

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Competition Appeal (AT) No. 05 of 2017

[Under Section 53-B of the Competition Act 2002 against order dated 24.03.2017 passed by the Competition Commission of India in Case No. 98 of 2014]

IN THE MATTER OF:

Association of Malayalam Movie Artists

...Appellant

Versus

Competition Commission of India & Ors.

...Respondents

Present:

For Appellant:

**Shri P.V. Dinesh and Shri Rajendra Beniwal,
Advocates**

For Respondent No.1:

**Shri Naveen R. Nath, Shri Abhimanyu Verma,
Ms. Archita Jain and Ms. Gurkirat Kaur,
Advocates and
Mr. Navdeep Singh Suhag, Dy. Director for CCI.**

For Respondent No. 2:

**Shri Karan S. Chandhiok, Shri Vikram Sobti
and Shri Mehul Parti, Advocates**

Competition Appeal (AT) No. 08/2017

IN THE MATTER OF:

**FEFKA Production Executive
Union and another**

...Appellants

Versus

CCI & Ors.

... Respondents

Present:

For Appellant:

**Shri Karan S. Chandhiok, Shri Vikram Sobti
and Shri Mehul Parti, Advocates**

For Respondent No.1: Shri Naveen R. Nath, Shri Abhimanyu Verma,
Ms. Archita Jain and Ms. Gurkirat Kaur,
Advocates for CCI

For Respondent No. 2: Shri Harshad V.Hameed., Advocate

Compt. Appeal (AT) No. 09/2017

IN THE MATTER OF:

FEFKA Director's Union

...Appellant

Versus

CCI & Ors.

... Respondents

Present:

For Appellant:

**Shri Karan S. Chandhiok, Shri Vikram Sobti
and Shri Mehul Parti, Advocates**

For Respondent No.1:

**Shri Naveen R. Nath, Shri Abhimanyu Verma,
Ms. Archita Jain and Ms. Gurkirat Kaur,
Advocates**

For Respondent No. 2:

Shri Harshad V.H., Advocate

Compt. Appeal (AT) No. 10/2017

IN THE MATTER OF:

**Film Employee Federation of Kerala
& Ors.**

...Appellants

Versus

CCI & Ors.

... Respondents

Present:

For Appellant:

**Shri Karan S. Chandhiok, Shri Vikram Sobti
and Shri Mehul Parti, Advocates**

For Respondent No.1: **Shri Naveen R. Nath, Shri Abhimanyu Verma,
Ms. Archita Jain and Ms. Gurkirat Kaur,
Advocates for CCI**

For Respondent No. 2: **Shri Harshad V.H., Advocate**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Informant –‘Shri T. G. Vinaykumar’ moved an application under Section 19(1)(a) of the Competition Act, 2002 (‘the **Act**’, for short) against the Appellants – ‘Association of Malayalam Movie Artists’ (hereinafter, ‘AMMA’/‘Opposite Party No. 1’/ ‘OP-1’); ‘Film Employees Federation of Kerala’ (hereinafter, ‘FEFKA’/‘Opposite Party No. 2’/ ‘OP-2’); ‘Shri Mammooty’ (hereinafter, ‘Opposite Party No. 3’/ ‘OP-3’); ‘Shri Mohanlal’ (hereinafter, ‘Opposite Party No. 4’/ ‘OP-4’), ‘Shri Dileep’ (hereinafter, ‘Opposite Party No. 5’/ ‘OP- 5’); ‘FEFKA Director’s Union’ (hereinafter, ‘Opposite Party No. 6’/ ‘OP-6’); and ‘FEFKA Production Executive’s Union’ (hereinafter, ‘Opposite Party No. 7’/ ‘OP-7’) alleging contravention of the provisions of Sections 3 and 4 of the Act.

2. The Competition Commission of India (‘the **Commission**’, for short) after investigation through its Director General (the **DG**) by impugned order dated 24th March, 2017 held:

“8. *Considering the findings elucidated in the earlier part of this order, the Commission finds that OP-1, OP-2, OP-6 and OP-7 have indulged in anticompetitive conduct in violation of the*

provisions of Section 3 of the Act. Further, their office bearers, namely, Shri Innocent (President, OP-1), Shri Edavela Babu (Secretary, OP-1), Shri Sibi Malayil (President, OP-2), Shri B. Unnikrishnan (General Secretary, OP-2) and Shri K. Mohanan (General Secretary, OP-7) are found to be liable under Section 48 of the Act for the anti-competitive conduct of their respective associations.

9. *These OPs, along with their office bearers named above, are directed to cease and desist from indulging in the practices, which are found to be anti-competitive in terms of the provisions of Section 3 of the Act in the preceding paras of the order.”*

3. In terms of order under Section 27 of the Act, the Commission also imposed penalty at the rate of 5% of average income for three years on ‘Association of Malayalam Movie Artists’ (OP-1) ; ‘Film Employees Federation of Kerala’ (OP-2 and one of the Appellant herein); ‘FEFKA Director’s Union’ (OP-6 and one of the Appellant herein) and ‘FEFKA Production Executive’s Union’ (OP – 7 and Appellant herein). With regard to the individuals including the Appellant penalty at the rate of 3% of their income for three years have been imposed.

FACTS OF THE CASE

4. The 'Association of Malayalam Movie Artists' (OP-1) had a dispute with 'Kerala Film Chamber' in the year 2004 with regard to agreements entered into with the actors on various aspects, including remuneration, shooting time schedule, etc. The Informant, who was then the President of 'Malayalam Artists and Cine Technicians Association' (MACTA) Federation, supported this idea of having an agreement/contract in place to safeguard the rights of both sides. Purportedly, 'Association of Malayalam Movie Artists' (OP-1), 'Shri Mammooty' (OP-3), 'Shri Mohanlal' (OP-4) and 'Shri Dileep' (OP-5) were agitated with the Informant due to this.

