

Competition Commission of India

Case No. 37/2011

Date: 3rd January, 2013

Information filed by:

Film & Television Producers Guild of India

...through Sh. Vibhu Bhakru and Sh. Harshvardhan Jha

Against:

1. Multiplex Association of India (MAI), Mumbai
...through Sh. Ramji Srivasan and Shri G. R. Bhatia, Advocates
2. PVR Limited ... through Sh. Saikrishana Raja Gopal, Advocates
3. Inox Leisure Limited }
4. Fame India Limited } through Sh. Ravashekhar Nair and Ms. Nidhi Singh, Advocate
5. Reliance Media Works Limited
6. Cinemax India Limited ... through Sh. Rohit K. Aggarwal, Advocate
7. Fun Multiplex Pvt. Ltd. ... through Ms. Diya Kapoor
8. Chaphalkar Brother, Pune
9. HDIL Entertainment Pvt. Ltd.
10. DT Cinemas ...through Sh. Karan Chandhoke, Advocate
11. Movietime Cineplex Pvt. Ltd.
12. Satyam Cineplexes Ltd. ... thorough Sh. H.S. Bobby Chandhoke, Advocate
13. SRS Entertainment & Retail Limited ...through Sh. Tarun Singla, Advocate
14. AB Movies Pvt. Limited ... through Sh. Rajiv Garg, Advocate
15. Velocity Limited

..... Opposite Parties

As per R. Prasad (minority)

I have a different view on the case and am therefore passing a separate order. There is no reason to discuss the facts of the case as they are discussed in detail in the majority order. But then there are allegations which have not been investigated by the D.G. such as (i) failure on the part of the multiplexes to enter into an agreement for an exhibition of the film till the date of release and thus in a way pressurising the producer to agree to the terms of release. (ii) Removing the film within three weeks so as to reduce the box office collections. (iii) Reducing the entertainment tax from the collections even in the case of states where no entertainment tax is levied. (iv) As the multiplex

operators do not finalize the agreement till the date of release, the advances are not given to the producers and the consumers do not know the movies which are going to be released in multiplex and are put to difficulties.

2. Any discussion in this case would not be useful without considering the past history of the dispute between the film producers and the multiplex operators. The multiplex operators started operations in 1997 and they started to adopt revenue sharing models in their dealings with the film producers instead of fixed amounts. The Multiplex Association of India was formed in 2002-03 and the multiplex owners opted for a revenue sharing model in their dealings with the film producers. The multiplex owners under the banner of MAI collectively demanded more lucrative terms under the revenue sharing scheme. In 2006, there was a conflict between multiplex operators and Yashraj Films Pvt. Ltd. as Yashraj Films demanded a larger share of the revenues generated for the exploitation of the film in multiplexes. The film producer went to the MRTP Commission which in 2007 passed a cease and desist order against MAI and some of the multiplex operators as the agreement between the members of the multiplex under the umbrella was held by the Commission to be restrictive. But the issue of revenue sharing did not die down. In April – May 2009 the film producers, the actors, the film technicians and labour, through their associations entered and formed an unregistered association known as UPDF. The film producers were directed by the associations that they should not release any film in multiplexes though they were allowed to release films in Single screen theatres. Thus, in approximately 2½ months hardly any Hindi film was released in the multiplexes and the multiplexes were put to great losses. The MAI filed information with the Competition Commission of India which was dealt in case no. 1/2009. The case was referred to the D.G. by the CCI. The DG found a contravention of the Competition Act and the Commission found contravention of Section 3(3) of the Act and also

levied fine on the leading figures of the UPDF. Meanwhile an agreement was entered into by the UPDF and MAI effective from 01.07.2009 regarding the revenue sharing arrangement. The film producers got a higher share of the revenues. This agreement was for a period of two years i.e. till 30.06.2009. After this agreement the Hindi films started being released in the multiplex theatres and there were no disputes. All the members of the MAI as well as the producers honoured the agreements. But the consumers were put to a loss as the multiplex operators increased their rates.

