COMPETITION COMMISSION OF INDIA

Case No. 98 of 2014

In Re:

Shri T. G. Vinayakumar (also known as Vinayan)
Bharathi, Pipeline Road, Palarivattom,
Cochin, Kerala **Informant**

And

Association of Malayalam Movie Artists	**Opposite Party No. 1**
Film Employees Federation of Kerala	**Opposite Party No. 2**
Shri Mammootty	**Opposite Party No. 3**
Shri Mohanlal	**Opposite Party No. 4**
Shri Dileep	**Opposite Party No. 5**
FEFKA Director's Union	**Opposite Party No. 6**
FEFKA Production Executive's Union	**Opposite Party No. 7**

CORAM

Shri S. L. Bunker
Member

Shri Sudhir Mital
Member

Shri U. C. Nahta
Member

Justice G. P. Mittal
Member

www.taxguru.in

Appearances:

For the Informant:	Shri Harshad V. Hameed, Advocate Shri Sreenivasan Nair, authorised representative of the Informant
For OP-1, Shri Innocent, President, OP-1 and Shri Edavela Babu, Secretary, OP-1:	Sh. P.V. Dinesh, Advocate Sh. Sindhu T. P., Advocate Sh. Bineesh K., Advocate
For OP-2, OP-6 and OP-7 *Shri Sibi Malayil, President, OP-2* *Shri B Unnikrishnan, General Secretary, OP-2* *Shri Siddique, President, OP-6* *Shri Kamaluddin, General Secretary, OP-6* *Shri Girish Vaikom, President, OP-7; and* *Shri K. Mohanan, General Secretary, OP-7:*	Shri Karan S. Chandhiok, Advocate Shri Vikram Sobti, Advocate Ms. Pankhi Harmilapi, Advocate

Order under Section 27 of the Competition Act, 2002

The present order will dispose of the information filed by Shri T. G. Vinayakumar, (hereinafter, the '**Informant**') under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the '**Act**') against 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.

www.taxguru.in

2. As per the information, the Informant is a director and writer in the Malayalam film industry. OP-1 is an association of actors of Malayalam films, formed with the objective to protect, promote and develop the financial status of its members. OP-2, formed in the year 2008, is an association of film employees *i.e.* directors, writers, screenplay writers, lyricists, music directors, art directors, make-up artists, *etc.* of the Malayalam film industry. It is a self-regulatory body, affiliated to All India Film Employees Confederation (AIFEC), having 17 separate sub-unions for different technicians under it. OP-3 to OP-5 are film actors who mainly work in Malayalam movies. OP-6, one of the sub-unions under OP-2, is a cine organisation for the welfare of Film Directors of Malayalam Cinema. Similarly, OP-7, one of the sub-unions under OP-2, is a cine organisation for the welfare of Film Production Executives of Malayalam Cinema.

3. Facts, in brief, as stated in the information

3.1 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, OP-1, OP-3, OP-4 and OP-5 were agitated with the Informant due to this.

3.2 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 that OP-3, OP-4 and OP-5 felt insecure about their film career due to this new initiative and began influencing people to scuttle it.

www.taxguru.in

3.3 In the year 2008, 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, 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.

3.4 Subsequently, on different occasions, the Opposite Parties tried to force various actors, technicians, producers, financers, 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.

4. ***Prima facie* order under Section 26(1) of the Act**

4.1 With regard to Section 4 of the Act, the Commission did not find OP-1, OP-2, OP-6 and OP-7 as such, to be qualifying to be termed as an 'enterprise' under Section 2(h) for the purposes of Section 4 of the Act. With regard to the allegations pertaining to Section 3 of the Act, the Commission observed that

www.taxguru.in

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.

4.2 *Vide* its order dated 24th February, 2015 passed under Section 26(1) of the Act, the Commission directed the Director General ('DG') to cause an investigation into the matter.

5. Observations and Findings of the DG

5.1 After conducting detailed investigation, the DG submitted the investigation report dated 16th November, 2015. In order to investigate the issues involved in the case, probe letters and notices were issued to OP-1, OP-2, OP-6 and OP-7 and Informant as well as third parties involved in the matter. Statements of Informant and witnesses were also recorded on oath at the Office of DG.

5.2 The DG relied upon various evidence to reach a finding with regard to involvement of OP-1 in the alleged ant-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.

www.taxguru.in

5.3 Further, the DG relied upon the statements given by various producers, actors, exhibitors in the Malayalam film industry. During the investigation, Shri P.A. Haris, a film producer, deposed that in the year 2011, he planned to produce a movie taking the Informant as a director, to whom he also gave advance of Rs. 100,000/-. However, the financier of the proposed movie, Shri Jackson, asked Shri P.A. Haris to take back the advance from the Informant, on the insistence of his brother (Shri PC George) who is a member of OP-1. In this regard, Shri P.A. Haris also wrote a letter dated 03rd April, 2013 to the Informant, expressing his inability to work with the Informant because of the prohibitions imposed by OP-1 and OP-2.

5.4 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.

5.5 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.

5.6 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-

www.taxguru.in

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.

5.7 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.

5.8 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.

5.9 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.

5.10 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.

5.11 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.

5.12 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.

www.taxguru.in

Meghna Raj. Further, minutes of the General Council meeting held on 17th February, 2010 and Circulars dated 27th February, 2010 and 09th 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*'.

5.13 The DG has relied upon a letter dated 03rd 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.

5.14 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

www.taxguru.in

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.

5.15 The DG further relied upon the 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.

5.16 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.

www.taxguru.in

5.17 The DG also relied upon the affidavit dated 19th September, 2015 submitted by Shri Liberty Basheer, an exhibitor, wherein it was stated that the General Secretary of OP-2 called him and asked him not to screen Informant's film. On being confronted, though OP-2 denied the averments of Shri Liberty Basheer, it was alleged that he is an interested party in the present matter because he is related to the Informant. However, OP-2 did not seek cross examination of Shri Liberty Basheer to counter his depositions. Therefore, investigation concluded that OP-2 had imposed a ban on working with the Informant and influenced even non-members not to cooperate with the Informant.

5.18 The DG also relied upon the statement of Shri P.A. Haris, Shri Kannan Perumudiyoor, Shri Sudhir C.V. and the Informant, to conclude that OP-2 was enforcing a ban against the Informant. Since the statements of these witnesses have already been discussed while dealing with the findings of the DG in respect of OP-1, the same are not repeated herein for the sake of brevity.

5.19 Based on the aforesaid material and statements recorded during investigation, the DG found that OP-2 had imposed a ban on its members from working with the Informant in the film industry which led to limiting and restricting the provision of services in the Malayalam film industry. The practices of OP-2 were hence found to be in contravention of the provisions of Section 3(1) read with Section 3(3)(b) of the Act.

5.20 With regard to OP-6, the DG relied on the minutes of the meetings held on 25th February, 2010 and 11th June, 2011 and circular dated 05th July, 2012 issued by OP-6 which indicate that actions were taken against persons for having worked with the Informant. In the meeting held on 25th February, 2010, it was decided not to co-operate with the film '*DAM 999*' in which Late Shri Thilakan was playing a role. Further, during the meeting held on 11th June, 2011, Shri Ali Akbar was suspended from the primary membership of OP-6 for three months because he gave a role to Late Shri Thilakan in his film and invited Shri

www.taxguru.in

Vinayan to a pooja ceremony of his film. The circular dated 05th July, 2012 of OP-6 highlighted that Shri Salu K. George was carrying out a vilification campaign against the union and members were directed not to cooperate with him.

5.21 After a careful consideration, DG concluded that the circulars issued by OP-6 and minutes of its meetings reveal that it was enforcing a ban on the Informant by coercing its members not to co-operate with the Informant. Further, it was also found that OP-6 was boycotting films in which people who had worked with the Informant were involved. This, as per the DG, amounted to limiting/controlling provision of services in the Malayalam film industry, thereby violating provisions of Section 3(1) read with Section 3(3)(b) of the Act.

5.22 With regard to other instances of violation of Section 3 of the Act by OP-6, the DG relied on Report of the Executive Committee Meeting held on 06th April, 2010, wherein, it was decided that there would be no cooperation with those who had not taken membership in the directors union. Further, circular dated 15th October, 2011 of OP-6 mentioned that disciplinary action would be taken against those who involved non-members in their films. Further, during the Executive Committee meeting held on 19th January, 2015, it was decided to impose a fine of Rs. 1000/- on assistant directors working without work permits. The DG concluded that OP-6 decided to send letters to all the affiliated organizations of OP-2 clearly exhibiting its stand of non-cooperation to the non-members of the OP-6. In effect, the OP-6 desired that only the directors on rolls of OP-6 may receive cooperation from various other Unions affiliated with FEFKA. Such a conduct restricts the provision of services of Technicians/ Professionals in the Malayalam Cinema Industry. A bare perusal of the contents of circular dated 15th October, 2011 clarifies that the intent of the circular had been to control the market for provision of services of technicians by the threat of disciplinary action against all those who involved non-members in making of the films. The DG found conduct of OP-6 to be

www.taxguru.in

limiting and controlling the provision of services in the Malayalam film industry, thus, violating Section 3(3)(b) read with Section 3(1) of the Act.

5.23 While determining the role of OP-7, the DG relied on the minutes of meetings held on 11th October, 2012 and 28th November, 2012 of OP-7 and letter dated 11th October, 2012 issued by OP-7 to Shri Rajan Philip, Production Controller, and letter dated 02nd January, 2011 issued by OP-7. During the meeting held on 11th October, 2012, OP-7 discussed the matter of Shri Rajan Phillip who worked with the Informant, though Shri Rajan Phillip was not a member of OP-2 or any of its affiliates. In this regard, a letter dated 11th October, 2012 was sent by OP-7 to Shri Rajan Phillip asking him to submit an explanation. Further, during the meeting held on 28th November, 2012, OP-7 decided not to take any action against Shri Rajan Phillip. In the letter dated 02nd January, 2011, issued by OP-7 addressed to its members, the said members were asked to contact the union if names of Meghna Raj, Guatham and Sphadikam George come up for consideration in any movie.

