



COMPETITION COMMISSION OF INDIA

Case No.32of 2013

In Re:

Shri P.V. Basheer Ahamed

Informant

And

M/s Film Distributors Association, Kerala

Opposite Party

CORAM

**Mr. Ashok Chawla
Chairperson**

**Mr. S. L. Bunker
Member**

**Mr. Sudhir Mital
Member**

**Mr. Augustine Peter
Member**

**Mr. U. C. Nahta
Member**

Appearances: Shri Dileep Poolakkut, Advocate for the Informant.

S/Shri Debopriyo Pal and Santosh Pal, Advocates for the
Opposite Party and its 34 office bearers.



Order under section 27 of the Competition Act, 2002

1. The present information was filed on 25.04.2013 under section 19(1)(a) of the Competition Act, 2002 (hereinafter, '**the Act**') by Shri P.V. Basheer Ahamed (hereinafter, '**the Informant**') against Film Distributors Association, Kerala ('**the Opposite Party**'/'**FDA-(K)**') alleging, *inter alia*, contravention of the provisions of sections 3 and 4 of the Act in the matter.

Facts

2. Facts, as stated in the information may be briefly noted:
3. The Informant is a producer, distributor and exhibitor of films. He is Managing Director (MD) of M/s Liberty Distributors and is also the President of Kerala Film Exhibitors Federation ("**KFEF**"). The Informant is also a member of the Opposite Party for the last 25 years. The Opposite Party is an association of film distributors in Kerala.
4. As per the information, in the year 2010, some differences arose between the Opposite Party and KFEF regarding revenue sharing between distributors and exhibitors. During that time, members of KFEF released films produced and directed by Shri Kamal and Shri Jayaraj against the wishes of the Opposite Party. Later, in November 2011, during the time of release of Malayalam film 'Swapana Sanchari' directed by Shri Kamal and another film 'Nayika' directed by Shri Jayaraj in, KFEF went on 'strike' against the decision of the state Government relating to service tax *etc.* The strike by KFEF was followed with a strike by the Opposite Party and when both strikes were called off, various Tamil films were pending for release. Allegedly, after the strike was over, the Opposite Party insisted KFEF to release pending Tamil movies first and then release the above mentioned Malayalam films on 27.11.2011 (Sunday).



5. However, against the insistence of the Opposite Party, KFEF released 'Malayalam films 'Swapana Sanchari' and 'Nayika' directed by Shri Kamal and Shri Jayaraj, respectively, on 25.11.2011. This action of KFEF led to a dispute between Shri Kamal & Shri Jayaraj on one side and the Opposite Party on the other side. After release of the films, the Opposite Party declared through its General Secretary Shri Jose C. Mundadan that it has banned the films directed and produced by Shri Kamal and Shri Jayaraj for distribution in Kerala and also issued a circular in this regard on 01.12.2011.

6. It is stated in the information that Shri V.P. Madhavan Nair, Managing Partner, Murli Films, Calicut, who has been a member of the Opposite Party for last 25 years and its Treasurer since November 2013, entered into an agreement on 21.09.2012 with M/s Prime Time Cinema (owned by Shri Kamal) to co-partner distribution of latter's film titled 'Celluloid' when the Opposite Party's directions which were issued on 01.12.2011 (not to commit any film produced or directed by Shri Kamal or Shri Jayaraj for distribution in Kerala) were in subsistence. Shri Nair arranged a meeting between Shri Kamal & Shri Jayaraj and the executive committee members of the Opposite Party to settle their disputes on 11.02.2013.

7. In the said meeting, matter relating to release of Malayam Film 'Swapana Sanchari' & 'Nayika' was stated to be settled amicably. Regarding distribution of 'Celluloid', Shri Nair was asked to pay Rs. 50,000/- to the Opposite Party as a settlement amount for accepting the distribution of the said film against the direction of the Opposite Party. Subsequently, the Opposite Party issued a letter dated 13.02.2013 to the Informant seeking explanation on his intention to release the film 'Celluloid' in violation of ban imposed by the Opposite Party. The Informant gave its reply to the said letter *vide* letter dated 20.02.2013



but the Opposite Party found the reply unsatisfactory and suspended the Informant for six months from the membership of the Opposite Party *vide* its communication dated 08.04.2013.

