facie case for making a reference to the Director General for conducting investigation into the matter and accordingly, the proceedings relating to this matter are closed forthwith under section 26(2) of the Act.

3. However, with regard to the observations of the Commission holding Home Department of the State of Andhra Pradesh and its Principal Secretary as 'enterprises', I hold a different



opinion. I am of the considered view that in the instant matter they do not fall within the definition of 'enterprise' as envisaged in section 2(h) of the Act.

4. On the issue of interpretation of the term 'enterprise', within the meaning of section 2(h) of the Act, I have given my views in my orders in case nos. 19 and 53 of 2011 and hence the same are not repeated here.

5. However, before I proceed further, in brief, it would be appropriate to briefly recapitulate my views expressed in the two cases cited above. To my view, the Indian Competition Act, 2002 like any other competition law basically seeks to take care of the supply side of the market to ensure free and fair competition among firms at the market place so that firms may compete with each other and offer their products and services in market without limiting the supplies of goods or services or fixing prices. It is foreseen that competition among the firms would ultimately benefit the consumers since as a result of that better products would be available at competitive prices. This would also increase the efficiencies of firms and incentivize them to innovate. It is considered that competition results in total welfare encompassing both consumers' as well as producers' welfare. However, what is looked into is the behaviour of the firms at the market place so that market is not distorted in the interest of a few firms acting either in collusion or in favour of a dominant enterprise or group.

6. Indian Competition Act like any other competition law also seeks to promote and protect competitive forces in the market. Competition at a market place essentially means that individuals and firms strive for a greater share of market of goods or services and earn higher profits as a consequence. Competition laws essentially look into the structure, conduct and performance of economic firms at a market place, in other words, activities of a business or commercial nature. Therefore, conduct of any non-market entity whose basic activity is not of economic nature, cannot be examined as conduct of a market or economic enterprise. It is futile to try to examine through competition lens the conduct of entities on which even the most elemental concepts of microeconomics and theory of firms like average cost, marginal cost, diminishing returns, production possibility frontier or producer's surplus do not apply. The definition of 'enterprise' in Section 2(h) must be seen in light of this basic logic that applies to firms in economic theory.



7. At this stage, it would be pertinent to have a look at the definition of 'enterprise' as given in the section 2(h) of the Competition Act, 2002. The section defines an 'enterprise' 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 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 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.

Explanation.- For the purposes of this clause,—

(a) "activity" includes profession or occupation;

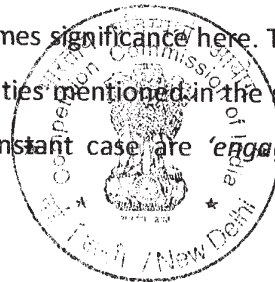
(b) "article" includes a new article and "service" includes a new service;

(c) "unit" or "division", in relation to an enterprise, includes—

(i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;

(ii) any branch or office established for the provision of any service;"

8. As may be noted, in order that any entity falls within the meaning of 'enterprise' as per Section 2(h) of the Act, it is necessary that it is or has been 'engaged in any activity' of the nature defined therein. The activities mentioned in the said section are clearly economic and commercial in nature since without that there would be no impact at the market place and therefore intervention of a competition agency would also not be required. The words 'engaged in' preceding the words 'any activity' assumes significance here. The words 'engaged in' reflect both regularity and continuity of the activities mentioned in the section. A pertinent question is whether the Opposite Parties in the instant case are 'engaged' in any of the activities mentioned in section 2(h).



9. In the instant matter, OP-1 issued a Govt. Order No. 47 dated 10.03.2006 in exercise of enabling provisions under the Andhra Pradesh Cinema Regulation Act, 1970 and introduced a regime of licensing of online booking. This order notified certain amendments to Andhra Pradesh Cinemas (Regulation) Rules, 1970 and provided for fixation of quota of tickets for online booking, fee for online booking license, levy of service charges etc. Vide order dated 19.02.2009 issued by the Department of Home, Govt. of Andhra Pradesh, permission has been granted to Galaxy Entertainers Private Limited (OP-2) to operate on-line ticket booking system for cinema theatres in the state of Andhra Pradesh. Thus, in the instant matter the activity of the Govt. of Andhra Pradesh is grant of permission to operate on-line ticket booking system in state of Andhra Pradesh.