5. In the year 2007, the Informant headed an initiative called 'Cinema Forum' which envisaged collaboration between film makers and distributors to make low budget movies with new actors. It was alleged 'Shri Mammooty' (OP-3), 'Shri Mohanlal' (OP-4) and 'Shri Dileep' (OP-5) felt insecure about their film career due to this new initiative and began influencing people to scuttle it.

6. In the year 2008, 'Shri Dileep' (OP-5) accepted advance and signed an agreement with Ullatil Films but later insisted that he would do this film only when the director, Shri Thulasidas, is removed. This, as per the Informant, amounted to violation of the agreement. The Informant advised all the actors to abide by the terms of the agreement they signed with the directors. It was alleged that due to these incidents, 'Association of Malayalam Movie Artists' (OP-1) and its prominent members/actors bore a grudge against the Informant and used their clout to reduce the strength of MACTA Federation

and forced its members to split and form an alternative association by the name 'Film Employees Federation of Kerala' (FEFKA) i.e. OP-2.

7. Subsequently, on different occasions, the Opposite Parties tried to force various actors, technicians, producers, financiers, not to work or associate with the Informant in any of his project. For achieving that purpose, the Opposite Parties allegedly imposed a ban on actors, technicians, producers, etc., who worked with the Informant, by issuing circulars and show cause notices. As per the information, many artists, technicians, producers and financiers withdrew from the Informant's projects and even the new actors (who came forward to work with the Informant) were threatened by Opposite Parties. Such conduct of the Opposite Parties, as per the Informant, has affected fair competition in the market, the interests of consumers and freedom of trade carried on by other participants by limiting and restricting the market in contravention of the provisions of Section 3(3) of the Act. The Informant has further alleged that the Opposite Parties, by virtue of its dominant position in the Malayalam film industry, has sought to control and abuse it within the meaning of Section 4 of the Act.

8. After looking into the *prima facie* case under Section 26(1) of the Act with regard to Section 4 of the Act, the Commission did not find OP-1, OP2, OP-6 and OP-7 as such, to be qualified to be termed as an 'enterprise' under Section 2(h) of the Act for the purpose of Section 4 of the Act. With regard to the allegations of Section 3 of the Act, the Commission observed that OP-1, OP-2, OP-6 and OP-7 by way of imposing various directions on its members and other non-members, were limiting and controlling the provision of

services in the Malayalam Film Industry. Their conduct was thus, *prima facie*, found to be in contravention of the provisions of Section 3(1) read with Section 3(3)(b) of the Act. However, the Commission did not find sufficient evidence against OP-3, OP-4 and OP-5 while examining the case at the *prima facie* stage.

9. In view of the *prima facie* opinion, the Commission referred the matter to the Director General (DG) under Section 26(1) of the Act to cause an investigation into the matter.

10. After conducting the detailed investigation, the DG submitted its investigation report dated 16th November, 2015. The statements of Informant and witnesses were also recorded on oath. The DG relied upon various evidence to reach a finding with regard to involvement of OP-1 in the alleged anti-competitive activities. On the basis of the minutes of the Executive Committee Meeting of OP-1 held on 5th April, 2010, the DG noted that Late Shri Thilakan, a renowned actor, was removed from a film (Christian Brothers), on the instructions of OP-2, as he acted in Informant's film. Based on the minutes of General Meeting held on 27th June, 2010, the DG observed that the General Secretary of OP-1 invited Captain Raju, an actor, for explaining why he had violated the instructions of OP-2 and acted in the film directed by the Informant. This, as per the DG, shows that OP-1 was endorsing the instructions given by OP-2. Further, the DG has also relied on these minutes to show that OP-1 and OP-2 are closely linked and have been, at times, acting in concert.

11. Further, Shri Kannan Perumudiyoor, a producer, also stated that he advanced a sum of Rs. 50,000 to Informant (as a director) for a film in the

year 2014. However, the project was cancelled pursuant to the call he received from Shri Unnikrishanan and Shri Sibi Malayil of OP-2 and Shri Edavela Babu of OP-1. The advance amount was also taken back from the Informant. This witness also deposed that OP-1 and OP-2 have dictated their members not to work with the Informant and have even boycotted those who have not complied with such diktats.

12. Shri Sudheer CV, another producer, submitted that he advanced a sum of Rs. 100,000/- to Informant for a film. However, the project was cancelled on account of the pressure exerted by OP-1 (through its Secretary, Shri Edavela Babu) and OP-2 (through its General Secretary, Shri Unnikrishanan). He submitted that he was told by these office bearers of OP-1 and OP-2 that if he does not obey their directions, he will not get any experienced artists and technicians for his film. This witness further submitted that it is only because of the ban of OP-1 and OP-2 that the Informant is suffering a loss and is not able to make movies like he used to do earlier.

13. Shri Salu K. George, an art director, deposed that the Informant has not been able to make movies like earlier because of the ban imposed by OP-1 and OP-2. He also stated that the issues concerning the Informant could be resolved if the ban of OP-1 and OP-2 on working with the Informant is lifted.

14. Shri K. Surendran, an actor, submitted that though he has never received any direct communication from OP-1 or OP-2 regarding the ban on Informant, he confirmed having heard about the same. He further submitted that OP-2 also issued a circular in this regard but since he is not active in the association's work, he did not have the copy of the said circular.

15. Shri V.M. Jayan (Jayasurya), an actor, also stated that OP-1 and OP-2 have imposed an informal ban on any artist working with the Informant. He also affirmed having received a call in the year 2013 from Shri Unnikrishnan (General Secretary of OP-2) and Shri Sibi Malayil (President of OP-2) advising him to avoid working with the Informant till the issues are resolved.