8. The Informant has alleged that the above conduct of the Opposite Party would affect fair competition, the interests of consumers and freedom of trade carried on by other participants in the relevant market and is in violation of the provisions of section 3(3) of the Act.

Directions to the DG

9. The Commission after considering the entire material available on record, *vide* its order dated 17.05.2013 observed that the impugned direction dated 01.12.2011 issued by the Opposite Party to its members for not taking films produced or directed by Malayalam filmmakers for distribution in the State of Kerala and also suspension of the Informant were *prima facie* in contravention of the provisions of section 3 of the Act. Accordingly, the Commission directed the Director General (DG) to cause an investigation to be made into the matter and to submit a report.

Investigation by the DG

10. The DG, after receiving the directions from the Commission, investigated the matter and submitted the investigation report on 30.06.2014.
11. To begin with, the DG proceeded to examine as to whether the Opposite Party issued the circular dated 01.12.2011 directing its members not to commit any picture produced or directed by Shri Kamal and Shri Jayaraj for distribution in Kerala and made it binding on its members, in any manner. To reach a decision on this issue, the DG relied on the copy of the circular dated 01.12.2011 along with the statements of various members of the Opposite Party. Statements of



Shri Kamal & Shri Jayraj and minutes of the various Executive Council (EC) meetings of the Opposite Party where decisions which are alleged to be anti-competitive were taken. The DG examined the extracts of relevant decisions taken in the 5th meeting of Governing Body held by the Opposite Party on 30.11.2011 whereby it was decided not to accept the films for distribution which were directed or produced by Sh. Kamal and Sh. Jayaraj. It was also decided in the meeting to issue a circular to inform the decision of the association to all members.

12. The DG also considered the circular dated 01.12.2011 of the Opposite Party which was issued immediately after the above stated meeting. Through the said circular, the Opposite Party unequivocally directed its members not to commit any film produced or directed by Shri Kamal and Shri Jayaraj for distribution in the State of Kerala. The DG also took note of the statements on oath by many members of the Opposite Party and others including the present President of the Opposite Party (Shri Siyad Koker), present General Secretary of the Opposite Party (Shri M.M. Hamsa), Shri Jayaraj, Shri Kamal *etc.*, who confirmed that the said circular was in fact issued by the Opposite Party.
13. The DG concluded that the Opposite Party issued the circular dated 01.12.2011 to its members including the Informant with a direction not to commit any picture produced or directed by Shri Kamal and Shri Jayaraj for distribution in the state of Kerala.
14. Further, the DG observed that the Opposite Party issued the circular dated 01.12.2011 to its members as a result of concerted decision taken at its Governing Body meeting on 30.11.2011 of not committing any film produced or directed by Shri Kamal and Shri Jayaraj for distribution in Kerala. The DG noted that due to this decision of FDA(K) the film 'Celluloid' though produced in September 2012



could not be released in the theatres till the time the producers reached a settlement with FDA(K) in February 2013. The issue of the above circular amounts to a boycott call given by the association restricting release of film of the above producers.

15. As per the DG report, the collective decision of the FDA (K) to ban the films produced or directed by Shri Kamal and Shri Jayaraj for distribution in Kerala is a collective decision and implemented by the Opposite Party. This collective decision which culminated in issue of circular/diktats/direction dated 01.12.2011 by the Opposite Party to its members, directing them not to commit any film produced or directed by Shri Kamal and Shri Jayaraj for distribution in Kerala is covered under the meaning of agreement as defined under the provision of section 2(b) of the Act.
16. Further, the DG examined as to whether the Opposite Party suspended the Informant and took action against others on the alleged non-observance of the impugned direction dated 01.12.2011. With regard to this issue, the DG took note of the joint meeting that took place between the Opposite Party and KFEF on 11.02.2013 and the letter issued by the Opposite Party to the Informant dated 13.02.2013 pursuant to that meeting.
17. It was observed by the DG that pursuant to the decision taken in the above meeting, a letter dated 13.02.2013 was issued by the Opposite Party under the signature of its then General Secretary, Shri Jose C. Mundadan to the Informant conveying that the Opposite Party has communicated in writing to all the members that they shall not take any pictures for distribution, which are either produced or directed by Shri Kamal and Shri Jayaraj but the Informant has violated the above direction by giving its statement in the print and visual media communicating that the Informant shall release the Malayalam film