5.24 From these documents, the DG inferred that OP-7 used its influence and decided to issue a show cause to Shri Rajan Philip on the ground that he had worked with the Informant. Therefore, it can be said that OP-7 had decided that none of its members will work with Shri Vinayan. Similarly, *vide* letter dated 02nd January, 2011, OP-7 has directed its members to contact the union if Ms. Meghna Raj, Shri Guatham and Shri Sphadikam George were to work in any film. It is corroborated by DG that these actors had worked with the Informant in his film '*Yakshiyum Njanum*' in 2009. Such conduct leads to limiting or controlling the provision of services in the Malayalam film industry and thus, violates provisions of Section 3(1) read with Section 3(3)(b) of the Act.

5.25 With regard to the other instances of violation of provisions of Section 3 by OP-7, the DG took into consideration bye-laws of OP-7 which requires obtaining the no-objection certificate (NOC) by any member before accepting

www.taxguru.in

any work. The circular dated 12th May, 2010 of OP-7, required an affidavit to be filed by Director and Production Executive before commencement of any film, failing which a fine of Rs. 25000/- was to be imposed on such Director and Production Executive and such films also risked non-clearance. Further, *vide* circular dated 12th January, 2012, OP-7 communicated that a fine of Rs. 25,000/- will be levied on production controller concerned, if non-members are employed. The production controllers were also mandated to file affidavit in this regard. The DG observed that the minutes of OP-7's Executive Committee meeting dated 09th October, 2013, wherein complaints were looked into about non-filing of affidavits, shows that it was implementing the affidavit system. The DG observed that this affidavit system introduced by OP-7 was clearly intended to ensure that non-members are not employed in films. Such conduct of OP-7 was found to be limiting/controlling the provision of services in the Malayalam film industry in violation of Section 3(1) read with Section 3(3)(b) of the Act.

5.26 The DG further looked into the Circular dated 15th October, 2012 issued by OP-7 wherein a decision was taken in the Executive Committee meeting held on 11th October, 2012 to enhance the wages of executives and managers to a pre-decided amount. The DG observed that such decision taken by OP-7 amounts to fixation of rates for services provided by its members, in contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act. The conduct of OP-7 was thus, found to be leading to limiting or controlling the provision of services in the Malayalam film industry and thus, violative of the provisions of Section 3(3)(b) read with Section 3(1) of the Act.

5.27 After examining the role of the OP-1, OP-2, OP-6 and OP-7 in the anti-competitive practices prevailing in the Malayalam film industry, the DG looked into the role of their main officials, responsible for their anti-competitive conduct under Section 48 of the Act. Accordingly, the DG identified the following persons to be responsible for the anti-competitive conduct of their respective associations:-

www.taxguru.in

(i) Shri Innocent, President, OP-1

(ii) Shri Edavela Babu, Secretary, OP-1

(iii) Shri Sibi Malayil, President, OP-2

(iv) Shri B Unnikrishnan, General Secretary, OP-2

(v) Shri Siddique, President, OP-6

(vi) Shri Kamaluddin (also known as Kamal), General Secretary, OP-6

(vii) Shri Girish Vaikom, President, OP-7; and

(viii) Shri K. Mohanan (also known as Seven Arts Mohan), General Secretary, OP-7

5.28 On 15th December, 2015, the Commission considered the investigation report filed by the DG and decided to forward it to the Informant, OP-1, OP-2, OP-6 and OP-7. The Commission also decided to forward a copy of the investigation report to the above-named persons identified by the DG to be responsible under Section 48 of the Act. The parties were directed to file their suggestions/objections to the investigation report latest by 27th January, 2016 and to appear for an oral hearing on 03rd February, 2016. Pursuant to the directions, Informant, OP-1, OP-2, OP-6 and OP-7 filed their individual responses to the investigation report. However, no response was filed by any of the individual office bearers of the OP associations.

5.29 On a request made by the parties, the hearing scheduled on 03rd February, 2016 was adjournment to 10th March, 2016. On 10th March, 2016, the parties appeared before the Commission through their legal representatives but owing to the interim stay order of the Hon'ble Kerala High Court dated 08th March, 2016 in the writ petition (WP No. 8621 of 2016) filed by OP-2, OP-6 and OP-7, the matter was further adjourned to 21st April, 2016. On 31st March, 2016, the Hon'ble Kerala High Court disposed of the writ petition pursuant to the withdrawal of the same by the OPs.

www.taxguru.in

5.30 The hearing on the investigation report took place on 21st April, 2016 and 27th April, 2016. The replies/objections of the parties are briefly discussed in the following paragraphs.

6. Reply/Objections of the Parties to the Investigation Report

Reply/Objections of the Informant:

6.1 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 has objected that the investigation report has not made any findings against Shri Mohanlal (OP-4) who had held the position of General Secretary of OP-1 for 12 years (from 2003 to 2015). It is submitted that as the General Secretary, OP-4 was in charge of primary responsibilities of OP-1 and he actively participated in imposing the ban on the Informant. As per the bye-laws of OP-1, the General Secretary is also the Chief Executive Officer of the Association. He also submitted that OP-4 had signed all the major documents of OP-1, as the General Secretary, including tax returns. Further, the Informant also submitted that the DG could have taken into account the statement of witnesses such as Shri Anil Kumbazha as an evidence against Shri Dilip (OP-5).

6.2 Based on the aforesaid, the Informant submitted that the Commission ought to consider the role of OP-4 and OP-5 also, along with OP-1, OP-2, OP-6 and OP-7, in the anti-competitive conduct under scrutiny.

Reply/Objections of OP-1:

6.3 OP-1 has submitted that the allegations, observations and findings in the investigation report are one-sided, perverse, biased and against the facts and evidence on record. It is alleged that investigation has been done following the proper procedure and principles of natural justice.

www.taxguru.in

6.4 OP-1 has contended that the DG has ignored the clarification given by OP-1 about the opinion expressed by Late Shri Thilakan during the Executive Committee Meeting held on 05th April, 2010. The opinion was in context of OP-2 and OP-1 took no decision in this regard.

6.5 With regard to the General Body Meeting held on 27th June, 2010, OP-1 has contended that every member has a right to present his statement before the General Body. During that meeting, Shri Captain Raju was not summoned to give explanation, rather he voluntarily exercised his right to speak and express his opinion during the said Meeting. However, the DG wrongly presumed that this amounts to a nexus between OP-1 and OP-2. Opinions expressed by members cannot be construed as the decision of OP-1.

6.6 During the oral hearing dated 21st April, 2016, OP-1 contended that the DG has selectively relied upon the minutes of the meetings dated 05th April, 2010 and 27th June, 2010 and a complete reading of the same will divulge that OP-1 was not involved in any anti-competitive decision making.

6.7 With regard to the DG's reliance on various witnesses, OP-1 has stated that the DG has followed a prejudicial approach and relied upon their statements without there being any supportive evidence on record in this regard.

6.8 It is contended that the statement of Shri P. A. Haris has been relied upon by the DG without any supporting evidence. Shri P. A. Haris deposed before the DG that Shri Jackson was influenced by his brother who was a member of OP-1. The DG, without even recording the statement of Shri Jackson, relied upon the statement of Shri P.A. Haris. Similarly, the deposition of Shri Kannan Perumudiyoor was challenged on account of him being a tutored witness. He neither produced any evidence in support of his allegations at the time of deposition, nor could he provide any evidence during his cross-examination. Shri Sudheer CV was alleged to be an interested witness. It is further contended that he is not a mainstream producer in Malayalam Film Industry.

www.taxguru.in

6.9 With regard to Shri Salu K. George's statement, OP-1 submitted that his statement did not indicate OP-1's involvement in any anti-competitive conduct. With regard to Shri K. Surendran, OP-1 has submitted that the DG has relied upon his statement to conclude that OP-1 has imposed a ban, despite Shri K. Surendran stating that there was no circular or ban imposed by OP-1.

6.10 OP-1 stated that the statement of Shri Jayasurya cannot be relied upon to give a finding against it as he did not state that OP-1 had imposed any ban on the Informant. Due to this, OP-1 has not rebutted his averments. With regard to Shri Liberty Basheer's affidavit, OP-1 has stated that since he failed to be present for cross-examination, the same cannot be relied upon.

6.11 It is submitted that the DG has failed to take into account the testimony of any independent witness and the conclusions are based on the statements given by people working in the mainstream cinema only. Moreover, some of those witnesses, who have claimed that they were forced to stop the production of films or change director of their films because of OP-1, are not even currently associated with filmmaking. OP-1 illustrated the names of Shri Kannan Perumudiyoor and Shri Sudheer CV, whose statements have been relied upon by the DG, while none of them have allegedly produced a single film in the past 10-15 years. It is further submitted that some of the witnesses who supported the Informant have been acting in the Malayalam movies. If there was a ban as alleged, they would not have been casted.

6.12 It is submitted that the DG, based on the Executive Committee Meetings of OP-1 held on 09th February, 2010 and 05th April, 2010 and its circular dated 27th December, 2013, has found that OP-1 and OP-2 are closely linked.

6.13 It is also submitted that the interview of Late Shri Thilakan, which was recorded years back, is not relevant, because it was in a different context. Moreover, he has since died, the statement made by him during such interview should not have been taken into account.

www.taxguru.in

6.14 With regard to other instances, apart from those directed under the *prima facie* order of the Commission, OP-1 has submitted that the DG has transgressed the scope of the investigation vested upon it by the Commission. In the alternative, OP-1 placed on record its justifications with regard to each of such finding.