16. In addition, the DG has also relied on the transcript of the interview given by late Shri Thilakan and the statement of Shri Surendran to point out that the former was banned by OP-1 and OP-2 as he worked with the Informant.

17. Based on the aforesaid, the DG concluded that the members of OP-1 had a tacit understanding not to work with the Informant. Members of OP-1 also exerted pressure on non-members not to work with the Informant. The DG opined that this tacit understanding amongst the members of OP-1 is likely to limit or control the provision of services in the market, thereby violating of the provisions of Section 3(1) read with Section 3(3)(b) of the Act.

18. To examine the conduct and involvement of OP-2 in the alleged contravention, the DG took into account the minutes of its meetings, circulars issued by OP-2, letters exchanged between OP-2 and other associations and the statements of various witnesses. They are briefly discussed herein below.

19. On the basis of the minutes of General Council meeting held on 28th November, 2012 and Circular dated 19th April, 2014, the DG noted that a disciplinary action was taken against Shri Salu K. George and Actress Ms. Meghna Raj. Further, minutes of the General Council meeting held on 17th February, 2010 and Circulars dated 27th February, 2010 and 9th April, 2011, were relied upon by the DG to conclude that OP-2 had asked its members not

to cooperate with the films in which Late Shri Thilakan is acting, until he withdraws his statements against OP-2 through media and tender apology. The DG has opined that although these minutes and contents of the circulars appear to be a result of the statements made by Late Shri Thilakan in the print and visual media, the investigation has sufficiently revealed that the main issue between Late Shri Thilakan and OP-2 started when OP-2 and other associations enforced a boycott against Late Shri Thilakan for having worked in the Informant's film 'Yakshiyum Njanum'.

20. The DG has relied upon a letter dated 3rd December, 2009 which was signed by Shri Sibi Malayil, President and Shri B. Unnikrishnan, General Secretary of OP-2 and sent to the General Secretary of All India Film Employees Confederation (AIFEC). In the said letter, OP-2 requested AIFEC to ensure that the cinematographer, Shri Rajaratnam, who was working with the Informant during that time, dissociate himself with the Informant's film. Subsequent to this letter, Shri Rajaratnam abandoned Informant's film and returned the advance. Based on this, the DG concluded that AIFEC instructed its affiliate in Tamil Nadu, which in turn ensured that Shri Rajaratnam dissociated himself from the film of the Informant, on the insistence of OP-2.

21. Further, the statement of Shri Jayasurya (V.M. Jayan), as per the DG, establishes that OP-2 (along with OP-1) had imposed a ban on its members against working with the Informant. The DG also relied upon the statement of Shri Anil Kumbazha, an art director, who stated that several members of OP-2 including executive members called him up in 2011 and asked him not to cooperate with the Informant. Even during cross examination of Shri Anil Kumbazha, OP-2 was not able to dispute the statement or impeach his

credibility on the issue of ban on working with the Informant. The DG noted that OP-2 failed to adduce any material or evidence to establish its claim that the statement of Shri Anil Kumbazha was untrue. Thus, the statement of Shri Anil Kumbazha and his cross examination were relied upon by the DG to conclude that the allegations levelled by the Informant were established.

22. The DG further relied on statement of Shri P. Madhavan Nair (Madhu), a renowned actor in the Malayalam film industry, who stated that in the year 2011, he accepted an offer to act in Informant's film. However, the office bearers of OP-2 along with other members dissuaded him from working with the Informant, pursuant to which he dissociated with the Informant. In its response to the DG, OP-2 admitted having met Shri Madhu along with other representatives of various organizations to invite him to a function. However, OP-2 claimed that Shri Madhu himself enquired about the issues with the Informant and expressed his willingness to return Informant's advance. OP-2 also stated that later, when Shri Madhu decided to act in Informant's films, none of its members approached him asking him not to do so. Though OP-2 denied the assertions of Shri Madhu, it did not cross examine him, citing his seniority. Based on the aforesaid, the investigation concluded that the statement of Shri Madhu supported the allegations levelled by the Informant.

23. Further, Shri Salu K. George, an art director, deposed before the DG and revealed that he was working in a movie 'Dracula' of the Informant in the year 2012 because of which OP-2 issued a circular directing all its members not to work with him. He also got a call from Shri B. Unnikrishnan, General Secretary of OP-2, informing the ban on him imposed by OP-2. Though OP-2

denied the statement of Shri Salu K. George, it did not seek his cross examination, despite being offered by the DG. The DG relied upon the statement of Shri Salu K. George, along with the minutes of the OP-2's General Council meeting held on 28th November, 2012 and Circular dated 19th April, 2013 issued by OP-2 to conclude that OP-2 initiated disciplinary action against Shri Salu K. George for having worked with the Informant. Thus, based on these, the DG concluded the statement of Shri Salu K. George supports the allegation of the Informant against OP-2. There are other evidences also which was relied upon by the DG.

24. The other instances of violation of Section 3 were also noticed by the DG who also took into consideration of bye-laws and circulars of OP-7.

25. The parties including the Appellant-herein raised objection to the investigation report. The Informant primarily endorsed the findings of the DG and prayed that the same be accepted with regard to OP-1, OP-2, OP-6 and OP-7. However, he objected that the investigation report has not made any finding against Shri Mohanlal (OP-4) who was holding the position of the General Secretary and OP-1 for 12 years. The Commission on hearing the parties and appreciation of facts as noticed above passed the impugned order.

26. Learned counsel appearing on behalf of the Appellants submitted that there is no written, formal/ informal ban imposed on the Respondent No. 2 (Informant). None of the witnesses have shown any written proof to the DG office regarding the alleged ban.

