



COMPETITION COMMISSION OF INDIA

Case No. 62 of 2012

In Re:

**M/s Cinemax India Limited
(now known as M/s PVR Ltd.)**

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 Ankur Sood, Advocate for the Informant.

S/ Shri Santosh Paul, Debopriyo Pal and Pradesh Chacko,
Advocates for the Opposite Party.

Order under section 27 of the Competition Act, 2002

1. The present information under section 19(1)(a) of the Competition Act, 2002 ('the Act') was filed by M/s Cinemax India Limited ('the Informant') against M/s Film Distributors Association (Kerala) [FDA (K)] ('the Opposite Party')



सत्यमेव जयते



alleging *inter alia* contravention of the provisions of sections 3 and 4 of the Act.

2. The Informant is a company registered under the Companies Act, 1956 and is engaged in the business of exhibition of films at its cinema halls (39 properties having 138 screens and 33,522 seats across the country including in Kerala). The Informant is now known as M/s PVR Ltd. after amalgamation of seven companies of Cinemax Group w.e.f. 12.02.2014 pursuant to the order of the Hon'ble High Court of Delhi under Section 394 of the Companies Act, 1956.
3. The Opposite Party is an association of film distributors registered under the Travancore-Cochin Literary, Scientific and Charitable Societies Registration Act-XII of 1955. Its objective is to encourage and promote proper distribution of feature films in the State of Kerala and to safeguard the interests of film distributors, who are its members. It is stated that there are about 221 distributors in Kerala, who are the members of FDA (K). In addition, it is stated that there are about 20 other distributors who are not the members of FDA (K) in the State of Kerala.
4. The Informant has alleged that under the garb of a trade association seeking to protect the interest of film distributors, FDA (K) has become a vehicle for cartelization between members, which has caused and continues to cause appreciable adverse effect on competition. It is also alleged that members of FDA (K) are behaving like a cartel and are exploiting their collective bargaining position to coerce film exhibitors such as the Informant through their anti-competitive behaviour to enter into extremely unreasonable revenue sharing arrangements. It is stated that FDA (K) and its members have entered into anti-competitive agreement whereby and whereunder they have collectively increased their share of revenue through the association.



सत्यमेव जयते



5. It is the case of the Informant that collectively the members of FDA (K) act as distributors for almost all the regional language films in Kerala and thereby exercise complete control over the distribution of Malayalam language films in Kerala. Thus, it is averred that FDA (K) is in a dominant position in the relevant market. It is further alleged that FDA (K) acts on behalf of all its members for the purpose of determining the revenue share and thereby abuses its dominant position by seeking to impose unfair, unreasonable and inadequate revenue share terms on the Informant.
6. It has been stated in the information that the members of FDA (K) had entered into agreements with the Informant for revenue sharing on the following terms: First Week- 50%, Second Week-42.5%, Third Week-37.5%, and Fourth Week onwards-30%. It has been stated that the above mentioned revenue arrangement was reasonable and consistent with the understanding reached by the Informant with other distributors for Hindi and English films.
7. The Informant has alleged that FDA (K) issued a notice to it on 01.06.2012 in which it hiked the existing revenue sharing arrangement. The relevant portion of the said notice is as follow:

“...Based on complaints from our members regarding the terms of exhibition practiced by you, the Executive Committee of FDA (Kerala) have decided to inform you that the percentage of Distributor’s share has to be fixed as per the prevailing terms and conditions followed by the other Exhibitors of Kerala. The said terms and conditions are mentioned below for your kind perusal.

1st week: 60% of the Net amount as Distributor’s share.

2nd week: 55% of the Net amount as Distributor’s share.

3rd week: onwards 50% upto holdovers... ”.



8. On the basis of the above notice, the Informant has contended that the members of FDA (K) have decided to act as a cartel. It is further averred that the members of FDA (K) acted in concerted manner to decide the rates at which Malayalam films will be provided for exhibition, which will leave no discretion in this regard with the individual members.
9. It has also been pointed out that the above notice makes it absolutely clear that the Executive Committee of FDA (K) has taken the decision for enhancing or revising the revenue share and each individual member would be required to follow the same irrespective of its individual choice/ decision.
10. The Informant has submitted that the aforesaid conduct would result in complete absence of competition between the distributors who are members of FDA (K); drive out the Informant and other Malayalam film exhibitors from the market; cause serious and severe loss and damage to the Informant and other Malayalam film exhibitors; and cause harm to the interest of the end consumers who will ultimately bear the burden of the higher prices.
11. Attention was also drawn to a subsequent letter dated 14.07.2012 issued by FDA (K) to the Informant whereby it was pointed out by FDA (K) that the Informant has not implemented the terms and conditions as set out in its previous letter dated 01.06.2012. *Vide* the said letter, the Informant was called for a meeting with FDA (K) to discuss and settle the matter. It is the case of the Informant that this letter once again points to the blatant cartelization by FDA (K) and its members in as much as the Informant was not permitted to negotiate individually with the members of FDA (K). Rather, it was summoned to appear before FDA (K) so that a collective and concerted decision could be made by the members of FDA (K). It is, however, averred that the issues could not be resolved at the meeting so called due to the unreasonable stand of FDA (K).