6.15 OP-1 submitted that no decision was taken by it in its Executive Committee Meeting held on 05th April, 2010, regarding the ban on actors from working in television medium. Further, during the Executive Committee Meeting held on 01st April, 2013, some discussions took place regarding the members of OP-1 acting in government commercials/advertisements. OP-1 was of the view that such service should be provided free of charge being in the interest of general public. However, it came to the notice of OP-1 that the mediators/companies, who are involved in production of such advertisements, were manipulating huge funds. To overcome this, it was suggested that unless a request is made either by the Head of Department or by the concerned Minister, the members of OP-1 would not do the commercial/advertisements free of cost for public cause.

6.16 Further, OP-1 stated that the findings of the DG regarding restriction by OP-1 on its members from taking part in award functions and working in television medium was aimed at protecting the interest of the members of the film industry.

6.17 Based on the aforesaid submissions, OP-1 prayed that the findings of the DG be rejected being devoid of merit.

Reply/Objections of OP-2:

6.18 During the oral hearing scheduled on 27th April, 2016, the learned counsel for OP-2 pressed its application dated 19th April, 2016 filed under Section 36 read with Section 18 of the Act challenging the jurisdiction of the Commission upon the ongoing proceedings before the Commission. OP-2 has contended

www.taxguru.in

that its activities are under the purview of Trade Unions Act, 1926 and thus, cannot be looked into by the Commission for want of jurisdiction.

6.19 It is submitted that the bye-laws of OP-2 are in consonance with the provisions of Trade Unions Act, 1926 and the actions of OP-2, including disciplinary action, are within the rights of a trade union. OP-2 referred to Clause 25 of bye-laws of OP-2 to state that its General Council is well within its rights to disaffiliate its members or take disciplinary actions against them whenever they are found to be acting prejudicially to the interests of OP-2. Further, OP-2 highlighted Section 19 of the Trade Unions Act, 1926 to argue that even if the objects of an agreement between the members of a trade union are in restraint of trade, the Trade Unions Act, 1926 shall prevail over the provision of the Competition Act, 2002.

6.20 OP-2 also referred to the decision of the Hon'ble Competition Appellate Tribunal in *Co-ordination Committee of Artists and Technicians of West Bengal Film and Televison Industry v/s Sajjan Kumar Khaitan, Proprietor of M/s Hart Video, Eastern India Motion Picture Association, Kunal Ghosh and Shri Sanjoy Das, 2014 CompLR 329*, wherein the minority order of learned Member of the Commission was confirmed, in which it was specifically noted that Section 3 of the Act does not take within its fold coercive actions taken by labour/trade unions. Relying on the same, OP-2 contended that trade unions are provided special rights under the Trade Unions Act,1926 to protect the interest of its workers and steps taken in furtherance of such objectives cannot be challenged under the Act.

6.21 It is submitted that the investigation done by DG is incomplete, biased and one-sided, without drawing any reference to the context and backdrop in which certain steps were taken by OP-2. It is argued that the DG has not annexed statement of individuals in its report that do not support the Informant's allegations. Statement of Shri Shammi Thilakan clearly stating that he never received any circular/letter from his association asking him not to work with the Informant was not taken into consideration. His statement is further

www.taxguru.in

corroborated by the statement of Shri Ajaykumar R. who has been acting in Malayalam film industry for the past 25 years.

6.22 Further, the investigation report does not contain the statements of office bearers of OP-1, OP-2 and OP-6, which provided justifications regarding various allegations. The DG has selectively relied upon the minutes of the meetings and other documents to support the conclusions of investigation report. It is contended that the DG has intentionally redacted pages from Annexure 24 and 25 of the investigation report, which is the report of OP-2's General Meeting held on 28th November, 2012.

6.23 The DG has extensively relied upon the allegation involving Shri Subhair, which is merely hearsay, to reach a finding against OP-2. Further DG has disregarded statements of various persons, such as statement of OP-2's General Secretary, while arriving at the findings in the investigation report. Such conduct is stated to be in complete disregard of Section 26(3) of the Act read with Regulation 20(4) of the Competition Commission of India (General) Regulations, 2009 which state that the report of DG shall contain his findings on each of the allegations made in the information or reference together with all evidences or documents or statements or analyses collected during the investigation.

6.24 OP-2 further claimed that DG has extensively relied upon the information and statement of Informant, which remained uncorroborated as OP-2 was not given an opportunity to cross-examine the Informant. OP-2 also relied upon the COMPAT's judgement in the case *Himachal Pradesh Society of Chemist & Druggist Alliance and Ors. v/s Rohit Medical Store and Ors.* (MANU/TA/0002/2016), wherein it has been held that the Commission is bound to examine if the investigation conducted by DG is consistent with the rules of fairness and that the parties are afforded an opportunity to cross-examine. The order of COMPAT in *Schott Glass India Pvt. Ltd. v/s Competition Commission of India, 2014 CompLR 295 (COMPAT)* is also relied upon by OP-2 in this regard.

www.taxguru.in

6.25 OP-2 further stated that the investigation has not been able to establish the existence of an agreement which is a pre-condition for scrutinising a case under Section 3 of the Act. Further, it is submitted that the investigation report has failed to bring any direct evidence or to demonstrate the existence of any strong probability in favour of an agreement amongst Opposite Parties.

6.26 It is further argued that OP-2 comprises of directors, writers, editors and cine drivers as its members, who operate at different levels for supply of services. Thus, the members of OP-2 cannot be said to be engaged in identical or similar provision of services, as required under Section 3(3) of the Act. Moreover, since the Informant is a producer and director in the Malayalam film industry, he cannot be said to be engaged in provision of services similar/identical to those provided by members of OP-2. Thus, a case under Section 3(3) of the Act cannot be established.

6.27 Pointing out the other instances investigated by the DG, which were neither part of the information nor directed by the Commission in the *prima facie* order, OP-2 has submitted that the DG has transgressed its powers. Accordingly, OP-2 has objected to those findings, which are not specifically mentioned in the *prima facie* order. It is further alleged that even if an agreement is presumed to be established in the present case, there has been no AAEC in the market as the actions of OP-2 were neither aimed at any anti-competitive gains not have led to any anti-competitive effects. It is further submitted that the DG has failed to consider the factors provided under Section 19(3) of the Act to support its findings.

6.28 OP-2 also stated that there is no barrier for new entrants in the Malayalam film industry. Last seven years witnessed a flurry of cinematic activities in the industry in which new actors, new directors, new writers and technicians came in to generate new sensibilities. The Informant has also directed and released 12 films during the same period, out of which films like '*Yakshiyam Njaanum*' admittedly made huge profits. OP-2 further claimed that the Informant is

www.taxguru.in

making more movies than most of the directors who are members of OP-2's affiliated trade unions. Thus, it is averred that the alleged ban has had no effect on the Informant.

6.29 OP-2 also submitted that its organizational structure functions openly and democratically and its policy of giving fresh membership to the workers and technicians is non-restrictive. Its primary objective is to protect the interest of its members, wherein OP-2 is only involved in the settlement of disputes regarding wages and other labour rights. OP-2 submitted that there has not been a single strike in Malayalam film industry since OP-2 came into being.

6.30 It is contended that OP-2 has not made it mandatory for its members to work only with fellow members. There are various instances when its members worked with non-members. However, OP-2 facilitates the non-members to take up membership of the respective association/union to ensure adequate representation of their rights.

6.31 With regard to each of the evidence gathered during investigation, OP-2 provided justifications, which are stated in the following paragraphs.

6.32 With regard to the report of General Council Meeting held on 28th November, 2012, OP-2 submitted that no action/steps were taken by OP-2 against actors who worked with the Informant. As an illustration, OP-2 referred to Ms. Meghna Raj who was first introduced by the Informant in a film and thereafter she went on to work with many leading directors and actors in Malayalam film industry, including film titled 'Beautiful' released in 2011 which was written and directed by OP-2's members.

6.33 With regard to the minutes of the aforesaid meeting, OP-2 submitted that the excerpts of the minutes as mentioned in the Investigation Report were in a different context. The incident in question was related to a film shoot which was disrupted many times by Bhartiya Mazdoor Sangh (BMS) workers. The BMS workers manhandled OP-2's drivers during such disruptions. Further,

www.taxguru.in

Shri Salu George, who is a member of FEFKA Art Directors' Union, was facing a disciplinary action at that time and therefore, in terms of the organizational procedure, he was asked to settle that issue before he started working.

6.34 With regard to the Circular dated 19th April, 2013, OP-2 submitted that it is within its legitimate right as a trade union to take disciplinary actions against a defaulting member. A dialogue with Shri Salu K. George was initiated when he chose to work in a film in which mostly politically affiliated and non-regular technicians worked. However, no ban was ever imposed on him, which was also admitted by him in his statement before the DG. Later, realising his error of judgment, he tendered an apology, after which the disciplinary action against him was discontinued.

6.35 With regard to the report of General Council Meeting held on 17th February, 2010 and Circulars dated 27th February, 2010 and 09th April, 2011, OP-2 argued that the inference drawn by DG, that Late Shri Thilakan was ostracized by the Opposite Parties for having worked with the Informant, is false and frivolous. It is submitted that during the General Body Meeting of OP-2, it was unanimously decided that its members will not cooperate professionally with Late Shri Thilakan because of his tendency of levying false allegations against OP-2 and its members.

6.36 With regard to the Letter dated 03rd October, 2009, OP-2 contended that the referred letter was written only to inform AIFEC about unskilled technicians (Shri Rajaratnam), with hardly any experience, being employed by the Informant while commencing the shooting of his film, '*Yakshiyum Njanum*' in Cochin. It has been AIFEC's policy that its members work on a member to member basis. OP-2 further submitted that despite Shri Rajaratnam abandoning Informant's film, the film was completed without any delay and earned huge profits as per box office collections. Thus despite the alleged steps

www.taxguru.in

initiated by OP-2, there was no effect on the Informant or competition in the Malayalam film industry.