10. The question that arises in connection with the aforesaid activity is whether Home Department, Govt. of Andhra Pradesh and its Principal Secretary be said to be acting like 'enterprises' as per provisions of Section 2(h) of the Act.

11. Principal Secretary, Home (General- A) Department is a Government Servant implementing and executing the policies and directions of the Government of Andhra Pradesh. As a Government Servant he is paid salaries by the Government. Any person occupying that post may be transferred from one department to another and wherever posted his/her role will be to execute and implement the policies of Government for which salaries shall be paid. Is the Principal Secretary in this case acting as a player in the 'market', as we understand in the parlance of economics in general or theory of firms in particular? The answer seems to be in 'negative'. The Principal Secretary is performing the duties assigned to him by the Government of Andhra Pradesh, which is democratically elected by citizens of the state. The duties could be all such duties as assigned to him by Govt. of Andhra Pradesh. In this case, he has issued Govt. Orders dated 19.02.2009 which provide for on-line ticket booking system for sale of cinema tickets in the State of Andhra Pradesh and also grant permission to M/s Galaxy Entertainers Private Limited(OP-2) to operate the on-line ticket booking system. The order has been issued in name of Governor of Andhra Pradesh. The decision, therefore, is of the State of Andhra Pradesh taken in name of Governor, Andhra Pradesh. If the Principal Secretary is termed as an 'enterprise' then logically the Governor acting as Head of State and Minister-in- Charge,



Department of Home would also be 'enterprises' since it is actually the Governor, on behalf of Govt. of Andhra Pradesh who granted the permission to OP-2 to operate the on-line ticket booking system. The Principal Secretary simply issued the permission.

12. This leaves the question as to whether Govt. of Andhra Pradesh, Home Department may then be called an 'enterprise'. If a view is taken that Department of Home, Govt. of Andhra Pradesh is an enterprise solely on the ground that it is issuing govt. orders granting permission to an entity/entities to operate the on-line ticket booking system, then any department of any state or Union of India would also fall within the definition of 'enterprise', if they are also granting permission or license in respect of any good or service. In competition law, if an entity is an 'enterprise' it would always be operating in some market with inherent desire to acquire more market power or earn higher profits. This logic would render all governmental acts of granting licenses or permits *per se* tantamount to business or commercial acts of limiting output or fixing price in those "markets". By extension of this logic, it would also render a government department banning any article or service as 'enterprise' guilty of creating entry barriers in the "relevant market" by not allowing any person to enter that market. In other words, the government would not have any authority to control or ban any good or service through licences or permits or prohibition if under this Act, such activity of the government department were to be interpreted in a manner to make it an 'enterprise' because then, it would naturally be dominant because of its ability to operate completely independently of "market forces", which fact would automatically establish abuse of dominance in every such case. This, in my view, cannot be the intent of the legislature since if the argument is taken forward, ministers and secretaries of each Ministry or Department of Govt. which is issuing orders granting licences enabling an entity to provide some goods and services at a market place would fall under the definition of 'enterprise'. Similarly, legislature enacting such laws to prohibit, ban or control any good or service in any manner would also be liable to be held as an 'enterprise' and subsequently guilty of anti-competitive conduct. In my opinion, such an interpretation of the Act would be far removed from economic logic, to say the least.