सत्यमेव जयते



12. Reference was also been made to a letter dated 01.08.2012 issued by FDA (K) whereby its decision *qua* revenue sharing as communicated to the Informant *vide* letter dated 01.06.2012 was reiterated and reaffirmed.
13. The Informant has stated that it wrote various letters to FDA (K) for negotiations with the members individually. It is, however, stated that the said requests of the Informant were not acceded to.
14. Based on the above averments and allegations, the Informant filed the instant information alleging *inter alia* contravention of the provisions of sections 3 and 4 of the Act.

Directions to the DG

15. The Commission after considering the entire material available on record *vide* its order dated 18.10.2012 directed the Director General (DG) to cause an investigation to be made into the matter and to submit a report within a period of 60 days from receipt of the order.

Investigation by the DG

16. The DG, after receiving the directions and subsequent extensions from the Commission, investigated the matter and filed the investigation report dated 27.05.2014. The findings and conclusions of the DG have been summarized in the succeeding paras:
17. As per the report of the DG, the allegations relating to infringement of the provisions of the Act were found to be true against the Opposite Party. FDA (K) directed the revenue sharing pattern to the Informant which was also made binding on its members and exhibitors. The Opposite Party issued the directions to the Informant on the revenue sharing mechanism for exhibiting Malayalam films at its multiplexes in the State of Kerala. The Opposite Party also prohibited and did not allow the Informant to negotiate independently



सत्यमेव जयते



with the individual distributors and forced it to accept the collective call of the association for accepting the revenue sharing.

18. The conduct of the Opposite Party in dictating/ imposing the revenue sharing mechanism unilaterally on the Informant was found by the DG to be in contravention of the provisions of section 3(3) of the Act. The activities of the Opposite Party were found to directly fix/ determine the revenue sharing arrangement among the distributors and exhibitors and, thus, in contravention of the provision of section 3(3)(a) of the Act. These have also resulted in limiting/ controlling/ restriction in the market and amounted to contravention of section 3(3)(b) of the Act. The association collectively decided to fix the revenue sharing arrangements for distribution/exhibition of the movies. Thus, based on the practice of determining the revenue sharing and limiting/ controlling/ restriction, the association was found to have indulged in the anti-competitive conduct. Its conduct ultimately has impeded competition in the market. It has directly indulged in determination of the price of providing movies for exhibition to cinema halls, which amounts to contravention of the provision of section 3(3)(a) of the Act. The Opposite Party has not allowed the Informant to negotiate independently with individual distributors and fixed the revenue sharing agreements as per their mutual arrangements which in effect compelled the Informant to adopt the percentage revenue sharing as fixed by the association. As the Opposite Party is an association of distributors, which by an agreement among themselves have fixed the price/ revenue sharing arrangements of providing movies to exhibitors, this very act of fixing the pre-determined price, together with use of its position to coerce the Informant and other film exhibitors to enter into such arrangements is violative of the provisions of section 3(3) and section 2 (c) of the Act dealing with formation of cartels. This cartelized behavior of the Opposite Party has snatched the freedom of negotiation from the Informant on price/ revenue sharing mechanism for exhibition of films in one to one agreements between the Informant and other individual distributors. The Opposite Party has also taken action against its members who did not accept its terms and conditions



सत्यमेव जयते



regarding revenue sharing arrangements. The above actions of the Opposite Party have therefore caused appreciable adverse effect on the competition and harmed the competition in the market of Malayalam film exhibition in the State of Kerala both for the Multiplexes and traditional theatres.

19. Accordingly, the conduct of the Opposite Party was found by the DG to be in violation of the provisions of section 3(3)(a) and 3(3)(b) read with section 3(1) of the Act.