6.37 With regard to the statement and cross-examination of Shri V M Jayan (Jayasurya), OP-2 submitted that OP-2's President and the General Secretary never contacted Shri Jayasurya asking him not to work with the Informant. He is an active member of OP-1 and therefore, it is not legitimate or even procedurally appropriate on OP-2's part to render any instructions to him. In his cross-examination, Shri Jayasurya has admitted to that he never received any circular calling for boycott of the Informant.

6.38 With regard to the statement and cross-examination of Shri P A Haris, OP-2 averred that the allegations as deposed by Shri P A Haris are purely hearsay, which as a principle of law and in terms of Section 60 of the Indian Evidence Act, 1872 are inadmissible as evidence. His cross-examination also reveals his professional relations with the Informant, when he contested the elections for the Producers' Association in 2014, under the panel led by the Informant.

6.39 With regard to the statement and cross-examination of Shri Kannan Perumudiyoor, OP-2 has submitted that the facts alleged by Shri Kannan Perumudiyoor in his statement contradict the answers given by him during his cross-examination. In his statement, he alleged that he has never worked with the Informant, while during his cross-examination he admitted that he was associated with the Informant in making of films for two years. Thu, his statement, being a lie under oath, cannot be accepted. Further, it is apparent from his cross-examination that he never read about any alleged ban imposed by OP-2 against the Informant. OP-2 requested the DG to seek the call details records of Shri Kannan to corroborate the submissions made by OP-2 that Shri B Unnikrishanan has never contacted Shri Kannan. However, despite such a request, DG failed to obtain his CDRs without assigning any reasons.

6.40 With regard to Shri Sudheer CV, OP-2 claims that it is evident from his cross-examination that he is an ally of the Informant and he also contested elections

www.taxguru.in

for the Producers' Association in 2014 with the Informant, as part of a single panel. As per OP-2, the fact that Shri Sudheer CV contacted the Informant as soon as he received the summons from DG office, evidences his biasness towards the Informant. Further, a request was made to the DG to seek his CDRs in order to verify if there was any contact between him and the General Secretary of OP-2. Such request was overlooked by the DG without any reason.

6.41 With regard to Shri Anil Kumbazha, OP-2 submitted that the DG ignored the apparent contradictory statements made by Shri Anil Kumbazha in his cross-examination. Despite stating that there has been a ban on working with the Informant since 2008, Shri Anil Kumbazha accepted that he has worked with the Informant after 2008. Thus, assuming without admitting that OP-2 suggested its members not to work with the Informant, there was no compliance of such alleged direction. With regard to Shri P Madhavan Nair (Madhu), OP-2 submitted that Shri Madhavan said in his statement that he was not aware of any boycott of the Informant and that he continued to work with the Informant.

6.42 With regard to the Informant's statement, OP-2 has contended that no opportunity of cross-examination has been provided to it. The allegations against OP-2 are merely hearsay without any documentary proof to support them. OP-2 also submitted that the video clip of Late Shri Thilakan's interview is doctored and contains no allegations against OP-2.

6.43 With regard to Shri Salu K. George, OP-2 has averred that the DG has overlooked his admission that he got a call from OP-2's General Secretary, specifying that there was no ban on him. Further, he stated that he or anyone else has not been penalised by any association for working with the Informant.

6.44 With regard to Shri Liberty Basheer's affidavit, OP-2 has submitted that the DG refused to probe the submission of OP-2 that Shri Liberty Basheer was related to the Informant and therefore, his statement should not be relied upon.

www.taxguru.in

It is submitted that the instances and statements of third parties, including the Informant, relied upon by DG to conclude boycott of the Informant are merely isolated instances arising out of trivial personal issues between individuals, not impacting/affecting competition in the market.

6.45 Besides, OP-2 has also rebutted the other evidence collected by the DG with regard to certain anti-competitive activities apart from the main issue under investigation. With regard to DG's finding on report of the General Council Meeting held on 30th March, 2010 and Minutes of the Executing Committee Meeting held on 06th June, 2013, OP-2 submitted that it is industry practice for a producer to register his or her film in the Film Chamber and the Producers' Association at least 45 days prior to shooting, to enhance the transparency of shooting. No penalty is imposed for a lapse related to this procedure; hence it cannot be termed as anti-competitive. In regard to circular dated 21st March, 2013, OP-2 submitted that the suggested recommendatory practice of employing certain percentage of OP-2's affiliated trade union's workers, while shooting for a film in a particular region is aimed at ensuring regular and gainful employment of the members of such affiliated trade unions. However, such practice is merely recommendatory and no penalty is imposed in case of non-adherence. Moreover, such practice no longer exists. With regard to minutes of the Executive Committee Meeting held on 17th December, 2013, OP-2 submitted that it is an affiliate of AIFEC. It has been AIFEC's policy that its members work on a member to member basis. This policy becomes a protective measure particularly in Kerala where politically affiliated trade unions including MACTA Federation consistently strive to terrorise producers to forcefully hire their members who have neither the skill nor the experience to work in cinema. It may also be noted that, all over India, the regional film chambers as well as producers' bodies have entered into MOUs only with federations affiliated to AIFEC. Hence, the notion of member to member working becomes operational not just by force or restriction, but by the mutual consent and agreement between the employer and employee.

www.taxguru.in

6.46 In regard to Circular dated 14th February, 2011, OP-2 submitted that when new comers work in a film, its affiliated trade unions give temporary membership to them without any restriction. Later on, they can apply for full-fledged membership. This is a non-restrictive practice in which membership is given to all. With regard to Circular dated 19th March, 2012, OP-2 merely informed its members that it will not be able to intervene in the disputes related to those films which have not filed the affidavit. This is an organizational procedure and there is nothing anti-competitive or restrictive about this. With regard to the minutes of its General Council Meeting held on 17th October, 2013, OP-2 submitted that the decision to give temporary membership in respective trade unions to all new comers cannot be called anti-competitive.

Reply/Objections of OP-6:

6.47 *Vide* its reply dated 11th April, 2016 before the Commission, OP-6 reiterated the submissions made by OP-2. The arguments with regard to challenge to the jurisdiction of the Commission, flaws in the investigation report, failure to grant an opportunity to cross-examine and non-observance of the principles of natural justice by the DG are similar to those made by OP-2 and the same are thus, not repeated herein, for the sake of brevity. Further, the submission related to non-existence of an agreement, absence of horizontal relationship between the members of OP-2, OP-6 and Informant, absence of AAEC, *etc*., as argued by OP-6, have also been discussed while dealing with the submissions of OP-2. The same are also not repeated. Besides, like OP-2, OP-6 also argued that the DG, by investigating issues other than those directed by the Commission in the *prima facie* order, has transgressed its powers.

6.48 OP-6 contended that it has not made it mandatory for its members to work only with fellow members. There are various instances where members of OP-6 have worked with non-members without any problem. However, OP-6 facilitates the non-members to take up membership of the respective associations/Unions to ensure adequate representation of their rights. Thus, the DG has failed to establish the effect of impugned practices/activities of OP-6

www.taxguru.in

alleged to be limiting and controlling the supply of services in the Malayalam film industry.

6.49 Further, OP-6 submitted that the DG has relied on hearsay statements and other documents to reach its conclusion against OP-6 which are not reliable. With regard to the minutes of OP-6's meeting held on 25th February, 2010, OP-6 has submitted that non-cooperation with the film '*Dam-999*' which starred Late Shri Thilakan, was only a suggestion which was over-ruled by OP-2. Further OP-6 denied issuing letter dated 06th March, 2010, wherein this decision (not to cooperate with the film '*Dam-999*') was conveyed to all the members.

6.50 Further, with regard to the minutes of OP-6's meeting held on 11th June, 2011, OP-6 stated that the DG has wrongly presumed the response of OP-6 as an admission of the fact that OP-6 issued directions to all its members not to associate with either the Informant or people who have worked with him. Whereas the reply clearly stated that Shri Ali Akbar has every right to work with Late Shri Thilakan and OP-2 has never obstructed his work. However, Shri Ali Akbar's actions were found to be against the interests of OP-2 and its affiliated trade unions, including OP-6, when he associated himself with a politically affiliated organization, MACTA Federation. It is further stated that disciplinary action taken against Shri Ali Akbar was in accordance with the provisions of its bye-laws, approved by the Registrar of Trade Unions. Similarly, with regard to the Circular dated 05th July, 2012, OP-6 submitted that Shri Salu K George's actions were found to be against the interests of OP-2 and its affiliated trade unions, including OP-6, when he associated himself with a politically affiliated organisation.

6.51 With regard to the Report of Executing Committee meeting held on 06th April, 2010, OP-6 submitted that its membership has always been non-mandatory and non-restrictive. The DG has failed to appreciate the reason behind placing emphasis on taking OP-6's membership during the relevant period was to protect and benefit its members. Since MACTA, during that period, used to

www.taxguru.in

disrupt shootings and the only way to safeguard the artists, technicians and other workers from physical threat was to ensure that the crew members were known faces, reasonable restrictions in the form of membership were imposed. The same cannot be construed as anti-competitive.

6.52 Further, OP-6 denied having issued the Circular dated 15th October, 2011, relied upon by the DG. It is submitted that OP-2 or OP-6 never tried to control the provision of service of technicians or restricted the employment of non-members. Newcomers and apprentices, working as assistant directors, are one of the most exploited and underpaid section of workers employed in the Malayalam film industry. To safeguard their rights, every director member is required to inform OP-6 whenever an assistant director is employed. This is a legitimate trade union practice and as a responsible trade union, OP-6 stands by its practice.