namely, 'Celluloid' produced and directed by Shri Kamal. The Opposite Party has thus sought the explanation from the Informant on its above violation vide its letter dated 13.02.2013. In response to the above letter of the Opposite Party, the Informant sent its reply dated 20.2.2013 stating that the film was taken for distribution by Shri V.P. Madhavan Nair, the owner of the company Murali Films who is a senior member of the Opposite Party. The DG also observed that the said reply of the Informant was discussed in the special executive meeting of the Opposite Party held on 26.03.2013 wherein the decision to suspend the Informant from the association for a period of six months was taken. Thereafter, a press clip was issued by the Opposite Party declaring the suspension of the Informant from the association for a period of 6 months for 'anti-organizational activities' i.e., doing acts which were prohibited by the Opposite Party.

18. The DG also took note of the letter dated 08.04.2013 issued by the Opposite Party to the Informant, communicating suspension of the Informant from the membership of the Opposite Party for a period of 6 months w.e.f. 26.03.2013 for doing the above acts as detrimental to the interests of the association as per Rule 8 (a) of the bye law of the Opposite Party as per the special executive committee decision taken on 26.03.2013.

19. The DG, thus, concluded that the Opposite Party issued the direction dated 01.12.2011 to all its members in order to control, limit, and restrict the distribution of films in the State of Kerala, particularly those produced and directed by renowned Malayalam filmmakers Shri Kamal and Shri Jayaraj and subsequently suspended the Informant for not following the said direction of the Opposite Party. The suspension of the Informant by the Opposite Party from its membership amounts to a concerted boycott by the association. The DG also noted that the Opposite Party fined its member distributor Shri V. P. Madhavan Nair



for taking the film Celluloid produced and directed by Shri Kamal on violation of direction given by the Opposite Party. Accordingly, the DG concluded that the Opposite Party was limiting and controlling the distribution of films in the State of Kerala, particularly the Film “Celluloid” produced and directed by Shri Kamal and ShriJayaraj. The members were forced to follow the ban imposed by the Opposite Party from distributing the films produced and directed by Shri Kamal and ShriJayaraj. In the event of not following the directions, its member distributors were restricted and fines/penalties/disciplinary action/explanation were imposed on them.

20. The DG also examined the pleas of the Opposite Party justifying its action on the ground of protecting the interests of its members/ distributors. The DG, however, concluded that the collective decision of the Opposite Party in imposing an absolute ban is in the nature of punishing the said two producers/ directors for not acceding to their earlier mandate of release of their films only after first release of Tamil films soon after the strike. The DG, thus, found the said direction of the Opposite Party as anti-competitive as it limited/controlled the distribution of films. Accordingly, it was concluded in the DG report that the said conduct of the Opposite Party is anti-competitive.

21. Lastly, considering the material collected during investigation, the DG opined that the Opposite Party was directly involved in directing, imposing and limiting/controlling the Malayalam film industry in the State of Kerala. The DG observed that the Opposite Party tried to control the film distribution business in the State of Kerala and also issued directions *vide* circular dated 01.12.2011 to all its members restricting the distribution of films produced and directed by Malayalam filmmakers Shri Kamal and Shri Jayaraj and subsequently suspended the Informant for non-compliance of such directions. The DG concluded that the members were, thus, forced to follow the



directions given by the Opposite Party to keep themselves in the business.

22. Thus, the DG found that the Opposite Party indulged in anti-competitive conduct of giving direction/circular to its members and putting restrictions on the distribution of films produced by Shri Kamal and Shri Jayaraj and controlling the film exhibition business in the stated geographical territory. Accordingly, it was concluded that the conduct of the Opposite Party was anti-competitive and violative of the provisions of section 3(3) (b) read with section 3(1) of the Act.

Replies/ Objections/ Submissions of the parties

23. On being noticed, the parties filed their respective replies/ objections/ submissions to the report of the DG besides making oral submissions.