3. Before proceeding with this issue, it is necessary to consider the necessary factors of the film industry. The shelf life of a film is normally a month. Earlier the revenue of a film was realised only on the exploitation of the films mainly in single screen theatres. Subsequently when a producer made a film, he could sell the music rights, satellite rights, cable rights and world rights. Thus a producer of a film is able to exploit the film in various manners and thus increase his revenue. But the period in which the exploitation can be done is very short. As far as multiplex owners are concerned though they have 20% of the screens in India they account for 60% of the revenue. This happens because the rates of tickets in the multiplexes is much higher than that in a single screen theatres. Further the multiplexes are mainly in large cities where the disposable income is high and therefore the public seeing the movies could make a large contribution to the running of the multiplexes. It was therefore considered necessary by the producers to get a larger share of the revenue proceeds due to exploitation of films in multiplexes. The disputes between the multiplex owners and the film producers is going on since 2006. This is a case of collective bargaining on the part of the film producers as well as the multiplex owners. The bargaining took place through the agency of UPDF and MAI. UPDF and film producers look after the interest of the producers whereas MAI looks after the interests of the multiplex owners. There was a concerted action on behalf of MAI is clear

from the order of MRTP Commission. The concerted action on the part of the producers is clear from the order of this Commission in case no. 1/2009. After the agreement between UPDF and members of MAI, no dispute arose between the producers and MAI. But when the tenure of agreement which was two years was coming to an end the dispute arose between the producers and the multiple owners. As there was no dispute in the period 2009 to 2011, it certainly shows a concerted action on the part of the multiplexes owners. The tenure of the agreement of 2009 was coming to an end on 30.06.2011. On 25.02.2011 a meeting of the members of the MAI was convened regarding the terms of the revenue-sharing between the multiplex owners. On 29.06.2011 a second meeting was called by MAI of its members with the idea of discussing the revenue-sharing arrangement for films releasing from 01.07.2011 especially as the master agreement of 2009 was to expire on 30.06.2011 and a film known as Murder 2 was to be released on 08.07.2011. The opposite parties who are the multiplex owners have stated that they were dealing with the producers/distributors on individual basis and that MAI had no role to play. It was also argued that MAI neither directly or indirectly influenced to the decisions of the multiplex owners in checking out the terms and conditions of revenue-sharing. The opposite party also argued that the revenue sharing between the different constituents to cinema exploitation could not be a matter of competition. Incidentally the master agreement entered into the producers and the multiplex owners was only a guideline and each multiplex owner and film producer entered into agreements separately. But the master agreement worked as a guideline and that was the basis on which the agreements between the exhibitors who are multiplex owners and the producers were signed. It is not necessary to establish that they should be express directive from the MAI to its members that they should not deal with producers/distributors on an individual basis. The agreements signed between the distributors/producers with exhibitors are always individual agreements based on certain guidelines which were provided by the master

agreement. The Director General had held that the members of MAI are part of a cartel and have acted in a collusive manner. This is a pure and simple case of collective bargaining and there is no cartel in existence.

4. Incidentally Director General did not find any documentary evidence to prove that a collective decision by the multiplex owners was entered into in respect of revenue-sharing arrangement. The facts show that the minutes of the meetings of MAI were not recorded properly and for this reason the minutes of the meeting did not reflect any decision being taken. But in the absence of the proper minutes, the case has to be decided on the facts of the case submitted by the informant and some other parties whom the DG had investigated. It appears from the action of the MAI that they were aware of the Competition Act and were therefore trying not to leave a trace of a concerted action.

5. The evidence gathered by the DG shows that e-mails were exchanged between the members of MAI itself regarding the agenda for the meeting of 25th February 2011. On the basis of the e-mails and on the basis of meeting on 29.06.2011 the multiplex operators demanded some changes in the master agreement. Many of the changes were proposed in the meeting of MAI held on 25.02.2011. The changes proposed were as follows:

- (i) Demand of rebate of 2.5% in the first week's collection if the film performed below the benchmark.
- (ii) For Hollywood films the revenue share was to be based on the day and date basis or the lapse of time before such film's release in India.