6.53 With regard to the Minutes of its Executive Committee Meeting held on 19th January, 2015, OP-6 submitted that the impugned practice of issuing work permit has neither been alleged by the Informant nor stated in *prima facie* order passed by the Commission. Without prejudice, OP-6 submitted that such practice helps enhance the transparency of shooting.

Reply/Objections of OP-7:

6.54 *Vide* its reply dated 11th April, 2016 before the Commission, OP-7 also echoed the objections raised by its parent association OP-2. Thus, the common arguments, including those related to challenge to the jurisdiction of the Commission, flaws in the investigation report, failure to grant an opportunity to cross-examine and non-observance of the principles of natural justice by the DG, non-existence of an 'agreement', absence of AAEC, transgressing of powers by DG by investigating instances other than those directed by the Commission *etc.*, are similar to those made by OP-2 and the same are, thus, not repeated herein, for the sake of brevity.

www.taxguru.in

6.55 OP-7, like OP-2 and OP-6, also submitted that its membership is not mandatory and that its members are not forced to work only with members. It stated that its primary objective is to protect the interest of its members, wherein OP-7 is only involved in the settlement of disputes regarding wages and other labour rights. Thus, OP-7 facilitates the non-members to take up membership of the respective associations/Unions to ensure adequate representation of their rights.

6.56 With regard to the minutes of meeting held on 11th October, 2012 and subsequent letter dated 11th October, 2012 issued to Shri Rajan Philip, OP-7 submitted that it was issued pursuant to the dispute between technicians and producers. Since OP-7 may not be able to interfere in case of a dispute with the non-member, an explanation was sought from Shri Rajan Philip as to how he sought to deal with that issue, in case such a contingency was to arise. As far as the statement of Shri Rajan Philip is concerned, OP-7 stated that he clearly stated that the reason for the alleged boycott of the Informant was because of the 'ego clash' between the Informant and other leaders of the associations. It is alleged that this kind of dispute does not fall within the ambit of Section 3 of the Act and is merely a clash of personalities, which is being perceived as an anti-competitive activity.

6.57 With regard to the letter dated 02nd January, 2011 issued by OP-7, it was submitted that the DG wrongly assumed that the names of Ms. Meghna Raj, Shri Gautham and Shri Sphadikam George came up because they had previously worked with the Informant, without even assessing the background in relation to discussions on such names. It is submitted that there is no evidence on record to show that the aforesaid persons were denied work or affected in any manner because of their working with the Informant.

6.58 OP-7 further submitted that the statement of its General Secretary, Shri K Mohanan, is taken out of context and relied upon only to substantiate the pre-determined conclusions of the DG. It has been submitted that there is absolutely no restriction imposed on the members of OP-7 not to work with the

www.taxguru.in

Informant. It is claimed that there are numerous instances of not only members of OP-7 but of other affiliates of OP-2 also, repeatedly working with non-members. However, it has been AIFEC's policy that its members work on a member to member basis. The primary reason to bring in such a policy is to ensure an effective platform for collective bargaining.

6.59 With regard to the Circular dated 12th January, 2012, OP-7 submitted that the NOC is required before taking up new work to ensure that there is no remuneration dispute pending against the particular producer(s) of the member's previous film(s). It is a welfare measure that allows OP-7 to examine a remuneration dispute and ensure that the parties carry out their obligations. It is further submitted that membership of OP-7 has always been non-restrictive and no instance has been provided wherein grant of such NOC was denied or penalty was imposed on any member for not submitting such NOC.

6.60 With regard to the Circular dated 12th May, 2010 and Minutes of Executive Committee Meeting of OP-7 held on 09th October, 2013, OP-7 submitted that it never tried to control the provision of service of technicians or restricted the employment of non-members. It is submitted that an affidavit of the Production Controller is obtained only for maintaining records about the work done by them.

6.61 OP-7 also submitted that the DG has gone beyond the scope of present enquiry by looking into the Circular dated 15th October, 2012 issued by OP-7. The primary objective of OP-2 and its affiliated trade unions is to collectively bargain with the employers and ensure just and fair wage rate for its members. Such standard trade union practice cannot be construed as anti-competitive.

6.62 Based on the aforesaid submissions, OP-7 has denied its involvement in any anti-competitive conduct and has prayed that the Commission rejects the conclusions drawn by the DG.

www.taxguru.in

7. Findings of the Commission

7.1 On a perusal of the investigation report and the replies/objections filed by the parties, the submissions made by them during the oral hearings and other material available on record, the Commission is of the opinion that the following issues require determination in this matter:

Issue 1: Whether the Commission has jurisdiction to analyse the conduct of OP-1, OP-2, OP-6 and OP-7 (hereinafter, collectively referred to as the Opposite Parties/OPs Opposite Parties)?

Issue 2: If the answer to the above question is in affirmative, whether OP-1, OP-2, OP-6 and OP-7 have contravened the provisions of Section 3 of the Act?

Issue 3: If the answer to issue 2 is in affirmative, the persons responsible, under Section 48 of the Act, for the conduct of these Opposite Parties.

Issue 1: Jurisdiction of the Commission:

7.2 The Opposite Parties have raised the preliminary objection regarding jurisdiction of the Commission, which requires consideration before the merits of the case are looked into. In their submissions, OP-2, OP-6 and OP-7 have stated that each of them is a registered trade union as per the relevant provisions of the Trade Unions Act, 1926 (hereinafter, 'Trade Unions Act'). Thus, the disciplinary actions taken by them against their members, in accordance with their bye-laws, do not raise any competition concern and accordingly, cannot be looked into by the Commission. They have referred to the decision of the Competition Appellate Tribunal (the Tribunal) in *Co-ordination Committee of Artist and Technicians of West Bengal Firm and Television Industry v/s Shri Sajjan Kumar Khaitan and others [2014 CompLR 329]* wherein the minority order of the Commission has been upheld. It is argued that the Tribunal has already confirmed that Section 3 of the Act does not take

www.taxguru.in

into its fold coercive actions taken by non-players or labour unions or worker unions, affecting the various facets of product or service market affecting production, distribution or supply of goods or services.

7.3 OP-2, *vide* application dated 19th April, 2016, specifically raised the issue of jurisdiction discussing each ground in detail. It is submitted that the allegations levelled in the information pertain to an industrial dispute under the Industrial Dispute Act, 1947 and allegations contained in the investigation report do not reveal any anti-competitive conduct by OP-2.

7.4 OP-2 has submitted that it is a registered trade union formed for protecting the rights of its affiliate trade unions and their members. OP-2 and its affiliates are governed by their bye-laws and rules, which are in conformity with Trade Unions Act. Section 19 of the Trade Unions Act states that *an agreement between the members of a registered trade union shall not be void and voidable merely by reason of the fact that any of the objects of the agreement are in restraint of trade*. OP-2 has contended that Section 19 of the said Act contains a *non-obstante* clause which takes precedence over any other law for the time being in force. Thus, the action of the Commission to investigate an 'alleged agreement between members of a registered trade union' is clearly beyond its purview.

7.5 It is further submitted that before coming to the Commission, the Informant had filed a complaint against OP-2 before the Labour Commissioner. The said complaint was dismissed since it was found that the allegations against OP-2 were bereft of any truth. Thus, the Informant has filed the present information before the Commission merely to do forum shopping after suffering an adverse order on an earlier occasion. It is submitted that the objections raised in the investigation report to the alleged boycott/ban of the Informant constitutes a legitimate trade union activity under the Trade Unions Act. OP-2 has relied on judgement of

www.taxguru.in

Calcutta High Court in *Jay Engineering Works Ltd. and others v/s State of West Bengal and Others, AIR 1968 Cal 407*, wherein the Hon'ble High Court recognized the right of a trade union to boycott in order to give force to its objectives. In the same judgment, the Court has also restricted and defined the scope of the 'legitimate trade union activity', holding that immunity to workers under the Trade Unions Act is not available where workers commit acts of violence, intimidation and other offences punishable under the Indian Penal Code, 1860. OP-2 further cited various cases wherein the said judgement was followed including, *inter alia*, *Federation of Western India Cine Employees v/s Filmalaya Pvt. Ltd. 1982 (83) BOMLR 423, Ambubhai and Diwanji v/s Gujarat Mazdoor Panchayat 1984 GLH 1035, Indian Express Newspapers (Bombay) Pvt. Ltd. v/s T.M. Nagarajan* and *others 1987 (15) DRJ 212 and Simpson and Group Companies Workers and Staff Union v/s Amco Batteries Ltd. ILR 1990 Karnataka 3568*. Further, the following observations of the High Court of Gujarat in *Ambubhai and Diwanji v/s Gujarat Mazdoor Panchayat, 1984 GLH 1035*, were cited:

> "*....the relations between employer and employees are governed by the special labour legislation. Their disputes are resolved by machinery evolved under the Industrial Disputes Act and other labour laws. ..... as far as possible, civil court should relegate the parties to have their recourse to the special forums created by the legislature for resolving their disputes*".

7.6 Further, referring to Section 62 of the Act, OP-2 has submitted that the Act is in addition to and not in derogation of the Trade Unions Act. OP-2 also placed reliance on the order of the Hon'ble Supreme Court in *Kiran Singh and Others v/s Chaman Paswan and Others, AIR 1954 SC 340*, wherein it was held that an order without jurisdiction is *void ab initio* and no consent can be given to validate an invalid order. Relying on that judgment, OP-2 has submitted that the Informant cannot invoke the jurisdiction of the Commission that has been constituted for the

www.taxguru.in

purpose of prohibiting anti-competitive agreements and abusing the dominant position in the relevant market. It is submitted that the Commission cannot be called upon to adjudicate on trade union disputes which do not find mention in the Act but which has been specifically included under the Industrial Dispute Act, 1947.