Replies/ objections/ submissions of the Opposite Party

24. At the outset, the Opposite Party submitted that it is their fundamental right under Article 19(1)(c) of the Constitution of India “to form associations or unions” and they are an association duly registered in conformity with Article 19(1)(c) of the Constitution. It was contended that right to form association for economic purposes for any lawful objective/purpose deserves constitutional protection since it is an association formed to protect the interests of the film distributors and to bring uniformity in payment of royalties across the State without any discrimination towards any cinema theatre owner. The Opposite Party came into existence on 14.10.1987 and registered under the Societies Act. The membership of the Opposite Party is open to all persons who distribute films in Kerala. The Informant had taken the Opposite Party’s membership on 08.07.2005. The formation of the Opposite Party is stated to benefit the film producers, distributors, exhibitors and cinema audience as a whole.



25. The Opposite Party contended that it has not entered into any agreement in respect of production, supply, distribution, storage, acquisition or of control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. The Opposite Party also submitted that there was no dispute between it and Shri Kamal or Shri Jayaraj, and as such there was no need for the Informant to approach the Commission.
26. The Opposite Party also claimed that it has not taken any action against the Informant even though he had exhibited the films 'Swapna Sanchari' and 'Nayika' in his theatres. Further, the Opposite Party highlighted that the impugned circular dated 01.12.2011 was not challenged by the Informant till 2013, who was also a member of the Opposite Party. It was contended that the suspension of the Informant was due to the defamatory statements made by him in the media against the Opposite Party and office bearers. It was further contended that the suspension of the Informant has to be challenged before the General Body meeting as per the Memorandum of Association and its Bye Law and therefore, action before the Commission is bad in law.
27. Further, the Opposite Party contended that it did not take any action against Shri V.P. Madhavan Nair who had committed the film 'Celluloid' for distribution in the year 2012. It was further contended that when the Informant gave a press release in February 2013 and stated that he will release movie 'Celluloid', the Opposite Party sent a notice to him on 13.02.2013 and called for his explanation taking into consideration that Shri V.P. Madhavan Nair has entered into agreement with the producers of 'Celluloid', stating that if the explanation is not received within seven days, disciplinary action will be taken against him as per the bye-law Clause No.8 and requested him to follow the decision of the association.



28. The Opposite Party further contended that the Informant has made a false complaint to the Commission by stating that he had incurred heavy losses due to suspension of his membership by the Opposite Party since in actual parlance he was not doing any distribution of films from the year 2006 onwards. Further, he made a false statement before the Commission stating that he had taken for distribution the film 'Celluloid' (Malayalam) directed by Mr. Kamal and produced by M/s Prime Time Cinema for distribution in Kerala State as the producer had never given the film for distribution to the Informant as he is not having distribution office anywhere in Kerala. The distribution right of the picture 'Celluloid' was taken by Mr. V.P. Madhavan Nair, M/s Murali Films, Calicut who is a regular distributor and he is in the business of film distribution for the last 46 years, having office in Trivandrum, Kottayam, Ernakulam, Palaghat and Calicut. The Opposite Party also alleged that the Informant, in his letter dated 20.02.2013 addressed to it, has admitted that he has not taken the film 'Celluloid' for distribution. It was contended that the Informant being the President of KFEF openly gave press reports stating that he will go against the decision of the Opposite Party.

29. It was also stated that in November 2011, KFEF closed down their theatres against certain demands put forward by them to the State Government of Kerala. Due to this, all the running pictures were terminated and the distributors incurred heavy losses. After some negotiation with the Government, the theatres were opened on 25.11.2011. The Opposite Party requested the Informant and his association to continue the films which they were screening at the time of closure of theatres. Instead of accepting the Opposite Party's request, the Informant in his TV interview stated that he will screen new films such as 'Swapna Sanchari' directed by Shri Kamal and 'Nayika' directed by Shri Jayaraj. Again the Opposite Party requested



the Informant and his association to continue the earlier movies which they had been screening at the time of closure of theatres at least for two days and release the above two new movies from 27.11.2011 in order to minimize the loss to distributors. When the Informant declared his interest of releasing fresh/ new films, the directors Shri Kamal and Shri Jayaraj also appeared on the TV Channels and gave interviews stating that they will supply their movies from 25.11.2011. Both these directors did not take into account about the losses of the film distributors due to the strike of the film exhibitors.