6. The D.G. examined the President of MAI and representative of Inox Shri Deepak Asher. Shri Asher denied that revenue sharing was discussed in the MAI meeting of 29.06.2011. It was stated in the said statement

that only the details of service tax and piracy were discussed in the meeting of 29.06.2011. It was also stated that the issue of revenue sharing was raised by Shri Ashish Saxena, an important member of MAI and the representative of Reliance Media Works Ltd. But Shri Asher stated that the issue of revenue sharing was not discussed in the meeting. Shri Asher also stated that the terms and conditions of agreements are not discussed in MAI meetings.

7. The D.G. has relied on the affidavit of Shri Rajesh Thadani, the distributor of Murder-2 in the Mumbai Territory. Shri Thadani in the affidavit has stated that all the multiplexes were demanding revised share from the producer/distributors as against the master agreement of 2009. On 04.07.2011, Shri Chandresh Daftary of Fun Multiplex Pvt. Ltd. went to the office of Shri Thadani and informed him that Vishesh Movies Pvt. Ltd., producer of Murder-2 must sign the revised sharing agreement if it wanted its films to be released in multiplexes. Shri Thadani further stated that in front of him Shri Chandresh Daftary phoned of Rajendra Singh Jyala of Inox Leisure Ltd. and asked for a copy of the agreement which was to be signed by the individual producer with each of the multiplexes. It has also been stated that in pursuance of this phone call, Shri Jyala sent a copy of the agreement by e-mail to be signed by Vishesh Films Pvt. Ltd. for the release of the film. It was stated in the mail that the advance payment would be released after the agreement was signed. Shri Thadani stated that subsequently the other multiplexes contacted him and requested that similar agreement, as sent by Shri Jiyale, should be signed by Vishesh Films Pvt. Ltd. Shri Thadani also stated as the film was stated to be released on 08.07.2011 he had no option but to sign agreements with different multiplexes in the same format which was sent by Shri Jiyala.

8. During the course of the inquiry, Shri Satyam Cinema stated that it had not signed any agreement with Vishesh Films Pvt. Ltd. and that it had signed agreements on revised terms with the distributors of Vishesh Films

Pvt. Ltd. on 30.05.2011, 04.07.2011 and 05.07.2011. These distributors were Ginni Arts, Red Sun Enterprises and AA Films respectively. These three distributors were not the distributors of Mumbai territory, which is a lucrative territory. In the same manner, M/s A.B. Movies signed similar agreements with Ginni Arts prior to 06.07.2011. Some other multiplex owners such as SRS entered into agreements with the distributors of Vishesh Films Pvt. Ltd. on 28.05.2011 for U.P. and on 05.07.2011. DT Cinema entered into agreement with Narsimha Enterprises, a distributor of Vishesh Films Pvt. Ltd. for release in Chandigarh multiplexes on the revised terms on 07.07.2011. Inox had entered into an agreement with M/s Ginni Arts, the distributor of Vishesh Films Pvt. Ltd., for the release of Murder-2 for the northern region much earlier than 06.07.2011. Reliance Media entered two separate agreements with the distributor of Vishesh Films Pvt. Ltd. having different terms for the territory of Mumbai.

9. On the basis of these facts the issue has got to be decided. The main aim of a film producer is to maximize his revenue. It depends on a number of factors. For the release of films, India has been divided in various territories and a producer has different distributors in different territories. The rates for release in different territories are different. In this manner, the price in Mumbai territory would be higher than the price or terms in the Eastern circuit of Kolkata, Assam and Orissa. The terms also depend on the agreement date. When an agreement is signed at an earlier date, lesser advance of money is received at that time. This makes the cost of funds lower and would lead to a lower sharing ratio. Further if a multiplex owner has very few screens, the rates would be different because the gross revenues are not affected much.

10. As the agreements referred to during the course of inquiry were entered prior to 06.07.2011 for other territories rather than the Mumbai territory, on the basis the affidavit of Shri Thadani cannot be thrown out. It was for the OPs to state that the affidavit was false. The OPs have not brought on record any material to establish that the affidavit of Shri

Thadani was false. If the affidavit was false, Shri Thadani was liable for prosecution. In absence of any such material, the affidavit of Shri Thadani has to be treated as correct. Other factors in this case support this view.