27. It is further submitted that FEFKA is a federation of 17 different unions and all unions are bound to follow the decisions taken by FEFKA. If FEFKA had indeed given the direction of a ban against Respondent No. 2, it should

have been followed by all 17 unions. However, allegation is made only against 2 unions. In fact, the DG Office also did not consider it fit to investigate against the remaining 15 unions. This is so because there was never any written, formal/informal ban imposed by FEFKA.

28. It is also submitted that as clear from the statements, witnesses have claimed that they know about the alleged ban either through media reports (given mostly by the Respondent No. 2 himself) or through industry rumours. There is no cogent proof regarding the ban on record.

29. It is further contended that the allegation of an informal ban falls flat as the Respondent No. 2 has admittedly produced/ directed 12 films since 2004. Out of the 12 Films, two films “Dracula” and “Little Superman” have been big budget films. Therefore, there has been no appreciable adverse effect on competition and on the Respondent No. 2.

30. Almost all the statements of the witnesses have confirmed that the cause of the alleged boycott is union politics as FEFKA is a breakaway of the MACTA (which was headed by the Respondent No. 2). Therefore, in order to get back at the office bearers of the FEFKA, FEFKADU and FEFKAPE, Respondent No. 2 has filed false information before the Respondent No. 1.

31. According to the learned counsel for the Appellant(s) the “key players” relied by the DG and the Commission Statements are interested parties and their statements have the following commonalities:

- They have not produced a movie for a long time, in some cases not after 1993. However, all the said producers suddenly presented a desire to produce movies with the Respondent No. 2 in the year 2013 and 2014, after a long gap;

- all such producers made the ‘so-called’ advance payment to Respondent No. 2 in cash, without a memo or cash receipt evidencing such advance payment;

- no producer announced and/ or registered the movie he intended to produce with the Respondent No. 2 as the director, which is usually the norm in the film industry;

- despite receiving alleged threats from the office bearers, no producer complained against these alleged threats with their respective associations, thereby raising questions over the genuineness of the statements of the producers;

- not a single producer produced any evidence or material to substantiate the threat of the “threatening calls”. Moreover, witnesses undertook to produce the said call data records from their respective operators. However, nothing has been produced till date; and

- Sh. P.A. Haris, Sh. Kannan and Sh. Sudheer formed a part of the poll panel with the Respondent No. 2 (Informant) which contested and lost the elections for the Kerala Film Producers’ Association. In fact, Sh. P.A. Haris also filed a defamation case against Sh. Sibi Malayil, office bearer of FEFKA. Thus, the statements of “key players” relied by the Commission are wholly interested parties.

32. Failure on the part of the Commission has also highlighted that the Commission has not considered the exculpatory evidence in favour of FEFKA, FEFKADU and FEFKAPE. It was submitted that the ‘Competition Appellate Tribunal’ (**COMPAT**) in Appeal No. 85 of 2016 titled as **‘Glaxosmithklien Pharmaceuticals Limited v. Competition Commission of India and Ors.’**,

has set aside the order of the Commission as the DC Office pre-judged the issue and was determined to record a finding that the appellants had indulged in bid-rigging. In fact, this finding is also affirmed by the Hon'ble Supreme Court in 'CA. No. 3525 of 2017'- '**Competition Commission of India v. Glaxosmithklien Pharmaceuticals Limited and Ors.**' and the appeal has been dismissed by the Hon'ble Court and held:

“42. *The explanations given by both the appellants were quite plausible but the DG discarded them apparently because he had pre-judged the issue and was determined to record a finding that the appellants had indulged in bid-rigging.*”

33. Further, in Appeal No. 21 of 2014 - "**Chemists and Druggists Association v. Competition Commission of India and Ors.**", the 'Competition Appellate Tribunal (COMPAT) has held as follows,

"17.... The supplementary report prepared by the Jt. DG is per se one sided in as much as he overlooked the categorical stand taken by the office bearers that they had not indulged in anti-competitive action and brushed aside their all arguments by adverting to the bald allegations contained in the information filed by Respondent No. 2 and the affidavit filed by Shri Rajesh Arora."

34. Further, in the Impugned Order, the Commission has admitted that it has only relied on the evidence annexed by the DG in its report. Therefore, it

is clear that the Commission has not considered the exculpatory evidence in favour of FEFKA, FEFKADU and FEFKAPE.

35. Learned counsel for the Appellant(s) also submitted that the Regulation 20(4) of the General Regulations, 2009 not adhered to by the DG Office as Regulation 20(4) requires that all documents and evidences should be considered during investigation; and also violates the COMPAT order in **“Air Cargo Agents Association of India v CCI”** in Appeal No. 98 Of 2015.

36. Learned counsel for the Appellant also submitted that certain evidences are not part of the DG’s report without assigning reason to the same - including:

- a. Reply of Appellant No. 1 providing detailed explanation of working of Appellant No. 1;
- b. Statement on oath of General Secretary of Appellant No. 1;
- c. Statements of individuals not supporting allegations of Respondent 2; and
- d. Statement of General Secretary of FEFKA Directors’ Union that there is no ban on members of Appellant No.1 to work with Respondent No. 2.

37. Learned counsel for the Appellant alleged that only truncated evidence has been relied on by the Commission. It is also submitted that the DG has annexed only a selective portion of the FEFKA General Council Meeting on 28.11.2012 to hold that FEFKA banned Sh. Salu K. George for acting in the movie directed by the Respondent No. 2 (Informant). However, a bare perusal of the complete minutes of the FEFKA General Council Meeting on 28.11.2012 reveals that the reason for the ban on Sh. Salu K. George was

totally different and unconnected i.e. his vehicle was driven by members of BMS, a political organization. In fact, in his statement, Sh. Salu K. George confirms that no union including FEFKA has ever banned him from working with the Respondent Not 2.