30. The previous executive committee of the Opposite Party had taken disciplinary action on 08.04.2013 against the Informant for his defamatory comments against the Opposite Party. It is contended that the Informant was only suspended for a period of six months and he was not prohibited from doing his own business. It is also stated that if the Opposite Party's motive was to stop the Informant's business then, the Opposite Party would have informed its members not to supply films to his 4 theatres in Kerala. The Opposite Party has never interfered with the business of the Informant but has only acted as per its bye-laws. It is also contended that the present governing body took charge only on 01.11.2013 and was not aware of the order dated 01.07.2013. In the Executive Committee meeting on 30.12.2013, a resolution was passed reinstating the Informant as member of the Opposite Party from 30.12.2013. Again a General Body meeting was called on 22.01.2014 and reinstatement of the Informant was intimated to all the members. The reinstatement was also informed to the Commission.

31. Further, through additional submission dated 18.09.2014, the Opposite Party stated that the suspension of the Informant was withdrawn pursuant to the Opposite Party Executive Committee meeting held on 30.12.2013 and the decision was intimated to all members in the



Annual General Meeting dated 22.01.2014. The Opposite Party further submitted that it is now acting in good faith to comply with all the orders of the Commission.

Analysis

32. On a careful perusal of the information, the report of the DG and the replies/ objections filed by the parties and other materials available on record, the following issue arises for consideration and determination in the matter:

Whether the Opposite Party has contravened the provisions of section 3 of the Act?

33. The Commission has perused the material relied upon by the DG with respect to the issue as to whether the Opposite Party issued the circular dated 01.12.2011 directing its members including the Informant not to commit any film produced or directed by Shri Kamal and Shri Jayaraj for distribution in Kerala and made it binding on its members, in any manner. The first piece of evidence in this regard is the minutes of the 5th meeting of Governing Body held by the Opposite Party on 30.11.2011. Following decision, *inter alia*, was taken during that meeting:

'It was noted that director Shri Kamal and Shri Jayaraj had issued statements in the press which is defaming the association and its officials. The said matter was discussed in the meeting extensively and a decision was taken, not to accept the films for distribution by our members which are directed or produced by the above said two persons namely Shri Kamal and Shri Jayaraj. The said decision was to be informed to all our members by a



circular and the said decision was also to be informed to the Kerala Film Producers Association.'

34. Second piece of evidence is the Circular dated 01.12.2011 whereby the Opposite Party directed all its members not to commit any film produced or directed by Shri Kamal and Shri Jayaraj for distribution in Kerala. It is not in dispute that such circular was issued under the letter head of the Opposite Party signed by the then General Secretary Shri Jose C. Mundadan pursuant to the collective decision taken at the Opposite Party's meeting dated 30.11.2011.
35. The Commission further observes that the DG recorded statements (under oath) of many members of the Opposite Party, including its present President (Shri Siyad Koker), General Secretary (Shri M.M. Hamsa), Shri Jayaraj, Shri Kamal *etc.*, who confirmed in unequivocal words that the Circular dated 01.12.2011 was issued by the Opposite Party. The Opposite Party also imposed fines (under the name of 'contribution') and sanctions by way of suspension upon its members who did not comply with the directions contained in the said circular.
36. Considering the above, the Commission is of the opinion that the Opposite Party issued the circular dated 01.12.2011 to its members including the Informant with a direction not to commit any film produced or directed by Shri Kamal and Shri Jayaraj for distribution in the State of Kerala.
37. It may be noted that section 3 of the Act deals with anti-competitive agreements. For applying section 3, existence of an agreement is a *sine qua non*. 'Agreement' has been defined in section 2(b) of the Act to include any arrangement or understanding or action in concert, whether formal or informal, oral or in writing. As per the DG's investigation, it



has been revealed that the Opposite Party took a decision in its 5th Governing Body meeting held on 30.11.2011 to issue a circular to all its members to not to commit to any film directed or produced by Shri Kamal and Shri Jayaraj. The relevant extracts of the decision recorded in the minutes of the meeting are reproduced hereunder:

'It was noted that director Shri Kamal and Shri Jayaraj had issued statements in the press which is defaming the association and its officials. The said matter was discussed in the meeting extensively and a decision was taken, not to accept the films for distribution by our members which are directed or produced by the above said two persons namely Shri Kamal and Shri Jayaraj. The said decision was to be informed to all our members by a circular and the said decision was also to be informed to the Kerala Film Producers Association'.