11. Another material relied upon by the D.G. was the submission made by Shri Ramesh Sippy, a distributor from Mumbai. Shri Sippy submitted a copy of e-mail sent by him to the President of MAI. In this e-mail he refers to negotiation of 2-3 multiplex operators with producers/distributors at a time. He also refers to competition law and an amicable settlement. In his statement before the D.G., he stated that in and around 30.06.2011 the multiplex operators started exerting pressure on the producers/distributors asking for unreasonable terms. It was stated that the multiplexes collectively started entertaining the producers/distributors prior to one or two days before release of the film so that the producers/distributors had no option but to agree to the terms of the multiplex operators. It was stated that UTV and Eros had succumbed to the pressure of the multiplex operators and agreed to the revised terms. He also stated that Shri Deepak Asher had stated that the multiplex operators would not meet in a group to avoid action from the CCI. Shri Asher stated that the producers/distributors should meet the multiplex operators in isolation. In this case, the D.G. examined Viacom 18 and UTV who stated that they had entered into agreements with the multiplex operators without any pressure and coercion and on the basis of mutually accepted terms.

12. During the course of inquiry, no material was brought forward to establish that the statement of Shri Sippy, recorded under oath by D.G. was false. The statement of Shri Sippy in respect of Eros and UTV was based on hearsay. Just because this hearsay evidence was found to be incorrect does not make his statement false. The OPs have also not established that the statement of Shri Sippy was false. Thus the

statement of Shri Sippy has to be accepted as stating the correct state of affairs.

13. The D.G. also found that Hollywood producers/distributors suffered similar treatment at the hands of the multiplex operators. Uptill 30.06.2011, the release of Hollywood movies was governed by the master agreement of 2009. After the expiry of the master agreement, as the multiplex operators wanted a higher share in the revenues and as the film 'Harry Potter' had to be released by Warner Bros., many of the multiplex operators met Warner Bros. at its office on 13.07.2011. In this connection the D.G. examined Shri Gaurav Sabharwal of Warner Bros. As Harry Potter was to have a world wide release on 15.07.2011, Warner Bros. sent a contract to PVR Cinemas, Cinemax, Inox and Fun Republic by e-mail on the basis of the 2009 Master agreement. PVR responded to the e-mail by offering a lower sharing in favour of Warner Bros. Warner Bros. did not accept it and issued various reminders but there was no response from PVR. Similar was the response from the other multiplex operators. According to Shri Sabharwal the multiplex operators as members of MAI asked for a meeting with Warner Bros. on 12.07.2011. On 13.07.2011, the representatives of PVR, Inox, Big Entertainment, Cinemax and Fun Republic met Shri Sabharwal. In the meeting, the multiplex operators stated that they represented the MAI and proposed the same terms as offered by PVR. The members of MAI told Shri Sabharwal that he should talk to Shri Ashish Saxena (Big Cinema) and Shri Deepak Asher (Inox). Shri Sabharwal talked to Shri Saxena. Shri Saxena stated that he would confer with Shri Asher and other members of MAI regarding the terms proposed by Warner Bros. In any case the MAI members stated that they would release Harry Potter on their terms and not on the terms of Warner Bros. On 14.07.2011, Shri Saxena phoned up Shri Sabharwal that Harry Potter would be released on open terms and that the terms would be settled four weeks after release. On the same date Warner Bros. sent a MOU to each of the operators for signature but none of the operators

signed the MOU inspite of reminders. But the multiplex operators allowed booking of their screens and the movie was released on 15.07.2011. But the settlement which was to take place after four weeks with the multiplex operators did not take place. The next film 'Final Destination 5' of Warner Bros. could not be released in the screens of MAI members because the terms offered were lower than that proposed under the Master Agreement of 2009. Warner Bros. wanted to exhibit three more films but it did not receive any response from multiplexes as the terms of Warner Bros. were not acceptable to multiplexes. But individual negotiations of Warner Bros. with PVR and Cinemax resulted in the release of the films on mutually accepted terms. The other members of MAI did not release these films in their theatres though non MAI theatres agreed to the release. Subsequently on 18.11.2011, the film 'Happy Feet' was released ultimately in all the theatres of MAI members on mutually accepted terms.