7.7 Based on these judgments and provisions of various laws, OP-2 argued that since the rights and restrictions of a trade union are well defined under the existing labour laws, the jurisdiction of the Commission to regulate the legitimate trade union activities is ousted.

7.8 The Commission has carefully examined the submissions made during the hearings before the Commission and judgments relied upon by OP-2 in its application dated 19th April, 2016. It has been argued that the trade associations have a legitimate right to resolve the disputes that arise between their members and to take decisions, which are aimed at ensuring the welfare of the members and protect their rights. Though the line of argument canvassed by OP-2 appears attractive at first, it is misconceived, to say the least. The Commission or the DG, as the case may be, has never held or found that the formation of a trade union for its legitimate functions falls foul of the provisions of the Act.

7.9 Trade Associations provide an important platform for betterment of a particular trade, for establishing code of conduct, for laying down standards for fair trade, for facilitating legitimate co-operative behaviour in case of negotiations with government bodies *etc.* However, when the activities of the trade association transgress the thin line between legitimate trade activities and anti-competitive practices, the competition regulator is well within its jurisdiction to interfere and take cognizance of such anti-competitive actions/practices. It is true that right to form an association is recognised under Article 19 of the Constitution of India. However, such right is neither unfettered nor absolute in nature.

www.taxguru.in

Fundamental rights enshrined under Article 19 of the Constitution of India are accompanied by reasonable restrictions, which are recognised by the Hon'ble Supreme Court in catena of judgments.

7.10 Similarly, the associations governed under different laws are amenable to the jurisdiction of the Commission, if they are found to be indulging in any of the activity prohibited under the Act. The OPs have relied upon Section 62 of the Act to contend that the jurisdictions of the Commission is not available when there is a 'trade dispute' between the association and one of its members, in view of remedy provided under the Trade Unions Act. The Commission notes that Section 62 of the Act clearly provides that '*the provision of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force*'. Hence, the issues covered under the ambit of the Act have to be enforced in true spirit and there is no prohibition under any other law to avoid the enforcement of the Act merely because such law is applied *albeit* in different context and purpose. In the instant case, the operation of two statutes is not confronting with each other. On the contrary, they are complementing each other, one (Trade Unions Act, 1926) is created with the objective of protecting legitimate trade union activities and the other (Competition Act, 2002) is created to protect fair competition in the markets.

7.11 In one of the cases before the Commission [*Case No. 35 of 2013: Advertising Agencies Guild v. Indian Broadcasting Foundation (IBF) and its members*], a similar issue arose. The allegation related to the agreement amongst the members of IBF and the decision taken by IBF to boycott on account of switching to a net billing method was under consideration. The Advertising Guild argued that such collective boycott violated the provisions of Section 3 of the Act. Commenting on the relevance of trade associations in general and their legitimate behaviour in particular, the Commission held as follows:

www.taxguru.in

'*Undoubtedly, there has been a collective action by OP-1 and its members but primarily the trade associations are for building consensus among the members on policy/other issues affecting the industry and to promote these policy interests with the government and with other public/private players. Such activities may not necessarily lead to competition law violation. To perceive otherwise will render the trade association bodies as completely redundant, being opposed to competition law. The trade association provide a forum for entities working in the same industry to meet and to discuss common issues. They carry out many valuable and lawful functions which provide a public benefit e.g. setting common technical standards for products or interfaces; setting the standards for admission to membership of a profession; arranging education and training for those wishing to join the industry; paying for and encouraging research into new techniques or developing a common response to changing government policy. Therefore, membership and participation in the collective activities of a trade association cannot by itself amount to violation of competition law as such*.'

7.12 The Commission further held that only when such trade associations transgress their legal contours and facilitate collusive or collective decision making with the intention of limiting or controlling the production, distribution, sale or price of or trade in goods or provision of services as defined in Section 2(c) of the Act, by its members, it violates the provisions of the Act. (emphasis supplied)

7.13 The present case clearly involves issues pertaining to alleged anti-competitive behaviour by the Opposite Parties that has the potential of affecting fair competition in the Malayalam film industry. It is imperative that the allegations are tested on the touch-stone of the

www.taxguru.in

provisions of the Act in light of the evidence collected by the DG, to ascertain whether any contravention of the Act has taken place or not. Thus, in light of the aforesaid, the Commission is of the view that the preliminary objection of OP-2, OP-6 and OP-7 regarding jurisdiction of the Commission is devoid of any merit and thus, liable to be rejected.

7.14 The Commission notes that OP-2 has relied upon the judgement of the Tribunal dated 03rd April, 2014 in *Co-ordination Committee of Artist and Technicians of West Bengal Film and Television Industry v/s Shri Sajjan Kumar Khaitan and others [2014 CompLR 329]* wherein the minority order of the Commission has been upheld. OP-2 has highlighted that the Tribunal has already confirmed that Section 3 does not take into its fold coercive actions taken by non-players or labour unions or worker unions, affecting the various facets of product or service market affecting production, distribution or supply of goods or services.

7.15 It may be noted that the Commission has appealed against the aforementioned order of the Tribunal before the Supreme Court and the same is yet to be decided by the Supreme Court. However, even otherwise, the Commission is of the view that the reliance of OP-2 is misplaced and based on an incorrect reading of the the Tribunal's order. The order of the Tribunal was based on different set of facts and it did not, by any stretch of imagination, provide blanket exemption to the coercive actions taken by trade unions or labour unions from the purview of Section 3 of the Act. The following excerpt from the Tribunal's order dated 03rd April, 2016 is of relevance in this regard:

> "*Here, there is no question of trading of any goods, or provision of any services, much less by the persons engaged in identical or similar trades or provision of services. These were protests raised by the Co-ordination Committee of which there were few members, who were either technicians*

www.taxguru.in

or artists and all that they were doing, was protesting against the showing of the dubbed films/ TV serials. Now there had to be some evidence available to show that any such action, limited or controlled the production, supply, markets, technical development and investment or provision of services. There is no such evidence available. In fact, because of the strikes or demonstration, as the case may be, the OP-4, CTVN Plus did not even stop showing the 'Mahabharata' serial on its channel. Further, OP-3, Channel-10 stopped showing the said serial on its channel on account of advise by leading actor Shri Mithun Chakraborty. Essentially, section 3(3)(b) applies to the competitors. The action as contemplated in section 3 should, therefore, result in limiting or controlling the production, supply by the competitors or should at least limit or control the market or the technical development, or investment or provision of services. In so far as the competitors are concerned, nothing of that sort has happened. In our opinion, the decision by the majority order that the viewers were deprived of seeing dubbed Mahabharata serial on a TV channel is also faulty, since OP-4, CTVN Plus never gave-in to the protests by the members of the Co-ordination Committee. The Co-ordination Committee was legitimately protesting and voicing their grievance for the benefit of their members. They may be under the wrong impression that showing of the dubbed TV serial would affect their prospects of getting further work, but that by itself does not raise a competition issue. This is not a case, where the production of the television serials or supply thereof has been affected. If at all, the complaint could have been made only by a competitor. In our opinion, therefore, the CCI has committed an error in holding the Co-ordination Committee guilty of contravention of section 3(3)(b). In our

www.taxguru.in

opinion, the minority order is a correct order and we approve of that order. In short, Appeal succeeds. Majority order is set aside and minority order of the learned Member is confirmed." (emphasis supplied)

7.16 A plain reading of the order of the Tribunal clarifies that it does not provide any absolute exemption/immunity to the actions of the trade unions from the purview of the Act. It merely states that since the said action led to no effects in the market, the same ought not to have been looked into by the Commission. Since this order is pending in the Supreme Court, the Commission is reluctant to deliberate any further on this. Suffice to say that the reliance placed by the OPs on this order is misplaced.

7.17 Based on the foregoing discussion, the Commission is of the firm view that it is well within its jurisdiction to decide the present case. However, before going to the main issues, the Commission further observes that some of the OPs have objected to the investigation by the DG in respect of instances, other than those, which were specifically alleged in the information by the Informant. It is also contended that the DG, in the current scheme of the Act, has no power to investigate *suo-moto*, unlike its predecessor in the MRTP regime, to look into issues other than those specifically directed by the Commission.

7.18 The Commission, after thoughtful consideration, does not subscribe to this view. When the DG is investigating a matter pursuant to the directions given to him by the Commission under Section 26(1) of the Act, the investigation with regard to incidental matters cannot be said to amount to *suo-moto* investigation. During the course of investigation, the DG may come across instances of anti-competitive practices, which though are not specifically alleged in the information, but may have the same nature and characteristics as those alleged therein. When the

www.taxguru.in

Commission orders investigation, it cannot foresee the nature and kind of evidence that the DG may come across to establish contravention of the provisions of the Act by the parties. To expect detailed elucidation of evidence and allegations at the *prima facie* stage would render the purpose of investigation futile.

7.19 The Commission is cognizant that the DG ought not to investigate an altogether different issue but just because an allegation is not specifically pointed out by the Informant, does not mean that the same is unconnected to the violation under consideration. In the present case, the Commission notes that such 'other' instances have only been relied upon by the DG in addition to the findings on the anti-competitive practices alleged in the information. These evidences have not been relied upon by the DG in isolation to give any categorical finding against such practices. Further, OPs were given sufficient opportunity to counter the evidence and findings of the investigation report before the Commission. Thus, the Commission is of the considered view that there is no infirmity in the investigation nor the DG has transgressed its powers, merely on the ground that the DG has investigated such 'other' instances.

Issue 2: Whether the Opposite Parties (*i.e.* OP-1, OP-2, OP-6 and OP-7) have contravened the provisions of Section 3 of the Act?

7.20 After having dealt with the preliminary issue, the Commission finds it appropriate to analyse whether a contravention of the provisions of the Act has taken place in the present case and, if yes, to look into the role of each of the Opposite Parties in the alleged contravention of the provisions of the Act.