38. Learned counsel for the Appellant(s) also submitted that the Trade Unions fall outside the purview of the Competition Act, 2002. Whilst the Hon'ble Supreme Court in **“Competition Commission of India v. Co-ordination Committee of Artists and Technicians of West Bengal Film and Television Industry and others”** - (2017) 5 SCC 17, has held that trade unions are covered under the purview of the Act and the said judgment does not consider Section 66 of the Competition Act. Section 66 of the Competition Act is the repeal and saving section wherein *“any right, privilege, obligation or liability acquired, accrued or incurred”* under the Monopolies and Restrictive Trade Practices Act, 1969 (**MRTP Act**) shall not be affected.

Learned counsel for the Appellant further submitted that in fact, Section 6(c) of the General Clauses Act, 1897 states that a repeal of an earlier enactment shall not *“affect any right, privilege, obligation or liability acquired, accrued or incurred under enactment so repealed.”* He also relied on Section 3(d) of the MRTP Act keeps outside its purview *“any trade union or other association of workmen or employees formed for their own reasonable protection as such workmen or employees”*.

39. It was submitted that the judgment of the Hon'ble Supreme Court in **‘Co-ordination Committee (Supra)’** is inapplicable to the facts of the instant case for the following reasons :

- A trade union acting by itself carrying out its legitimate trade activities (acting on behalf of its members and not carrying out economic activity) would not amount to 'enterprise' or 'association of persons' as per the said judgment of the Supreme Court.
- Agreements or decisions of Appellant No. 1 do not amount to any economic activity; and is a registered trade union. The order of the Commission is thus liable to be set aside for ignoring settled principles of competition law.
- The Commission in the impugned Order has held that the association must be proven to have transgressed their legal contours i.e., its legal powers bestowed by the bye-laws and the Trade Unions Act. Pertinently, the impugned order is silent on the fact that whether FEFKA, FEFKADU and FEFKAPE have actually transgressed any of their powers mentioned in their statutorily approved constitution. On the contrary, Rule 25 of the Constitution of FEFKA allows it to take disciplinary action against its members for not abiding by its decisions.

40. Learned counsel for the Appellant(s) also submitted that there is no 'Appreciable Adverse Effect' on competition. While the Commission notes the objections of the Appellants qua the 'appreciable adverse effect' on competition, however, the Impugned Order fails to analyze the same. Learned counsel further submits that there is no 'Appreciable Adverse Effect' on competition as:

- a) There has been no analysis of whether the effect on competition, if any, is appreciable.

- b) A case under Section 3(3) cannot be made out where the aim of the activity is not to distort or prevent competition or to reap anti-competitive gains.
- c) The conduct as described in Section 3(3) raises only a presumption and not a declaration of violation of Section 3(3).
- d) Respondent No. 1 has ignored the factors as laid down in Section 19(3):
 - i) No barriers to new entrants in the market has been created - flurry of cinematic activities in Malayalam film industry, in which new actors, new directors, new writers and technicians came in to generate new sensibilities;
 - ii) The competitors including Respondent No. 2 has been continuing to make movies and thus no existing competitors have been driven out;
 - iii) There is no foreclosure of competition by hindering entry into the market - Appellant functions openly and democratically and its policy of giving fresh membership to the workers and technicians is non-restrictive to the core;
 - iv) There has been accrual of benefit to consumers (members) and improvement in the production of goods and provision of services as the trade union (Appellant No. I) has ensured smooth functioning of the said industry; and there is promotion of development as Appellant No. I facilitates non-members to take up membership for adequate representation of his rights.

41. Learned counsel appearing on behalf of the Informant (Respondent No. 2) and the Commission (Respondent No. 1) relied on the findings and opposed the submission as made on behalf of the Appellant(s).

42. To appreciate the case, it is desirable to notice the position of the opposite parties, some of the Appellants herein, are as under:

The opposite parties impleaded by the Informant in the information under Section 19 of the Act are as follows:

OP1: Association of Malayalam Movie Artistes (hereinafter OP1 or AMMA) Association of Malayalam Movie Artistes (AMMA) is an association of actors of the Malayalam Films. Its president is Sh. Innocent and its Secretary is Sh. Edavela Babu.

OP2: Film Employees Federation of Kerala (hereinafter OP2 or FEFKA).

Film Employees Federation of Kerala (FEEKA) is a registered trade union and a federation of 17 unions of different types of technicians / workers employed in Malayalam film making. It was formed in the year 2008 and got affiliated to All India Film Employees Confederation ('AIFEC') in 2011. It is a self-regulatory body having 17 separate unions for different technicians under it. The 17 constituent unions are as follows.

1. FEFKA Directors Union
2. FEFKA Writers Union

3. Production Executives Union
4. FEFKA Editors Union
5. FEFKA Cinematographers Union of Malayalam Cinema
6. FEFKA Art Directors Union
7. FEFKA Publicity Designers & Pros Union
8. FEFKA Cine Outdoor Unit Workers Union
9. All Kerala Make-up Artists & Hair Stylists Union
10. FEFKA Production Assistants Union
11. FEFKA Still Photographers Union
12. FEFKA Union for Dubbing Artists
13. FEFKA Dancers Union
14. Kerala Cine Drivers Union
15. All Kerala Cine Costume Designers Union
16. Cine Audiographers Association of Kerala
17. FEFKA Music Directors Union

OP3: Sh. Mammooty (hereinafter OP3)

Sh. Mammooty is a famous film personality and also General Secretary of AMMA (OP1).

OP4: Sh. Mohanlal is a famous film personality and also Vice President of AMMA (OP1).