14. A perusal of the above facts show that initially there was a concerted action on the part of the members of the MAI. But as 'Harry Potter' was a super hit film, the members of MAI agreed to the release of the film as the film would add substantially to their revenues. A war of nerves took place between the members of MAI and Warner Bros. As Warner Bros. was not willing to budge, two of the members PVR and Cinemax broke rank and agreed to release the movies of Warner Bros. Subsequently as the multiplexes are mainly in metros and big cities where the demand of Hollywood movies is high, the other members of MAI also agreed to the release of Warner Bros. movies on mutually agreed firms. The discussion also shows that the leaders on behalf of MAI were Shri Ashish Saxena and Shri Deepak Asher, President of MAI.

15. In this connection the DG examined Shri Mukesh Bhatt, a director of M/s Vishesh Films Pvt. Ltd. Shri Bhatt stated that there was a concerted action on behalf of the members of MAI because each member of MAI offered identical terms to the film producers. Further if the producers did

not agree to the terms of the agreement, no multiplex operator would agree to the release of the film. All the multiplex operators would sign the agreement if Shri Deepak Asher, President of MAI and CEO of Inox approved of the agreement. He also stated that he had met Shri Asher and Shri Saxena who stated that the master agreement of 2009 would not be applicable and that new terms would apply from July, 2011.

16. The DG then considered the statement of Shri Ashish Saxena of Big Cinema. In this statement DG has asked Shri Saxena to explain an e-mail sent by him to Shri Asher, President of MAI. In this e-mail Shri Saxena has referred to MAI meeting in respect of discussions with UPDF. In this e-mail Shri Saxena has referred to steps to be taken in respect of films releasing after 1st July, 2011. Shri Saxena explained that this was in respect of service tax of distributors shares. DG asked to Shri Saxena to submit correspondence relating to service tax matters. These details were not submitted by Shri Saxena to DG.

17. The next issue to Glitz Cinema at Ranchi. E-mail correspondence shows Glitz Cinema was willing to release the films on National Multiplex Terms. In the telephonic conversation Glitz Cinema had stated that it was a Member of MAI & it would exhibit to films on the same terms that were being offered to MAI members. Glitz Cinema also stated that MAI terms meant National Multiplex Terms. The MAI terms were 3.as follows.

1. 1st Exhibition Week: 45% of the Net Collections.
2. 2nd Exhibition Week: 37.5% of the Net Collections
3. 3rd Exhibition Week: 32.5% of the Net Collections and
4. 4th Exhibition Week: onwards till the last Exhibition Week:
27.5% of the Net collections.

On the basis of these correspondences, the DG held that the multiplex operators were acting on the directions of MAI and that the films were released only when the producers and directors approved the MAI terms.

Shri Shabarwal in his statement stated that after 18.11.2011 all the films were released on mutually agreed terms.

18. The DG then considered the e-mails exchanged between multiplex operators in respect of the release of the film 'Singham'. On this issue the DG considered the evidence of the fact that Reliance ADA was releasing the films on the terms set by the producers. The producers raised this issue and it was referred to Shri Asher, President of MAI. In these e-mails the Multiplex Operators wanted to have a solution from MAI in respect of the release of films by DG-ADA. Incidentally Reliance ADA and Multiplex Operator Big Cinema belong to the same group.