13. There cannot be two views that the basic activity of Home Department, Govt. of Andhra Pradesh is to frame and implement policies on matters concerning maintenance of law and



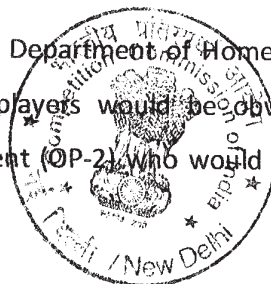
order in the state of Andhra Pradesh with. As per website of Govt. of Andhra Pradesh, it works towards eliminating threats to the internal security of the State. It preserves, protects and promotes social harmony. As such, it cannot be said to be operating in any market as 'engaged' in any activity of the production, storage, supply, distribution, acquisition or control of any article or good, or provision of service as defined in Section 2h and 2(u) of the Act. It certainly cannot be said to be operating in the market of online ticketing of movies.

14. Further, Section 2(u) of the Act stipulates that the "Service" for the purposes of Competition Act needs to be in connection with business of any industrial or commercial matter. For the mere fact that Principal Secretary of Department of Home or Govt. of Andhra is issuing orders allowing some entity to operate and provide services in market of on-line ticket booking system, they cannot be held as "enterprise". They are not 'engaged' in the commercial or industrial activities but are acting as enabler and facilitator in the market of on-line ticket booking system with an objective of ascertaining and ensuring correct disclosure of sales volumes and check tax evasion on behalf of the State Government.

15. I find that the activities of OP-1 are not guided by the general economic principles of demand, supply and price. It is not that they behave like firms engaged in economic and commercial activities and are competing at a market place or are acquiring (or buying), controlling an article or product or service and are thereafter selling it in the market in competition with others with a motive to earn profit or drive out competition.

16. It is also important to ascertain here whether the Parties mentioned as OP-1 are operating in a market competing as market players in midst of competitors or responding to the competitive forces. The answer to this question also appears to be in negative. The Govt. of Andhra Pradesh has only issued orders awarding the on-line ticket booking licence to the OP-2 in this case, out of seven other applicants and is not engaged in any activity of selling or buying any goods or service in pursuit of some business or commercial goal.

17. In the market of on-line booking system, it is not the Department of Home of Andhra Pradesh who would be the market player. The market players would be obviously, the consumers who would book the tickets, Galaxy Entertainment (OP-2) who would be booking

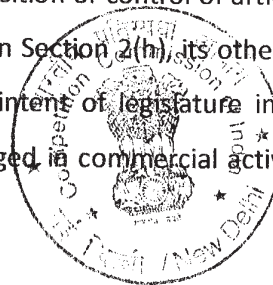


the tickets on-line and the cinema halls whose tickets will be booked on-line through OP-2. The OP-2 is to levy 6% service charges on the tickets booked for cinema halls. This makes it clear that Govt. of Andhra Pradesh is not acting like a market player. It has only enabled and facilitated market operations. The Govt. could not have allowed the on-line ticket booking system and by that act the market would have been closed, not open for competition. In that scenario, there would have been no case for assessment of competitive forces simply since there would have been no market of on-line ticket booking.

18. It is OP-2, who once the market was thrown open by the Government became an 'enterprise' in the market of on-line ticketing, and may be said to 'control' the services of booking of on-line tickets due to govt. licence. It would only be OP-2 who would operate in the market place as an economic firm, keeping in view its commercial interest and not the government.

19. As we know, in addition to land, labour and capital, enterprise is considered as the fourth factor of production. Enterprise risks capital and organises three other factors of production - land, labour & capital to produce some output with profit motive. The enterprise receives profit as a residual after the other factors of production have been paid. The profit causes enterprises to move resources into the production of profit-linked good. On the other hand, if firms take losses, the loss is signal to other enterprises that consumers value less than the factors that go to make the good. Are Department of Home, Govt. of Andhra Pradesh and its Principal Secretary, in the instant matter behaving within these parameters to be called enterprises? The answer is 'no'.