38. Thereafter, the circular was issued which unequivocally communicates the decision taken in the above meeting to all its members. This, squarely falls within the ambit of the word 'agreement' as defined under the Act.
39. The collective decision taken by the Opposite Party pursuant to which the impugned circular/diktats/direction dated 01.12.2011 was issued by the Opposite Party, to its members directing them not to commit any film produced or directed by Shri Kamal and Shri Jayaraj for distribution in Kerala is covered under the definition of agreement as provided in section 2(b) of the Act which falls in the jurisdiction of the Commission under section 3 of the Act.



40. On the issue as to whether the Opposite Party *vide* its communication dated 08.04.2013 subsequently suspended the Informant and took action against others on the alleged non-observance of the impugned direction dated 01.12.2011, the Commission took note of the evidence collected and relied upon by the DG. The material on record is quite indicative of the events that took place in context of this issue. The Commission has taken note of the material collected by the DG *i.e.*, the minutes of the Joint Meeting between the Opposite Party and Kerala Film Producers Association (KFPA) held on 11.02.2013 where anti-competitive decisions were taken, letter sent by the Opposite Party to Informant dated 13.02.2013 seeking an explanation for acting against the diktats of the Opposite Party, reply sent by Informant to the Opposite Party dated 20.02.2013, press clip issued by the Opposite Party regarding suspension of Informant and letter sent by the Opposite Party to Informant dated 08.04.2013 intimating the fact of his suspension from the membership of the Opposite Party. All these evidences taken together prove beyond doubt that the Opposite Party in fact suspended the Informant and took action against others on the alleged non-observance of the impugned direction issued by the Opposite Party.

Extracts of relevant decisions taken in the Joint Meeting between FDA and Kerala Film Producers Association held on 11.02.2013:

‘In connection with the release of Malayalam picture Swapnan Chanchari and Nayika, the film directors Shri Kamal and Shri Jayaraj made speech in connection with these pictures in the channel against the association. They attended the meeting and Kamal and Jayaraj expressed their views and the matter was amicably settled.’



'In connection with the distribution taken by our member Shri V.P. Madhavan Nair in regard to the film "Celluloid" was discussed and Shri Madhavan Nair agreed to pay a sum of Rs. 50,000/- towards contributions and a month time was given to him for making the payment'.

'It was discussed that Shri Basheer Ahamed is purposefully and intentionally violating the decision of Film Distributors Association and Film Producers Association. This attitude of Shri P.V. Basheer Ahamed will weaken the strength of both the association and the committee decided to get explanation from P.V. Basheer Ahamed about his speech in TV channels and in news media continuously and ask him to give explanation for his speech. If the reply is not satisfactory the association decided to take disciplinary proceedings against him'. (emphasis supplied)

41. The minutes of the meeting clearly indicate that the Opposite Party took violation of its directives very seriously. The fact that Shri V.P. Madhavan was made to pay Rs. 50,000 towards contribution in regard to distribution undertaken by him of the film "Celluloid" directed by Shri. Kamal shows that the Opposite Party penalised Shri. V.P. Madhavan as he agreed to distribute a film directed by Shri Kamal which was banned by the Opposite Party through its circular dated 01.12.2011. The usage of the word 'contribution' does not change the character of the payment which in fact was a penalty for disregarding the diktats of the Opposite Party.



42. Further, the minutes of the meeting also indicate the decision of the Opposite Party to seek explanation from the Informant about his speech in TV channels and in news media continuously regarding his intention of violating the decision of the Opposite Party. The Opposite Party further decided in the said meeting that if the reply of the Informant is not found to be satisfactory, it will take disciplinary proceedings against him. Immediately, after the said meeting, on 13.02.2013, the Opposite Party sent a letter to the Informant seeking explanation as to why he violated its decision regarding distribution of films which were either produced or directed by Shri Kamal and Shri Jayaraj. The opening lines of the letter mention the directions issued by the Opposite Party through its circular dated 01.12.2011 and the closing line states unequivocally that if the explanation of the Informant is found unsatisfactory, disciplinary proceedings shall be initiated against him as per the By-Law Rule 8A.