Consideration of the DG report by the Commission

20. The Commission in its ordinary meeting held on 05.06.2014 considered the investigation report submitted by the DG and decided to forward copies thereof to the parties including all 38 members of the Executive Committee of FDA (K) for filing their replies/ objections thereto. The Commission also directed the parties to appear for oral hearing. Subsequently, arguments of the parties were heard.

Replies/ objections/ submissions of the Opposite Party

21. The Opposite Party filed its objections to the investigation report of the DG. Denying the contents of the report, the Opposite Party raised some preliminary objections to the present proceedings. It was argued that the film distributors have a fundamental right under Article 19(1)(c) of the Constitution of India to form associations or unions. It was pointed out that FDA (K) is a duly registered body in conformity with the constitutional provisions. It was argued that the only restrictions which can be placed upon such right are enumerated in Article 19 itself.
22. It was further pointed out that the opposite party association has been formed to protect the interest of the film distributors and to bring uniformity in payment of royalties across the State without any discrimination to any cinema theatre owner. It was also stated that the association has formulated the revenue sharing ratios which are uniformly applied across the State to all



सत्यमेव जयते



cinema theatre owners. It was stated that the association acts in the interest of film distributors, cinema theatre owners and the movie going public to bring certainty to revenue sharing arrangements. It was suggested that this work of the Opposite Party benefits the cinema audiences as well as the cinema industry as a whole; in the absence of uniform revenue sharing policy, there would be the law of jungle operating, which would be detrimental to the cinema industry and the cinema audiences; and the pricing of tickets for the cinema audiences would be absolutely uncertain and cause wide fluctuations in the pricing of the tickets.

23. It was contended that the investigation report cannot be sustained in law for the reasons that the Opposite Party has not entered 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.
24. It was also submitted that the inquiry may be closed in view of the fact that the dispute between the Informant and the Opposite Party is over and nothing remains to be decided. There are no other parties to the dispute nor is there any other party which is affected or is going to be affected.
25. On merits, it was denied that the Opposite Party has not permitted the Informant to negotiate the revenue sharing individually with the members. It was also highlighted that the election of FDA (K) was conducted on 30.10.2013 and the present office bearers took charge of the office on 31.10.2013. The present office bearers have complied with all the directions of the Commission and have also produced all the documents as required by the Commission. It was argued that the submissions and replies of the Informant will show that it had entered into agreements with various members of the FDA (K). The Opposite Party has never formed a cartel to enhance the rates but the members themselves have decided to enhance the rates of revenue sharing. On the contrary, it was alleged that the Informant has formed a cartel and intimidating the distributors, movie makers and



सत्यमेव जयते



producers. The Informant is having various theatres and by forming cartel it is imposing terms on the individual distributors.

26. Elaborating further, it was submitted that in the State of Kerala revenue sharing pattern (1st week-60%, 2nd week-55%, 3rd week-50% and after Hold Over 40% for air conditioned theatres) had been in existence for past nearly 5 to 6 decades and all the exhibitors and distributors are following the same without any issue. In this system, both the distributors and exhibitors are safe and the same is profitable to each other and the revenue is shared according to the terms prevailing in the industry.
27. It was stated that the Informant is also an exhibitor in State of Kerala. It was argued that running a multiplex is profitable than single screen theatre. The multiplex theatre employs only 15 to 20 staff for managing 4 screens whereas a single screen theatre employs around the same number of staff for a single screen. Despite this, it was argued that the Informant (running multiplexes) now wants to dictate/impose his terms of revenue sharing on the distributors given its dominant position.
28. Further, it was contended that the Informant after entry into State of Kerala started an altogether new revenue sharing pattern of 1st week-50%, 2nd week-42.5% and 3rd week-30% and forced the distributors to supply their pictures according to its terms. In due course, this was brought to the association's knowledge and the matter was discussed in the Executive Committee meeting. The Opposite Party wrote a letter on 01.06.2012 requesting the Informant to follow the prevailing method of business and the pattern of revenue sharing terms which had been in vogue for the last 5 to 6 decades in the State of Kerala, uniformly with all exhibitors. Since the Informant was putting unequal terms, the members of the Opposite Party were put into heavy losses in their businesses. Like the Informant, all are in film trade business and investing crores and crores of rupees besides employing 100 to 150 persons whereas the Informant is only employing 15 persons. If the



producers and distributors are not paid their eligible terms which they were getting for the last 5 to 6 decades, they will be forced to leave the business. The Informant is looking only at its own profit and is not thinking of the interests of other stakeholders in the film industry.