OP5: Sh. Dileep is a famous actor of Malayalam cinema and also treasurer of AMMA (OP1).

OP6: FEFKA Directors' Union (OP-6) is a union of film directors in the Malayalam cinema. Its secretary is Sh. Kamaluddin (known as Kamal in the industry).

OP7: FEEKA Production Executives' Union ('OP-7') is a union of production executives working in the Malayalam film industry. Its secretary is Sh. K. Mohanan (known as Seven Arts Mohan in the industry).

43. Thus, for all practical purposes, the Appellant- 'Film Employees Federation of Kerala' is acting on behalf of all its members. These Member Unions represent the aggregation of inputs that go into the creation of the Film, the final product, including the creative inputs of film making such as Script Writers, Designers, Cinematographers, Dancers, Editors, Dubbing Artists etc. Hence any decision by the said Appellant would have far reaching effects. The constitution of the Appellant - FEFKA by itself indicates the extent of its control over the Industry.

44. The Hon'ble Supreme Court has categorically rejected the argument that Trade Unions are exempt from the applicability of Competition Act in **"Coordination Committee - (2017) 5 SCC 17"**. Identical argument was raised, considered and rejected by the Apex Court. Hence the issue is no longer *res integra*.

45. The Anti-Competitive Agreement as defined under Section 2(l) of the Act has wide definition. It can be an understanding, either formal or informal, and it is not necessary that the same is reduced into writing or whether it is intended to enforceable by legal proceedings or not.

46. The Judgment originally stated that 'Relevant market' needed to be delineated for the purposes of Section 3(3) investigations. This was subsequently clarified/corrected by the Court on 07.05.2018 on an Application filed by the Commission. By the clarificatory Order, it is stated

that since Section 3(3) carries a statutory presumption of anti-competitive Agreement and as such, determination of Relevant market is not mandatory.

47. It is true that the DG's report is required to comprise of all evidence or documents, or statements or analysis collected during investigation under Regulation 20(4) of the CCI (General Regulations, 2009. However this omission is inconsequential and caused no prejudice as:

- (i) The Appellant was supplied these pieces of evidence by the DG and was able to raise its objections to the DG's report before the Commission under Section 26 of the Act.
- (ii) The point was also urged before the CCI during the course of arguments and recorded by the Commission.

48. There is no need to establish 'Appreciable Adverse Effect' on the Competition [AAEC] in view of the clarification made by the Hon'ble Supreme Court dated 07.05.2018. As stated in the said Order, as long as there is evidence to suggest the existence of anti-competitive Agreement, there is a presumption of 'Appreciable Adverse Effect on Competition' as explicitly stated in Section 3 (3) (d) of the Competition Act, 2002.

49. To appreciate the case, some of the evidences considered by the Commission, as noticed below:

A. ESTABLISHING A NEXUS/ASSOCIATION BETWEEN AMMA AND FEFKA

- a. The Executive Committee meeting dated 05.04.2010 & the General Body Meeting dated 27.06.2010 of AMMA dated 27.06.2010.

These minutes establish that there were instructions in place by FEFKA which imposed a ban on anyone working with the informant.

b. Statement of Sh. P.A. Haris (Producer) and his letter dated 03.04.2013.

Sh. P.A. Haris had sought to produce a movie with the informant in 2011. His Financier, Sh. Jackson however informed him, after receiving instructions from PC George [Member of AMMA] not to work with the informant. In lieu of this, Sh. Haris took back his advance. Other producers/directors also compelled, Sh. Haris not to be associated with the informant. His letter dated 03.04.2013, adds corroborative Evidence to justify the return of money to be influenced by the ban alone.

c. Statement and Cross-examination of Kannan Perumudiyoor

Sh. Kannan was personally called by Sh. Unnikrishnan and Sh. Sibi Malayil [Office bearers of FEFKA] and Sh. Edavela Babu [Secretary of AMMA] and asked not to work with the informant. Due to this. Sh. Kannan also took back his advance from the informant. His stand was consistent throughout that both AMMA and FEFKA had imposed bans on the informant.

d. Statement of Sh. Sudheer CV (Producer)

Sh. Sudheer, like Sh. Kannan was telephonically directed by Sh. Unnikrishnan and Sh. Edavela Babu to not work with the informant. If Sh. Sudheer failed to do so, artists and technicians would not cooperate in the making of the film.

e. Statement of Sh. Salu K. George

Salu K. George stated that a ban was in place. Even though he did not specifically name office bearers of AMMA or FEFKA etc. for imposing the ban against the informant, his statement further aligns as a corroboration of a ban in place against the informant.

f. Statement of Sh. K. Surendran [Actor in the industry]

Sh. Surendran stated that there was tacit understanding between AMMA & FEFKA to not allow the informant to work freely, even though there was no formal ban in place. Sh. Surendran was not cross-examined by the Appellants.

g. Statement & Cross-Examination of Sh. Jayasurya (Alias Sh. V.M. Jyan) [Actor in the industry]

Like Sh. Kannan. Sh. Jayasurya also received a call from the office bearers of AMMA & FEFKA 'advising him' not to work with the informant.

h. Statement of the Informant

The informant stated that Late Sh. Thilakan was removed from a movie of Shri. Mohanlal called "Christian Brothers" because he had acted in a movie directed by the informant. Further, late Sh. Thilakan corroborated this stance in a TV interview.