OP-1

7.21 While determining the involvement of OP-1, the Commission has considered the evidence gathered by the DG, the findings recorded in the

www.taxguru.in

investigation report and the replies/objections made by OP-1 to each such evidence/finding.

7.22 There are two meetings (executive committee meeting held on 05th April, 2010 and general body meeting held on 27th June, 2010), the minutes of which were relied upon by the DG to infer that there is a nexus between OP-1 and OP-2, whereby the members of OP-1 were obliged to comply with the instructions of OP-2. Further, the DG found that there was a tacit understanding among the members of OP-1 not to work with the Informant. OP-1 has challenged DG's reliance on these minutes, stating that the DG has selectively relied upon the minutes of the meeting and that a complete reading of these minutes will reveal that OP-1 was not involved in any anti-competitive decision making. It has been contended that the instruction, if any, not to work with the Informant, was given by OP-2 and that OP-1 had no role to play in it.

7.23 The Commission has carefully read the complete minutes of both the meetings mentioned above. The executive committee meeting held on 05th April, 2010 revolved around the issue relating to boycott of Late Shri Thilakan by the members of OP-1. It appears that Late Shri Thilakan was asked to present his version of the background facts and to justify his stand regarding the ill-statements made by him against OP-1 and OP-2 in the print and visual media. A show cause notice dated 15th March, 2010 was also issued to Shri Thilakan in this regard. In the meeting, Late Shri Thilakan presented his situation and the background facts as to why he showed his anger through the print and visual media. His statement in the meeting reveals that he had been removed from the film '*Christian Brothers*' only because he had acted in Informant's film. He also stated that Shri Subair, the producer of '*Christian Brothers*' had told him that Shri B. Unnikrishnan of OP-2 had insisted that none of the actors who had acted in the Informant's film should be included in the new project, nor would any of them be allowed to act in any Malayalam

www.taxguru.in

film thereafter. The minutes further revealed that a lot of exchanges took place between Late Shri Thilakan and other members of OP-1. Late Shri Thilakan also raised objection regarding OP-1 not supporting its members when associations like OP-2 impose a ban upon them. Finally, the members of OP-1 unanimously decided to expel Late Shri Thilakan.

7.24 After a thorough reading of these minutes, the Commission is of the view that these minutes do not clearly indicate that the ban on the Informant was imposed by OP-1. It has a brief mention about the grievance of Late Shri Thilakan regarding his removal from the film '*Christian Brother*' because of his association with the Informant in some other film. It also mentions about the ban imposed by OP-2 on the Informant as well as those actors who have worked with the Informant's film. It is apparent that Late Shri Thilakan was unanimously expelled from OP-1 but the same is also explainable for the views he expressed against OP-1 in print/visual media. Thus, these minutes, in themselves, may not be sufficient to draw any adverse conclusion against OP-1. However, it can be made out from these minutes that there was some nexus between OP-1 and OP-2 and the former was concerned about the issues which any of its members had with the latter.

7.25 The Commission next perused the minutes of the general body meeting held on 27th June, 2010. These minutes also refer to some nexus between OP-1 and OP-2. OP-1 has objected to DG's reliance on these minutes stating that DG has selectively relied upon them. After having read the complete minutes, the Commission is of the view that the reliance of DG with regard to these minutes has not caused any injustice. The excerpt of the minutes relied upon by the DG provide a clear picture of the dispute at hand. The relevant excerpt of the minutes is reproduced below:

> "*Next a problem concerning Sri Captain Raju came under discussion. His having acted in Vinayan's film violating*

www.taxguru.in

FEFKA's instruction had become an issue. Sri Edavela Babu invited Captain Raju to the stage to explain his side of the problem."

7.26 The aforesaid excerpt clearly shows that it was a concern for OP-1 that Shri Captain Raju has worked in Informant's film. OP-1 has stated that every member has a right to express his/her views in the meetings of the association and Shri Captain Raju expressed his views voluntarily in the general body meeting held on 27th June, 2010. The Commission is of the view that a plain reading of the aforesaid excerpt invalidates the justification offered by OP-1. It does not appear that Shri Captain Raju voluntarily expressed his views on the issue. Rather it is apparent that his having acted in Informant's film, despite contrary instructions by OP-2, had become an issue for OP-1 and OP-1, through its Secretary Shri Edavela Babu, had sought clarification on the same from Shri Captain Raju. Otherwise phrases like '… a problem concerning Shri Captain Raju' …….. 'violating FEFKA's instruction had become an issue' ….. 'to explain his side of the problem' would not have been used. Even a complete reading of the minutes does not lead to any other conclusion, as wrongly claimed by OP-1.

7.27 Based on the foregoing, the Commission is of the view that the minutes of the general body meeting held on 27th June, 2010 establishes the allegation of the Informant that there was a ban imposed by OP-1 and OP-2 on its members and others not to work with the Informant.

7.28 The Commission further observes that the investigation report contains statements of various witnesses regarding the imposition of ban on the Informant. Statement of each of such witness along with the objections raised by OP-1 are discussed in the following paragraphs.

www.taxguru.in

7.29 Based on the statement of Shri P. A. Haris (producer), the DG concluded that at least one of the members of OP-1 influenced the financier Shri Jackson so as to stall the project of Shri P.A. Haris with the Informant. OP-1 has stated that without even interrogating Shri Jackson, DG reached such a conclusion. In this regard, the Commission is of the view that certain relevant excerpts from the statement of Shri P.A. Haris need to be spelt out to conclude on the rival claims:

> *"Q. 3 Have you made any movie with Shri Vinayan?*
> *Ans. In 2011 I had given an advance of Rs 100000/- for Shri Vinayan's new project. My financier for the project was an NRI named Jackson. Both of us has discussed and finalized the terms and condition of the project. All of sudden Shri Jackson who has got an information from his brother PC George (member of AMMA) who has received telephone call from super star Bharat Mammooty and Shri Joshy, Director not to work with Shri Vinayan. Consequently, the financier Shri Jackson withdrew his commitment and I was compelled to take back the advance amount from Shri Vinayan.*
>
> *Question 5. Have you got any circular/letter from AMMA/FEFKA asking not to work with Shri Vinayan? If so name the people who has called/advised you not to work with Shri Vinayan?*
> *Ans. No, I have not received any written communication/call from FEFKA/AMMA. However, my well-wishers and producers/directors like Shri Thomas, Shri Binu, Ms. Sheena actress etc. compelled me not to be associated with Shri Vinayan otherwise you will be in problem.*

www.taxguru.in

Question 6. Do you know that there is boycott of Shri Vinayan by AMMA/FEFKA affiliated union? What according to you is the cause for the industry to boycott Shri Vinayan?

Ans. Yes I am aware of the issue through media and mainly from film industry. I think in the year 2004 KFCC the apex body has instructed the producers that there should an agreement between artists and the producers. But the prominent producers like Saga Appachan and Siyad Koker contacted personally Shri Vinayan, the then President of MACTA and insisted for an agreement between artists and producer before producing any movies.

I have been given to understand through media, industry people and Shri Vinayan that Superstar Mohanlal has personally asked Shri Vinayan to visit him at Gokulam Hotel, Ernakulam to discuss this matter in the interest of AMMA not to insist for any formal agreement and work without any agreement. Further on his refusal to accept the terms and conditions put forward by Shri Mohanlal none of the members of the AMMA cooperated with Shri Vinayan."

7.30 The above extracts from the statement of Shri P.A. Haris clearly shows that he wanted to work with the Informant for which he even paid the advance to the Informant. However, he took the advance money back because the financier, Shri Jackson, asked him to do so. It is also clear that Shri Jackson was acting on the instructions of his brother, who was a member of OP-1, and who asked him not to associate with the Informant. Though Shri P. A. Haris did not receive any formal communication or call from OP-1 directly, his statement shows that the ban on working with the Informant was known to everyone in the malyalam film industry and he was led to take the advance back from the Informant because of such ban.

www.taxguru.in

7.31 Further, letter dated 03rd April, 2013 sent by Shri P.A Haris to the Informant is corroborative of the facts deposed by him. In this regard, the Commission observes that the following excerpts from the said letter are self-speaking:

> "……*my financier has strictly told me that I can engage your services only after the prohibitions imposed by AMMA and FEFKA are lifted and I am forced to cancel the project*."

7.32 Thus, the Commission observes that the statement of Shri P.A. Haris, read with the letter dated 03rd April, 2013, establishes that there was a ban on the Informant imposed by OP-1.

7.33 Further, the basis of the statement and cross examination of Shri Kannan Perumudiyoor, the DG concluded that OP-1, through its Secretary, Shri Edvela Babu was involved in enforcing the ban on working with the Informant. OP-1 in its reply submitted that Shri Kannan Perumudiyoor is a tutored witness and he has no evidence to support his allegations. Further, he failed to name any person of OP-1 who could be involved in the contravention.

7.34 The Commission notes that Shri Kannan Perumudiyoor clearly stated that he was called by Shri Unnikrishanan and Shri Sibi Malayil of OP-2 and Shri Edavela Babu of OP-1 and was asked not to work with the Informant. Because of this reason, he purportedly took back the advance money paid to the Informant. He was also threatened with due consequences that his film will not be released and the money will be lost, if he does not follow the instructions. He also confirmed that apart from the abovementioned three functionaries of OP-1 and OP-2, other people in the industry also told him not to work with the Informant. He further stated that OP-1 and OP-2 have asked their members not to work with the Informant, otherwise they might have to face the consequences. During the cross examination by OP-1, Shri Kannan Perumudiyoor has been consistent and reiterated the facts

www.taxguru.in

deposed during his statement. Despite various questions posed by OP-1, Shri Kannan Perumudiyoor maintained that there was a ban imposed by OP-1, of which he was informed over the phone by Shri Edavela Babu, Secretary of OP-1, Shri B. Unnikrishnan, General Secretary of OP-2 and various other members of OP-1 and OP-2. Thus, the Commission observes that though Shri Kannan Perumudiyoor could not specifically name the other members of OP-1 (apart from Shri Edavela Babu) who instructed him not to work with the Informant, the same does not affect the veracity of his deposition. It cannot be denied that there was an understanding and direction from OP-1 not to work with the Informant, which was well communicated to the members of OP-1 and even to the non-members who deal with the members of OP-1.