29. Explaining the role of the association, it was submitted that as an association, the Opposite Party negotiates with the theater owners and collects the due share for its members which avoids unnecessary court cases and the same is beneficial for the theater owners too.
30. It was also brought to the notice of the Commission that on 17.07.2012 Film Exhibitors Federation- an association of theatre owners having 350 members in 70 releasing centres in the State of Kerala- wrote a letter informing that it will also put lesser terms like the Informant (such as 1st week- 50%, 2nd week 42.5% etc.) Once this is followed, the entire film industry will run into heavy losses and the system of revenue sharing followed for the last 5 to 6 decades will stop. To maintain a cordial relation in the film industry, as an association of the distributors, it was decided by the association in its Executive Meeting held on 31.07.2012 to request the Informant to implement the terms *i.e.* 1st week- 60%, 2nd week- 55%, 3rd week- 50% etc. from 15.08.2012 which is in practice in the film business for the last 6 decades in the State of Kerala and has been accepted by 350 theatres in the State of Kerala. However, it was alleged that the Informant instead of accepting the Opposite Party's request has imposed its own terms on the distributors. It was submitted that the Informant having multiplexes throughout India is trying to enforce its terms in Kerala.
31. It was also stated in the reply that after a round of discussions in the month of September 2012, the Informant wrote a letter on 31.10.2012 informing the Opposite Party to the effect that M/s Media One Global Entertainment Ltd. has been appointed as its booking consultant who will fix the terms for revenue sharing for collections. In the course of discussion, M/s Media One



सत्यमेव जयते



Global Entertainment Ltd. confirmed the revenue sharing terms *i.e.* @ 1st week- 60%, 2nd week- 55%, 3rd week- 50% for Malayalam Movies and @ 1st week- 55%, 2nd week- 50% for Tamil, Hindi and English movies but even this was not followed by the Informant. It was alleged that although the Informant agreed for the aforementioned sharing pattern, it was not ready to pay the amount as per the said terms to the distributors. It was alleged that the Informant is not interested to follow the regular norms prevailing in the industry and also not interested in implementing the terms agreed to and signed by its booking consultant. The Informant is forcing the entire industry to follow its terms and the Informant having an all India strength in the multiplex theatres is forcing the distributors to follow terms.

32. Lastly, it was submitted that the Opposite Party has not dictated the revenue sharing mechanism unilaterally on the Informant and has not contravened the provisions of section 3(3) of the Act. The averment that the association has collectively decided to fix the revenue sharing arrangements for distribution of the movies is not correct. The revenue sharing is decided and agreed to between the individual distributors and the exhibitors. The Opposite Party as an association has not fixed revenue sharing arrangements and has not coerced the Informant or others to enter into any such arrangements. It was thus submitted that the investigation report filed by the DG has not considered the versions of the Opposite Party and all the relevant aspects were not appreciated while submitting the report. It was prayed that the report may not be acted upon and all the allegations levelled against the Opposite Party being false, it has not violated the provisions of section 3 of the Act.

Analysis

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



सत्यमेव जयते



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

34. The Informant, who is in the business of exhibition of films at its cinema halls across the country including Kerala, is essentially aggrieved of the conduct of FDA (K) in imposing the revenue sharing pattern upon the Informant as allegedly decided by it and thereby not allowing the Informant to negotiate independently with the individual distributors of the association.
35. As mentioned in the beginning of this order, the Opposite Party is an association of distributors of films and as such it is an association of enterprises as envisaged under section 3 of the Act.
36. As noted above, the investigation has found the impugned conduct of the Opposite Party in contravention of the provisions of section 3(3)(a) & (b) read with section 3(1) of the Act.
37. Before advertent to the merits of the case, the Commission deems it appropriate to deal with some preliminary objections raised by the Opposite Party. It was fervently urged that the film distributors have a fundamental right under Article 19(1)(c) of the Constitution of India to form associations or unions. It was also pointed out that FDA (K) is a duly registered body in conformity with the constitutional provisions. It was argued that the only restrictions which can be placed upon such right are enumerated in Article 19 itself.
38. There can be no dispute with the constitutional freedoms enshrined in the Constitution and the right of the film distributors to form associations or unions within the constitutionally circumscribed limits. The Commission, however, is of opinion that if the impugned conduct of the trade associations falls foul of the provisions of the Act, the same needs to be examined under the relevant provisions thereof. The Commission also notes that the competition law is not an impediment to appropriate trade association



सत्यमेव जयते



activities and members of such associations should be fully aware of the types of conduct such law proscribes when carrying out an association's programs and activities. Under the Act, trade associations face anti-trust risks under section 3 of the Act for entering 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.