43. It may also be noted that when the Informant sent the reply to the Opposite Party through its letter dated 20.02.2013, the Opposite Party supposedly found it unsatisfactory and through its Special Executive Meeting dated 26.03.2013 decided to suspend the Informant. Subsequently, the Opposite Party issued a press clip suspending the Informant from the membership for a period of 6 months for 'anti-organizational activities'. It is, thus, clear that the Opposite Party was offended by the Informant as the latter disregarded the diktats issued by it through its circular dated 01.12.2011 and the suspension was a consequence thereof. The fact of his suspension was communicated to the Informant by the Opposite Party *vide* letter dated 08.04.2013, whereby the Opposite Party wrote in clear words that his membership has been suspended for 6 months as per the decision taken in its Special Executive Meeting dated 26.03.2013 since the reply sent by the Informant was found unsatisfactory.



44. Considering the evidence placed on record, the Commission is fully convinced with the conclusion of the DG that the Opposite Party suspended the Informant and took action against others on the alleged non-observance of the impugned direction issued *vide* its circular dated 01.12.2011.
45. The Commission has also perused the material on record to examine as to whether any justification can be found behind the impugned directions issued by the Opposite Party to its members. In this regard, at the outset, it may be noted that neither the Opposite Party nor any of its members denied any of the evidence collected by the DG *i.e.*, the circular dated 01.12.2011, minutes of the various meetings of the Opposite Party, letter issued by the Opposite Party to the Informant *etc.* As justification, the Opposite Party has contended that its actions were directed towards safeguarding the interest of its members *i.e.*, distributors in the State of Kerala. It was alleged by the Opposite Party that in November 2011 KFEF closed down their theatres against certain demands put forward by them to the State Government of Kerala. Due to this, all the running pictures were terminated and the distributors incurred heavy losses. After some negotiation with the Government, theatres were opened on 25.11.2011. The Opposite Party requested the Informant to continue the films which they were screening at the time of closure of theatres. Since the Informant did not agree to the Opposite Party's request and declared his interest of releasing fresh/new films, the distributors underwent heavy losses. Being the association of distributors, the Opposite Party was under an obligation to safeguard their interest and therefore, it issued the impugned circular dated 01.12.2011 and thereafter took action against those who disregarded the directions of the said circular. The Opposite Party also justified its actions by taking shelter of the protection guaranteed under Article 19(1)(c) of the Constitution of India to form an association.



46. The Commission has considered the justification of the Opposite Party but is not convinced with it. Undoubtedly, formation of an association or union is a fundamental right protected under Article 19(1)(c) of the Constitution of India. The Commission is cognizant about the existence of such a right and in its Order dated 01.07.2013 in Case No. 35 of 2013 (*Advertising Agencies Guild. vs Indian Broadcasting Foundation & its members*), it held as under:

‘..... The trade association provides a forum for entities working in the same industry to meet and to discuss common issues. They carry out many valuable and lawful functions which provide a public benefit e.g., setting common technical standards for products or interfaces; setting the standards for admission to membership of a profession; arranging education and training for those wishing to join the industry; paying for and encouraging research into new techniques or developing a common response to changing government policy. Therefore, membership and participation in the collective activities of a trade association cannot by itself amount to violation of competition law as such. However, when these trade associations transgress their legal contours and facilitate collusive or collective decision making with the intention of limiting or controlling the production, distribution, sale or price of or trade in goods or provision of services as defined in section 2(c) of the Act, by its members, it will amount to violation of the provisions of the Act.’



47. Hence, it is undisputable that formation of a trade association is not *per se* illegal under the Act. However, when such trade association is used as a platform to fulfil illegitimate objectives which are against the Act *i.e.*, taking collective decisions which are anti-competitive, issuing anti-competitive circulars/diktats, taking sanctions against those who disregard such anti-competitive diktats/directions, facilitate collusive or collective decision making with the intention of limiting or controlling the production, distribution, sale or price of or trade in goods or provision of services as defined in section 2(c) of the Act, by its members, it will amount to violation of the provisions of the Act. In the present case, the Opposite Party has exactly done what is expressly prohibited by the Act. Therefore, the justifications proffered by the Opposite Party are liable to be rejected.