19. Considering the facts of the case, it is clear that the whole dispute between the film producers and the multiplex owners is with respect to the sharing of revenue on the exploitation of the rights of exhibition of the films in multiplex theaters. This dispute is going on from 2006. The MRTP Commission had passed a cease and desist order on the multiplex operators. But this did not solve the issue. In the consequence, the film industry combined together in the middle of 2009 in an unincorporated association known as UPDF and boycotted the multiplexes. No new movies were released in the multiplexes in the middle of 2009 and in the period of 2-3 months in mid 2009 the multiplex operators suffered losses of around Rs. 30 crores. The multiplex operators approached the CCI and the CCI fined the leading members of UPDF after finding a violation of Section 3(3) of the Act. In any case, UPDF and members of the multiplex operators came to a settlement and the film producers got a share larger than what the multiplex operators wanted to give to the producers. The master agreement which was signed by the member of MAI in early July was valid for two years i.e. till 30.06.2011. The producers and the member of MAI represented by MAI acted on the basis of the master agreement and there were no disputes between the producers and the MAI till 30.06.2011. Though there was a master agreement, each

producer and the multiplex operator entered into a separate agreement which was largely based on the master agreement but was slightly different. Thus, there was concerted behaviour on the part of the producers and the multiplex operators between July 2009 to June 2011 to maintain status quo. Further, the agreement was for the Hindi films and also for the Hollywood films.

20. As the master agreement was coming to an end in June 2011, material gathered by the DG shows that in February 2011 the multiplex operators met under the auspices of MAI. In this meeting, it is decided that the multiplex operators should take a higher share. Probably in the meeting of MAI the issue of revenue sharing was also discussed. But as proper minutes of the two meetings were not maintained, there is hardly any documentary evidence. But in that case, the concerted action of the multiplex operators has to be gathered from their behaviour.

21. The DG had examined Shri R.G. Thadani, distributor of Murder 2. The examination showed that Inox Leisure Ltd through its President Shri Deepak Asher was playing an important role in reducing the revenue sharing of the producers. In fact the draft agreement which each multiplex had to be signed was sent by Inox Leisure Ltd. The other multiplexes had the same format. As these negotiations were taking place few days prior to the release of the film and as the advertisements had already been released and expenses incurred, the release date could not be deferred. Therefore Vishesh Films had no option but to sign the agreements in the same format as sent by Inox Leisure Ltd. with the different multiplexes.

22. The DG also examined Shri Ramesh Sippy who stated that the multiplex operators started negotiations with the producers/ distributors one or two days before the release of the films so that the producers/distributors had no option but to agree to the terms of the

multiplex operators. Shri Sippy also relied on his talks with Shri Asher, President of Inox and also the President of MAI. Shri Asher had stated that the multiplex operators would not meet the producers in a group so as to avoid any action by the CCI. It is also clear from the statement of Shri Thadani that the draft agreement was sent from the office of Inox Ltd. This shows a concerted action on the part of the MAI.

23. Investigation by the D.G. in respect of Shri Gaurav Sabharwal of Warner Bros. shows similar facts. It showed that PVR, Inox, Big Entertainment, Cinemax and Fun Republic offered terms of release which was lower than that expected by Warner Bros. Warner Bros. wanted terms based on the master agreement of 2009. But these multiplex operators offered the same terms which were offered to Vishesh Films Ltd. In fact the multiplex operators stated that Shri Sabharwal should talk to Shri Ashish Saxena. Shri Sabharwal talked to Shri Saxena who in turn stated that he would confer with Shri Asher and other members of MAI in respect of the terms acceptable to Warner Bros. In any case, the multiplex owners were not willing to release the film 'Harry Potter' on the terms of Warner Bros. Shri Ashish Saxena got back to Sabharwal with the suggestion that the film 'Harry Potter' could be released on open terms and a settlement would take place after four weeks. Warner Bros. sent a MOU to the multiplex operators. But the multiplex operators did not approve the MOU sent by Warner Brothers. But in any case the movie was released.