39. Coming to the specific allegations as projected in the present information, the Commission observes that the letter dated 01.06.2012 issued by FDA (K) clearly indicates that the association communicated to the Informant stating *inter alia* that its Executive Committee has decided that the percentage of distributor's share has to be fixed as per the prevailing terms and conditions being followed by other traditional theatre exhibitors of Kerala *i.e.* 60%, 55% & 50% for the first, second and third week respectively. Investigation, thus, revealed that the Opposite Party association was extending the above cited 'revenue sharing pattern' to the multiplex exhibitors at par with traditional exhibitors in the State of Kerala. The Opposite Party by issuing these directions asked the Informant - who was a new entrant in multiplex market- to adopt the above uniform revenue sharing pattern in its multiplex. Subsequently, the Opposite Party issued letter dated 14.07.2012 to the Informant highlighting that it has not implemented the terms and conditions as detailed in the said letter dated 01.06.2012 and accordingly called a meeting to discuss and settle the matter on 19.07.2012. In these circumstances, the Opposite Party issued a letter dated 01.08.2012 intimating the Informant about the decision of its Executive Committee in the meeting held on 31.07.2012 to implement the terms and conditions as contained in the letter dated 01.06.2012.
40. The DG, during course of investigation, recorded the statement of Shri Siyad Koker, present president of FDA (K) wherein he admitted that the Opposite Party association had issued the letters dated 01.06.2012, 14.07.2012 and



सत्यमेव जयते



- 01.08.2012 to the Informant asking *inter alia* to accept the increased revenue sharing pattern for multiplexes in line with the similar pattern which was accepted by the other exhibitors.
41. The DG also recorded the statement of Shri M MHamsa present General Secretary of FDA (K) during the course of investigation wherein he also admitted that the Opposite Party association had issued the letters dated 01.06.2012, 14.07.2012 and 01.08.2012 to the Informant asking *inter alia* to accept the increased revenue sharing pattern for multiplexes in line with the similar pattern which was accepted by the other exhibitors.
 42. In view of the above, it is crystal clear and without any doubt that the Opposite Party issued the impugned directions to the Informant to follow the fixed revenue sharing mechanism to pay distributor's share for exhibiting films at its multiplexes.
 43. From the sworn depositions recorded of the office bearers of the FDA (K) and other witnesses as well as from the minutes of various meetings held by FDA (K) gathered by the DG during the investigation (at pp.32-42 of the DG Report), the Commission agrees that FDA (K) was directly involved in directing, imposing and implementing the fixed uniform revenue sharing pattern in the market of Malayalam film exhibition among its members and multiplex film exhibitors in Kerala. The Commission notes that FDA (K) stopped the screening of all movies in the theatres that did not accept its terms /directions of the revenue sharing pattern. Further, the Opposite Party also imposed fines on its members, which did not implement the terms imposed by it. The Opposite Party also asked its members to pay the contribution for violating the terms and conditions of business directed by it.
 44. In this connection, illustratively the extract of the decisions taken in Urgent General Body Meeting held by FDA (K) on 25.08.2012 may be noticed:



Extracts of relevant decisions taken in the Urgent General Body meeting held by the FDA on 25.08. 2012

(vii) "After discussions over the release of the Film 'THAPANA' at Ernakulam Cinimax without following the conditions accepted by the association, certain decisions were made as-

a) All language films released at Cinimax and Q Cinema multiplex theaters after 15th August 2012 is to be stopped from exhibiting from 26/8/2012.

b) The accounts of the films released after 15th August 2012 at the Ernakulam Cinimax and Q Cinemas will be directly settled by the association.

c) From tomorrow onwards (26/8/2012) no new films will be given for release at Cinimax and Q cinema.

d) It was decided that anybody who gives films for release over riding our decision, at Cinimax and Q cinema then such films will not be allowed to be exhibited in other theatres in Kerala.

e) The Committee has decided to take appropriate actions against those distributors mentioned below who have not received the terms as stipulated by the association for giving the films for exhibiting

- 1) Galaxy multimedia*
- 2) Radhak arts*
- 3) Jawahar films*
- 4) Rajashree films*