48. So far as the issue as to whether by doing the above, the Opposite Party has indulged in any practice which contravenes the provisions of section 3(3) of the Act, the Commission has already held that the Opposite Party took collective decisions in its various meetings which were anti-competitive, issued anti-competitive directions by way of circular dated 01.12.2011, took action against those members who failed to comply with the diktats/directions issued by it *etc.* The Commission also held the collective decisions taken by the Opposite Party and implemented to by its members amounted to 'agreement' between them as understood in context of the Act.

49. It may be noted that section 3(1) of the Act states that 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. The conduct of the Opposite Party by way of various decisions/agreement taken by it during the period of



investigation is amenable to scrutiny under this section. Further section 3(3) lays down that any agreement which is horizontal in nature (*i.e.*, 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) and is resulting into any of the agreements mentioned under sub-section (a) to (d) of section 3 is presumed to have an appreciable adverse effect on competition. The decisions of the Opposite Party, as found by the DG, resulted into limiting/controlling the Malayalam film industry in the State of Kerala, thereby contravening section 3(1) read with section 3(3)(b) of the Act. The Opposite Party tried to control the film distribution business in the State of Kerala and also issued directions *vide* circular dated 01.12.2011 to all its members restricting the distribution of films produced and directed by Malayalam filmmakers Shri Kamal and Shri Jayaraj and subsequently suspended the Informant on getting the information of violation of the above direction of the Opposite Party. The suspension of the Informant by the Opposite Party amounts to a concerted action/boycott by the Opposite Party. The Opposite Party has thus imposed restrictions to limit the market of film distribution/exhibition business in the State of Kerala. As per the scheme of the Act, the agreements falling under section 3(3) of the Act are presumed to be having an appreciable adverse effect on competition and the burden of proof is on the Opposite Party to rebut that presumption. As held earlier, the Opposite Party failed to satisfy the Commission through the justifications offered by it. Therefore, the Commission is of the opinion that the decisions of the Opposite Party which were taken collectively by its members and were subsequently implemented by them amounted to contravention of section 3(1) read with section 3(3)(b) of the Act.



ORDER

50. Considering the findings elucidated in the earlier part of this order, the Commission directs the Opposite Party *i.e.*, FDA-(K) and its Office Bearers & Executive Committee members to cease and desist from indulging in the practices which are found to be anti-competitive in the preceding paras of the order.

51. With regard to penalty under section 27 of the Act, the Commission is of the considered view that the said anti-competitive conducts require to be penalized to cause deterrence in future among the erring entities engaged in such activities. It has been seen that the Opposite Party and many similar associations at different levels in the film industry indulge in such anti-competitive activities. Accordingly, it is required that the penalty is adequate enough to create deterrence. However, having said that the Commission recognizes one mitigating factor shown by the Opposite Party *i.e.*, the new Executive Committee which took charge of the association on 01.11.2013 showed compliance and co-operation with the Commission's orders and processes. Further, the Informant was reinstated to the membership of the Opposite Party by the new Executive Committee as per the resolution passed by the Opposite Party in its special meeting held on 30.12.2013. At the same time, the Commission is also not oblivious of the previous conduct of FDA (K) and its then General Secretary Shri Jose C. Mundadan in not co-operating with the investigations. As a result, the Commission had to initiate proceedings under section 43 of the Act against them which resulted into imposition of penalties.

52. Considering the totality of facts and circumstances of the present case, the Commission decides to impose penalty on FDA (K) @ 5% of the average turnover of the last three years. The total amount of penalty is worked out as follows:



सत्यमेव जयते



(In Rs.)

S. No.	Name	Turnover for 2011-12	Turnover for 2012-13	Turnover for 2013-14	Average Turnover for three years	@5% of average turnover (Rounded off to nearest Rupee)
1.	FDA-K	1149144.70	1513154.68	1856591	1506296.79	75315

53. The Commission further directs the Opposite Party to deposit the penalty amount within 60 days of receipt of this order.

54. On the issue of individual liability of the persons-in-charge of FDA (K) in terms of the provisions of section 48 of the Act is concerned, it may be noted that on consideration of the investigation report, the Commission ordered forwarding of copies thereof to the parties including such persons for filing their respective reply/ objections. The Commission also directed them to file their income statements/ Income Tax Returns of the last 3 financial years. As the requisite information is not on record, the Commission decides to pass an order separately in this regard.

55. The Secretary is directed to inform the parties accordingly

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(S.L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

New Delhi:
Dated: 23/12/2014