24. In August 2011 Warner Brothers wanted to release the film 'Final Destination 5'. The terms offered by the multiplex operators Movie Time, Fun Republic Cinemas, Inox and Big Cinemas were low and the same was not acceptable to Warner Brothers. Final Destination 5 was released in only non-MAI cinemas all over India. Final Destination 5 was not shown on any MAI member screen. The next movies to be released by Warner Bros. were Contagion, Crazy Stupid Love and Dolphin Tale. The rates

acceptable to Warner Brothers were in accordance with the master agreement of 2009 but these were not acceptable to most of the multiplex operators. Incidentally the films Contagion, Crazy Stupid Love were released in September 2011 while Dolphin Tale was released in November 2011. All these multiplex operators i.e. Cinemax and PVR took the films for all India release in addition to other non-MAI members all over India. The other multiplex operators were members of the MAI did not release the above stated films as the terms of revenue sharing were not acceptable to Warner Brothers. In November 2011 Warner Brothers released the film Happy Feet 2 after entering into agreements with each of the multiplexes separately.

25. The DG also examined certain e-mails exchanged between Warner Brothers and one of the multiplex operators i.e. Glitz Cinema. The e-mails show that Big Cinema was willing to exhibit Final Destination 5 on the national multiplex terms. In another e-mail Glitz Cinema explained to Warner Brothers that the national multiplex terms were the MAI terms.

26. The DG then examined the e-mails exchanged between the multiplex operators and the producers of Singham. This Film was being released by Reliance ADA and one of the multiplex operators i.e. Big Cinema is a part of the same Reliance ADA group. The terms of release of the film i.e. Singham was the same as per the master agreement of 2009. In view of new format adopted by Reliance ADA group this new in the market the multiplex operators sent e-mails to Shri Deepak Asher, President of MAI and also the President of Inox as what ought to be done in such a case especially as Big Cinema had agreed to the terms offered by its sister concern. This happened in July 2011. The DG had held that this showed a concerted action on the part of the multiplex operators.

27. On the basis of these facts and after relying on certain decisions of United States the majority has come to a conclusion that there was no

concerted action on the part of the multiplex operators. I have a different view and therefore have a different view. There is evidence to show that there was a master agreement of July 2009 which was expiring on 30/06/2011. In a bid to get a better deal the multiplex operators got together and took a decision that a master agreement where larger share of profits should be given to multiplex operators should be adopted. This decision took place from the first week of July 2011 after meetings of MAI in February and July 2011. The multiplex operators were aware of the Competition Act and therefore the MAI did not issue any direction to any of its members that the film should be released on the terms of the multiplex operators. In fact they agreed to meet the film producers not together but separately. But the terms were dictated by what was decided in the MAI meetings. The persons' who took active interest were Mr. Asher of Inox cinema who is also the President of MAI and Mr. Ashish Saxena of Big Cinemas. In fact the master agreement which each multiplex operators had to enter into was supplied by Mr. Asher's office. It is also a fact that the concerted action did not last long especially when a big operator like Reliance ADAG group was involved. This happened at the time of release of the film Singham in July 2011. The other multiplex operators could do nothing about it especially as the economic strength of ADAG group is huge. As far as the Warner Brothers was concerned it was not able to release many films in the theatres of multiplex operators because the terms were not acceptable to Warner Brothers. The consumer or the cinegoers were deprived of various Hollywood movies. This created a harm to the consumers because of a shortage of supply. It is not necessary for an agreement or a decision taken to be in writing. An agreement or a decision taken can be understood by the behaviour of the parties to the agreement. This is the case in the present context because the DG has not found any agreement but he has found evidence that there was a concerted on the part of the multiplex operators specially in the first four months after July 2011 with the exception of the release of the movie Singham. It is true that the decision taken could not be acted

upon after November 2011. This is evident from the statement of Sabharwal the manager of Warner Brothers. It was for the opposite parties which are the multiplex operators to establish that the statements of different persons recorded by the DG were erroneous and false. Therefore the onus cast on the opposite parties to demolish the fact that no decision was taken has not been discharged.