सत्यमेव जयते



45. Further, illustratively extracts of relevant decisions taken in 12th Executive Committee meeting held by FDA (K) on 05.09.2012 may also be noticed:

(viii) 4) “ *It has been decided to get contribution from the below mentioned members as they have given films to multiplex theaters such as Cinimax, Q Cinema without assuring the terms which has been stipulated by our association.*

<i>Galaxy Multimedia</i>	- Rs. 1,00,000/-
<i>Jawahar Films</i>	- Rs. 50,000/-
<i>Radhakh Arts</i>	- Rs. 15,000/-
<i>Rajasree Films</i>	- Rs. 10,000/-

46. In view of the above, the Commission is of opinion that FDA (K) was imposing fixed revenue sharing pattern as distributors' share, which was made binding on its members and exhibitors, due to various measures adopted by it to pressurize all the concerned. The members were, thus, forced to follow the terms imposed by the Opposite Party if they were to screen the Malayalam films in their multiplex theatres. In the event of non-obedience, the Opposite Party decided that such films would not be allowed to be exhibited in other theatres in Kerala and also fines/penalties were imposed by the Opposite Party on such distributors/members.

47. The Commission notes that in terms of the provisions contained in section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can 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. Section 3(2) of the Act declares that any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void. Further, by virtue of the presumption contained in subsection (3), any agreement entered into between enterprises or associations of



सत्यमेव जयते



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

48. Thus, in case of agreements as listed in section 3(3) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition; the onus to rebut the presumption would lie upon the opposite parties.
49. In the present case, the Opposite Party could not rebut the said presumption. It has not been shown by the Opposite Party how the impugned conduct resulted into accrual of benefits to consumers or made improvements in production or distribution of goods in question. Neither, the Opposite Party could explain as to how the said conduct did not foreclose competition.
50. The Commission notes that the Opposite Party is an association comprising of almost all the distributors (221 distributors are the members of the Opposite Party and there are only 20 other distributors who are not the members of the Opposite Party) in the State of Kerala. As such, the Opposite Party by its impugned conduct fixed the price for distribution/ exhibition of films in the State of Kerala and forced the Informant to accept such terms and conditions. Further, the Opposite Party being the single largest association of distributors in the State of Kerala has thereby controlled and regulated the market of film distribution/exhibition.



सत्यमेव जयते



51. The above conduct of FDA (K) is therefore clearly in contravention of the provisions of section 3(3)(a) & (b) read with section 3(1) of the Act.

Conclusion

52. In view of the above discussion, the Commission is of opinion that impugned acts/conduct of FDA (K) is found to be in contravention of the provisions of section 3(3)(a)/ 3(3)(b) read with section 3(1) of the Act, as detailed above.
53. Resultantly, the Commission passes the following:

ORDER

54. In view of the findings recorded by the Commission, FDA (K) is directed to cease and desist from indulging in the acts/ conduct which have been found to be in contravention of the provisions of the Act in this order.
55. Furthermore, in terms of the provisions contained in section 27(b) of the Act, the Commission may impose such penalty upon the contravening parties, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.
56. It may be noted that the primary objectives behind imposition of penalties are: to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings that may be considering anti-competitive activities from engaging in them. In the present case, the Commission notes the conduct of FDA (K) and its then General Secretary Shri Jose C. Mundadan in not co-operating with the investigations which constrained the Commission to initiate proceedings under section 43



सत्यमेव जयते



of the Act against them which ultimately resulted into imposition of penalties for non-compliance of the directions.

57. 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:

(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 @5% of average turnover (Rounded off to nearest Rupee)
1.	FDA (K)	1149144.70	1513154.68	1856591	1506296.79	75315

58. The Commission further directs the Opposite Party to deposit the penalty amount within 60 days of receipt of this order.
59. 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 the DG in the investigation report furnished a list of 38 individuals who were found responsible in terms of the provisions of section 48 of the Act as they were found to attend the meetings of the association wherein the issues pertaining to the impugned revenue sharing pattern in respect of multiplexes was discussed. These are essentially the members of the Executive Committee of FDA (K) and its office bearers who attended the meetings where the impugned decisions were taken.
60. On consideration of the investigation report, the Commission *vide* its order dated 05.06.2014 ordered forwarding of copies thereof to the parties including such persons as aforesaid 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.



सत्यमेव जयते



61. The Secretary is directed to inform the parties accordingly.

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(S. L. Bunker)
Member

Sd/-
(SudhirMital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U.C Nahta)
Member

New Delhi
Date: 23/12/2014