He further stated that Sh. Shammi Thilakan returned the advance given for acting in the movie Little Superman stating that the President of AMMA had threatened him with dire consequences if he acted in any movie directed by the informant. Further the affidavit of Sh. Anil states that on 25.06.2011, during the GBM of AMMA, Sh. Mohanlal, Shri Mammooty and Sh. Dileep asked him not to work with the informant.

i. Interview of Late Sh. Thilakan

At the AMMA meeting dated 05.04.2010, Sh. Thilakan was condemned for having worked with the informant. This was his stance in the TV interview conducted on 01.02.2010 as well.

j. Nexus between AMMA and FEFKA Circular dated 27.12.2013

AMMA refers to FEFKA as its sister organisation. This when read in conjunction with the EC Meeting of AMMA dated 05.04.2010, highlights that both entities were active and aware of each other's activities.

B. SPECIFIC EVIDENCE COLLECTED AGAINST FEFKA

a. FEFKA's GCM dated 28.11.2012 and Circular dated 09.04.2013

The circular issued by FEFKA states that disciplinary proceedings were initiated against Sh. Salu K. George. Sh. George testified before the DG that this was due to him working with the informant. It is trite to submit that despite being given an opportunity, he was not cross-examined by the Appellants.

b. Minutes of FEFKA's GCM dated 17.02.2011 and Circulars dated 27.02.2010 & 09.04.2011

The perusal of these documents reveal that FEFKA had barred its members from working with Late Shri Thilakan. Furthermore, Sh. Thilakan had categorically stated that the ban was enforced subsequent to him working with the informant.

c. Letter dated 03.12.2009 sent by FEFKA to AIFEC

This letter categorically highlights that no member of FEFKA was working in a film that the informant had started to make. Yet, a FEFSI member Sri Rajaratnam was the cinematographer of the film. FEFKA states that it tried to make him decline working in the informant's movie. This

categorically establishes that FEFKA was attempting to prevent members of other associations from working with the informant. Subsequent to this, Sh. Raja Ratnam abandoned working in the informant's film.

- d. Letter dated 06.12.2009 written by Sh. Raja Ratnam to the producer of the film M/s. R.G. Production India Pvt. Ltd.

Sri Rajaratnam was working with the informant on his film 'YakshiumNjanum' directed by the informant. In the letter he informs the production house that ever since he started working on the film, his union SICA kept telling him not to work on the project. He discontinued working on the project and returned the advance that he received for the film.

- e. Statement and Cross-examination of Sh. Anil Kumbhaza

Anil Kumbhaza is categorical in his assertion that many members of FEFKA called him up and insisted that he does not cooperate with Sh. Vinayan. He was cross-examined by the Appellant however his stance did not change nor were any inconsistencies in his testimonies established.

- f. Statement of Sh. P. Madhavan Nair

Sh. Nair testified that he had to give working in a project with the informant after members from FEFKA and various association of the film industry approached him to no work with the informant.

C. SPECIFIC EVIDENCE COLLECTED AGAINST FEFKA DIRECTOR'S UNION

- a. Minutes of Meeting dated 25.02.2010

The categorical statement recorded in the minutes of the meeting is that it was decided not cooperate with the film DAM 999 in which the informant handled a role.

- b. Minutes of meeting dated 11.06.2011

Here, Sh. Ali Akbar was called to the committee to explain his stance wherein Sh. Akbar expressed that he did not have any guilt for giving Sh. Thilakan a role in his film 'Achan'. Further, Sh. Akbar also stated that the participation of the informant in the pooja ceremony of his film was not wrong. It is trite to submit that due to this Sh. Akbar was suspended from the membership of the Union.

c. Circular dated 05.07.2012

Ban against Sh. Salu K. George was communicated to the members of FEFKA Director's Union.

D. SPECIFIC EVIDENCES AGAINST FEFKA PRODUCTION EXECUTIVES UNION.

a. Minutes of the Meeting of FEFKA Production Executives Union on 11.10.2012 & the Letter dated 11.10.2012 sent to Sh. Philip

The minutes deliberated upon seeking an explanation from Sh. Rajan Philip, who had worked with the informant. The minutes outline that Sh. Philip who was not a member of FEFKA or any other union affiliated to AIFEC had worked with the informant. The show cause notice dated 11.10.2012 sent to Sh. Philip also highlights the same fact.

b. Statement of Sh. K. Mohanan, General Secretary of FEFKA Production Executives Union recorded before the DG & the Statement of Sh. Philip recorded before the DG.

Sh. Mohanan, stated that FEFKA members could work only with other FEFKA members. He admitted that Sh. Philip was questioned for working with the informant who was not a FEFKA member. Sh. Philip had in the past, prior to receiving the Show Cause Notice dated 11.10.2012. worked with the informant in 25 movies. He further stated that he had refused to participate in the movie of the informant, titled 'Little Superman' due to this Show Cause

Notice. This highlights that the FEFKA Production Executives Union followed the decision taken by FEFKA and influenced its members as well as its non-members not to work with the informant.

- c. Letter dated 02.01.2011 issued by the FEFKA Production Executives Union

It was communicated to the members that the union was to be informed if the names of Ms. Meghna Raj, Guatham and Spadhikam George came up for consideration in any movie. These actors had worked in a movie titled 'Yakshiyum Njanum' in 2009 and no direct reason was given as to why special permission was sought for these three artists in particular by the Union. It is evident by inference alone that these actors would be screened in a manner that would lead them to face the adverse consequences for working in the movie of the informant.

50. Learned counsel appearing on behalf of the Commission placed reliance on the evidences vis-à-vis counsel for the Appellant relied on the evidence of Shri Madhavan (also known as Madhu), Shri Rajan Philip and Shri Anil Kumbazha, which is relevant to quote.

51. Some of the statement made by Shri P. Madhavan Nair is extracted below:

“Statement of Shri P. Madhavan Nair (also known as Shri Madhu in the industry)

Question 3. Have you acted in any movie of Sh. Vinayan?