28. Under the Indian Competition Act of 2002 agreement has been defined in section 2(b). It reads as follows:

“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.*

A perusal of the above definition would show that any action in concert is an agreement under the Competition Act 2002. Section 3(3) reads as follows:

Any agreement entered into between enterprises or associations of enterprises or persons or association of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which –

- (a) directly or indirectly determines purchase or sale prices;*
- (b) limits or controls production, supply, markets, technical development, investment or provision of services;*
- (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;*
- (d) directly or indirectly results in bid rigging or collusive bidding.*

A perusal of the section would show that a decision taken by an association of enterprises or association of persons engaged in identical or similar goods or provision of services is hit by the provisions of section 3(3) of the Act. An action in concert is an agreement and in this case a decision has been taken by the multiplex operators to enhance their revenue-sharing rights in the release of films. The multiplex operators decided to do by not agreeing to the terms of the producers. If each multiplex operator separately had offered different terms to the producers then the case would have been different. But here the case is that each multiplex operators who is an OP, being a member of MAI in this case had offered similar terms to the producers for the release of the films and in many cases as the release dates had already finalized and as the publicity expenses had been incurred, there was no option with the producers but to accept the rates of dictated by the multiplex operators. Sometimes as in the case Warner Brothers if the producers did not accept the rates the films were not released. If this does not show concerted action on the part of the multiplex operators then I do not know what would. There is no doubt that the concerted action was in existence only for a period of four months from July till November 2011. The only exception was of Singham against which the multiplex operators could not move because the release and distribution of film was being done by an economic powerhouse i.e. Reliance ADAG group. There is nothing in the Act which states that an agreement should be acted upon to constitute an offence. In this case the agreement has been acted on for a period of four months. Even an attempt to enter into an anti-competitive agreement is a contravention of Section 3 of the Competition Act. This is mentioned in Section 3(1) of the Act. Further under Section 3(3) of the Competition Act which is an enactment of deeming provision, the onus is cast on the opposite parties. If anyone tries to limit or control supply of goods or provision of services either directly or indirectly determines the purchase or sale Price he is hit by the provision 3(3) of the Act. In this particular

case the multiplex operators by concerted action have tried to limit and control the supply as well as indirectly determine the purchase price. Therefore the action by the multiplex operators attracts clauses (a) and (b) of Section 3(3). As this was a decision taken by a group of multiplex operators the provisions of Section 3(3) are applicable. By the fiction of law the onus shifts on the multiplex operators to establish that no decision was taken to control or limit supply of indirectly fix the purchase price. This onus has not been discharged by the multiplex operators by bringing material on record. Therefore in accordance with the provisions Section 3(3) of the Act, it is held that an appreciable adverse effect on competition in India has been created by the multiple operators and its association MAI.

29. Though in the information an argument has been raised that MAI is abusing its dominant position, it is not necessary to look into this aspect as anti-competitive behaviour on the part of MAI has already been established. There is no doubt that MAI does not carry out any business but the issue is whether it can be treated as an enterprise under Section 2(h) of the Competition Act. There is no doubt that MAI is a person as it is an association and therefore is covered by the definition under Section 2(l) of the Competition Act. In accordance with Section 2(h) of the Competition Act, it is not necessary that a person should carry out any business. If the persons' activities has an effect on production, storage, supply, distribution etc. then it can be treated as an enterprise under Section 2(h) of the Competition Act. MAI being a person is indulging in activities which has an effect on production, storage, supply, distribution etc in the markets and therefore it would have to be treated as an enterprise. This is also a view of the Delhi High Court in the case of Hemant Sharma vs. Chess Federation of India which has also been confirmed by the Division Bench of the same High court.

30. But this case is basically a case of collective bargaining and the exercise by the multiplex operators was to increase their revenue share. The behaviour of the multiplex operators MAI are hit by the provision of Section 3(3) of the Competition Act and therefore there is no necessity to consider this issue again under Section 4 of the Act.

31. Considering the fact that there was a contravention of Section 3(3) of the Competition Act, it is directed under Section 27 of the Competition Act that the opposite parties multiplex operators should not indulge in such anti competitive collusive behaviour. They should cease and desist from such action.

32. The infringement of the Competition Act led to the denial of release of movies in some of the multiplex. Though there was a contravention, it is not an extreme one therefore a penalty of Rs. 1 lakh on each of the 15 multiplex operators which are the opposite parties in this case is imposed.

33. The Secretary is directed to convey this order to all the opposite parties and also ensure the penalties levied on opposite parties in this case is recovered.

sd/-
(R. Prasad)
Member