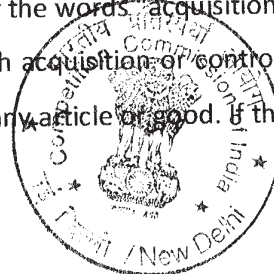
20. This throws up a wider question. When can a Govt. Ministry, Department or any institution, functionary of Govt. be termed as an 'enterprise' within the meaning of Section 2(h) of the Act? I am of the view that unless a govt. entity is solely engaged in the commercial or business activities of production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services or other activities mentioned in Section 2(h), its other activities do not bring them within the mischief of 'enterprise'. The intent of legislature in section 2(h) appears to include all those govt. entities which are engaged in commercial activities and are



acting at a market place like any other commercial firm in the definition of 'enterprises'. Thus, while the state owned enterprises and departmental undertakings which are engaged in commercial activities and are acting as market players can be termed as 'enterprises', those entities which are performing non-commercial functions and in course of performing their assigned duties, are granting permissions and licenses to the firms to enable them to operate in a market cannot be termed so. Similarly non-commercial sales, such as auction of depreciated vehicles or of lawfully seized articles or purchases for purely administrative reasons would not make a department an 'enterprise'.

21. In the whole discussion, we cannot lose sight of the fact that Competition Law is essentially a law to regulate the *markets*. Thus, existence of a '*market*' and *market players* is necessary for competition law enforcement. What is to be looked into is the act and conduct of the firms so that the markets are not distorted in favour of one or few of them to the detriment of other players or the consumers. Competition laws are not tools to tackle problems arising in areas that cannot be called 'market' due to complete or substantial government control. Since almost all acts of licensing, permits or prohibition emanate from laws, no practical remedies are possible under the Act. A department or a govt. servant cannot be asked to cease and desist from discharge of lawful duties or free exercise of administrative mandate without the relevant law, regulation or administrative mandate being modified by competent authority with due process. Similarly, monetary penalties cannot be imposed because those entities would normally not have any turnover or profits. It is also not possible to divide a Government or ministry or department or govt. servant as a remedy for dominance. The solutions in such cases, if at all, would lie in first opening up or creation of a free market through change of policies or laws and not in holding government or its policies or laws in contravention of Competition Act. Legislative or administrative roadblocks to free markets can only be removed through relentless persuasion and sensitization, where required.

22. Germaine to this discussion is also the interpretation of the words "acquisition" or "control" used in section 2(h) in relation to "articles or goods". Such acquisition or control should be in nature of business or commercial purchases or control of any article or good. If the purchase or



control does not go into the production chain of any further commercially produced or sold article or good, it would not qualify an entity as 'enterprise' under section 2(h). Obviously therefore, any goods purchased by a person purely for consumption and not for further trade or commerce would not qualify the person as 'enterprise'. Similarly, if it is a service being looked at, the entity must be commercially providing some service for it to qualify as 'enterprise'. The word 'control' should be read in relation to *articles or goods* and not *service*. Otherwise, every regulator of services such as telecom or banking would wrongly become 'enterprise' and their regulatory acts would be misconstrued as abuse of dominance. In other words, to qualify as an 'enterprise', the person must be engaged in some *economic activity* in some *market* and must be buying or selling some article, good or service *in pursuit of its economic activity*. This fundamental principle is also adopted by mature jurisdictions such as the EU as reflected in the citations:

"...in Community competition law the definition of an 'undertaking' covers any entity engaged in an economic activity....." [ECJ, C-205/03 P – FENIN, 11 July 2006, para: 25.]

"In this connection, it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity" [CFI, T-319/99 - FENIN, 4 Mar 2003, para. 35]

22. In view of the reasoning above, I am of the considered opinion that the entities mentioned as OP-1 in the information cannot be said to be 'enterprises' within the meaning of Section 2(h) of the Act. However, I concur with the decision of the Commission in the instant case that *prima facie* no case is made out for making a reference to the Director General (DG) for conducting investigation into this matter under Section 26 (1) of the Act.

M. L. Tayal
(Member)

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