Ans. I have acted in little superman and two other movies made by Sh. Vinayan. For a movie in 2011 the name whereof I do not remember, I accepted an advance of Rs.50000 from Sh. Vinayan. However, about a dozen functionaries of various associations of

the film industry came to my house and requested me to act in Mr. Vinayan's movie. I remember only Sh. B. Unnikrishnan and Sh. Siyad Koker among the visitors as representatives of some of the associations. Nobody from AMMA came.

Question 4. Are you aware of a ban imposed by any of these associations on any artist working with Sh. Vinayan?

Ans. I was not aware of any boycott until they came to my house to persuade me not to act in Sh. Vinayan's movie. The representative of the directors, producers and technicians association told me that they have taken a decision not to cooperate with Sh. Vinayan. They said that if I do not comply with their decision it will be a big blow to them."

52. Statement of Shri Rajan Philip also shows that the Appellants' Association collectively decided to ban one or other artists or technicians including the Informant as is apparent from the following question and answer:

Question 3. In how many movie you have assisted Sh. Vinayan and why you have decided not to assist Sh. Vinayan in future?

Ans. I have assisted about 25 movies directed by Sh. Vinayan. However, after receiving a show cause notice dated 11.10.2012 from FEFKA Production Executive Union, I decided not to assist Sh. Vinayan in future. Even in recent past Sh. Vinayan asked me to assist him in his new film Little Superman but I refused to assist

him because of the show cause notice already issued to me by FEFKA.

Question 4. What are the other association apart from FEFK who has imposed such ban not to cooperate with Sh. Vinayan?

Ans. As per my information only FEFKA Production Executive Union have issued show-cause notice to the their technicians not to work with Sh. Vinayan.

Question 6. What according to you is the cause for the industry to boycott Sh. Vinayan?

Ans. I think there is ego clash between Sh. Vinayan and other leaders of the association. I think it has started from the formation of FEFKA as a breakway of MACTA which was then headed by Sh. Vinayan. So it is also related to union politics. Another cause was the dispute of MACTA with Sh. Dileep.

Question 8. Is the ban imposed by FEFKA, AMMA etc. affecting the work of technicians who want to work with Sh. Vinayan?

Ans. I cannot say for other technicians but it is true that Sh. Vinayan has suffered financially and also his choice is restricted, he has to bring technicians from outside.

Question 9. Do you have anything else to say?

Ans. I have nothing more to say. However, I am tendering a copy of the show-cause notice issued by FEFKA Production Executive Union dated 11.10.2012 with a request not to disclose my identity.

53. Sh. Anil Kumbazha, Director also made similar statement:

Question 3. In how many movie you have assisted as art director in Sh. Vinayan's film? Are you still working with Sh. Vinayan?

Ans. I have assisted with 4 movies as Art director, directed by Sh. Vinayan. However, I have received many telephone calls from executive members of FEFKA i.e., Jose Thomas, Sasi Perumanur, Sabu Prabatha as well as many members of FEFKA insisting me not to cooperate with Sh. Vinayan.

In this context I have to state that Sh. Vyasana, Manager of popular Malayalam film actor Sh Dileep, enquired from me whether I was interested in working films of super star and if I was interested I should meet Sh. Dileep on 26-06-2011 at Abad Plaza Hotel. When I met Sh. Dileep on 26-06-2011 he offered me a film with a precondition that I should abstain from working with Sh. Vinayan.

Question 4. Are you a member of any association?

Ans. I am member of FEFKA Art Director's Union and MACTA Art Directors Union.

Question 5. What are the other association apart from FEFKA who have imposed such ban on Sh. Vinayan?

Ans. As per my information FEFKA Art Directors Union and Sh. Dileep who is one of executive members of AMMA have cautioned me not to work with Sh. Vinayan.

Question 7. What according to you is the cause for the industry to boycott Sh. Vinayan?

Ans. I think it has started from the formation of FEFKA as a breakway of MACTA which was then headed by Sh. Vinayan. So it is also related to union politics. Another cause was the dispute of MACTA with Sh. Dileep.

Question 9. Is the ban imposed by FEFKA, AMMA etc. affecting the work of technicians who want to work with Sh. Vinayan?

Ans. It is true that art directors have suffered both financially as well as of having new assignments of Sh. Vinayan. Further Sh. Vinayan has suffered financially and also his choice is restricted, as he has to bring technicians from outside.

Cross Examination of Shri Anil Kumbazha by Shri Mohammed Siyad

Q.16. As you say you have worked with Sh. Vinayan as well as other directors after 2008, then where is the ban?

Ans. 16. Due to ban I was removed from three films namely 'bodyguard', 'kanchipurathekalayalanam' and 'sarkar colony'. In the first movie I was sent off from the location. In the other two

movies I was told by the producer that I would be working as art director but before the shooting, I was removed.”

54. There are large number of evidences which have been relied upon by the DG and also by the Commission to come to a definite conclusion about the Appellant(s) indulged in anti-competitive conduct in violation of the provision of Section 3 of the Act. Accordingly, the Appellants - ‘Association of Malayalam Movie Artists’ (hereinafter, ‘AMMA’/‘Opposite Party No. 1’/ ‘OP-1’); ‘Film Employees Federation of Kerala’ (hereinafter, ‘FEFKA’/‘Opposite Party No. 2’/ ‘OP-2’); ‘FEFKA Director’s Union’ (hereinafter, ‘Opposite Party No. 6’/ ‘OP-6’); and ‘FEFKA Production Executive’s Union’ (hereinafter, ‘Opposite Party No. 7’/ ‘OP-7’) and their office bearers were found to be liable under Section 48 of the anti-competitive conduct.

For the said reason, we are not inclined to grant any relief. The appeals are dismissed. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice A.I.S. Cheema]
Member (Judicial)

[Balvinder Singh]
Member (Technical)

New Delhi

13th March, 2020

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