7.35 Another witness who confirmed the existence of the aforesaid ban imposed by OP-1 and OP-2 is Shri Sudheer CV, a producer in the Malayalam film industry. Based on his statement and cross examination, the DG concluded that OP-1, through its Secretary, Shri Edavela Babu was involved in enforcing a ban on working with the Informant. OP-1 challenged the statement of Shri Sudheer CV by stating that he was an interested witness. It was also contended that he is not a mainstream producer in Malayalam film industry and his deposition is unsupported by any credible evidence.

7.36 In this regard, the Commission notes that the statement of Shri Sudheer CV is self-explanatory. The relevant excerpt is reproduced below:

> *"Question 3. Have you worked with Shri Vinayan?*
> *Ans. No, I have not worked with Shri Vinayan. I know Shri Vinayan since he was in tele-serial production and direction. I had planned to make a film with Shri Vinayan as director and I also gave an advance amount of Rs 1 lakh to him in the year 2012.* ***Shortly thereafter I was called up by Shri Unnikrishnan from FEFKA and Shri Edavela Babu from AMMA and told not work with Shri Vinayan otherwise artists***

www.taxguru.in

and technicians will not cooperate in the making of the film. The calls came on my landline at home. Many other people in the industry also told me not work with Shri Vinayan otherwise I would be in trouble. Therefore I dropped the project but I did not take the advance back*."* (emphasis supplied)

7.37 The Commission observes that the statement of Shri Sudheer CV requires no further deliberation. Further, OP-1 was given an opportunity to cross-examine Shri Sudheer CV However, nothing material came out of the said exercise as the witness maintained the consistency of his statement. OP-1 failed to establish that Shri Sudheer CV was a tutored witness or that his deposition lacks credibility. It is clear from his statement and cross examination that he was forced by OP-1 to leave the project with the Informant because of the existence of the ban on the Informant.

7.38 The next witness relied upon by the DG is Shri Salu K. George, an Art Director, who also confirmed that there was a ban imposed by OP-1 on working with the Informant. OP-1 countered this witness by stating that his statement did not indicate OP-1's involvement in any anti-competitive conduct. The Commission observes that this witness has neither specified the names of any of the members of OP-1 or OP-2 for imposing the ban against the Informant nor has mentioned any particular instance when he was informed about the ban. However, his statement gives a perspective about the case at hand.

7.39 Yet another witness whose deposition was relied upon by the DG is Shri K. Surendran. In his statement, he has said that though there was no formal ban imposed on the Informant by OP-1, there is a tacit understanding among the members of OP-1 not to work with the Informant. The relevant excerpts from his statement are reproduced below:

www.taxguru.in

"Question 4. Have you received any communication from any of the associations asking you or others not to work with Shri Vinayan?

Ans. I have not received any direct communication from any of the associations. However, in 2011 when I worked with Shri Vinayan, I approached Shri Innocent, President AMMA to know if there was a ban on working with Shri Vinayan. Shri Innocent told me that AMMA has not banned as such however, I should take my own decision with the view that members of so many other associations and unions of cine workers were not working with Shri Vinayan. It is a fact that Shri Vinayan was the President of MACTA for a short time in 2010-11. He did some good work for the cine workers and thus built a rapport. The opposite lobby floated the FEFKA to counter MACTA. Most members of MACTA left it for FEFKA. It is also a fact that Shri Vinayan voiced strong opinion against big stars for not following the contract signed with producers/directors. In my opinion this angered most of the established actors in the industry. Also Shri Vinayan proposed a scheme of low budget films part financed by exhibitors with new faces. This also antagonized the big stars who felt threatened. I have heard that the associations affiliated to FEFKA have taken a decision not to work with Shri Vinayan and also have issued a circular asking their members not to work with Shri Vinayan but I do not have the circular with me as I am not active in the association work.

Question 5. Is the boycott of Shri Vinayan by members of the FEFKA affiliated associations continuing?

Ans. Yes the members of FEFKA affiliated associations including even the drivers are not working in any project by Shri Vinayan. Although AMMA has not given any formal

www.taxguru.in

communication but there is a tacit understanding among the members not to work with Shri Vinayan." (emphasis supplied)

7.40 Shri K. Surendran's statement shows that though there was no explicit ban imposed by OP-1 on working with the Informant, there was a tacit understanding among the members not to work with him. Despite given an opportunity, OP-1 did not seek to cross-examine Shri K. Surendran. In view of the circumstances, the Commission observes that though the statement of Shri K. Surendran does not individually establishes the imposition of ban by OP-1, it provides a perspective upon the prevailing circumstances in the Malayalam film industry. Further, when corroborated by the statements of other witnesses, it establishes the existence of a ban on the Informant.

7.41 The DG also recorded the statement of Shri Jayasurya (Shri V.M. Jayan), a renowned actor in the Malayalam film industry. The relevant excerpts of his statement are reproduced herein below:

"Q7. Do you know that FEFKA and AMMA associations have asked their members and other people not to work with Shri Vinayan?
Ans. Yes I am aware. I got a call nearly 2 years back from Shri Unnikrishnan and Shri Sibi Malayil of FEFKA advising me to avoid working with Shri Vinayan for the time being till the issue is resolved…"

7.42 It is observed that he got a call from Shri Unnikrishnan and Shri Sibi Malayil of OP-2 advising him to avoid working with the Informant. The DG provided an opportunity to OP-1 to cross-examine the Shri Jayasurya. However, OP-1 in its reply submitted that since Shri Jayasurya has not mentioned, that the ban on the Informant was imposed by OP-1, it did not

www.taxguru.in

cross-examine the said witness. The Commission is not impressed with this reasoning. The DG categorically asked Shri Jayasurya whether he is aware about the ban upon the Informant by OP-1 and OP-2. Shri Jayasurya answered in affirmative The Commission observes that though the deponent has said that there was a ban on the Informant, however he did not expressly say that the ban was imposed by OP-1. He only said that ban was from the side of OP-2. However, corroborated with other evidences and statements, it is clear that OP-2 has imposed an informal ban on the Informant and members of OP-1 also had tacit understanding with OP-2 to follow the same.

7.43 The statement of the Informant is also of relevance in ascertaining the involvement of OP-1 in the ban imposed upon him. Before the DG, the Informant stated that Late Shri Thilakan was removed from a movie of Shri Mohanlal '*Christian Brothers'* because he acted in a movie written and directed by the Informant. Later on, Late Shri Thilakan said in an interview on India Vision and ASIANET that Shri Mohanlal and Shri Mammooty influenced OP-1 to remove him from the movie '*Christian Brothers*'. Informant also stated that other persons who worked or who wished to work with the Informant were threatened with advance consequences. Shri Indrans (Shri K. Surendran) and Shri Ajayan were also influenced by OP-1 not to work with the Informant. In 2011, one artist Shri Madhu returned the advance for working in a movie, stating that OP-2's Secretary Shri Unnikrishnan with other functionaries of OP-1 and OP-2 pressurized him not to work with the Informant.

7.44 The Informant also highlighted an affidavit of Shri Anil Kuuzand which highlights the role of OP-1 in the ban imposed upon the Informant. the relevant portions of the Informant's statement regarding the said affidavit are reproduced below:

www.taxguru.in

"There is also affidavit by Shri Anil which says that during 25.06.2011 general body meeting of AMMA at Abad Plaza Hotel Cochin, Shri Mohanlal, Shri Mammooty and Shri Dileep asked him not to work with me. Again in 2013 June, Shri Shammi Thilakan returned Rs 50000 advance given for acting in the movie Little Superman saying that the president of AMMA, Shri Innocent has threatened him against acting in my movie. This can be verified from bank transaction and telephone record."

7.45 The above statement clearly establishes that OP-1 was interfering with the decision-making by individual artists/actors/other players in the Malayalam film industry by imposing the ban on the Informant and forcing its members and other players not to work with the Informant Further, it is observed that OP-1 did not seek cross examination of the Informant.

7.46 The DG also relied upon some other evidence *e.g.* the affidavit of Shri Liberty Basheer wherein the role of OP-1 in banning the Informant has been categorically brought out. However, since the said witness did not appear before the DG for cross-examination by OP-1, the Commission does not find it appropriate to take his affidavit into account for reaching any conclusion.

7.47 The DG further took into account the interview of Late Shri Thilakan. OP-1 has challenged such reliance on the ground that the interview was recorded years back and is not relevant because it was in context of a separate issue. OP-1 also stated that the version of Shri Thilakan cannot be taken into account due to his death as OP-1 has no means to rebut it. In this regard, the Commission concurs with the findings of the DG. Late Shri Thilakan has categorically stated, during the executive committee meeting held on 05th April, 2010, that he was being condemned for having worked with the Informant. Also, during an interview, given by him to Indiavision channel which was telecasted on 01st February, 2010, he clearly stated that

www.taxguru.in

OP-1 and OP-2 were not allowing him to work because he worked with the Informant. The issue does not appears to be separate as claimed by OP-1, rather it corroborates the existence of the ban by OP-1. Even if the Commission accepts the plea that the ban imposed on Late Shri Thilakan is in context of a separate issue, it will not absolve OP-1 of its liability. Such statement by OP-1 further reiterates that it was indulging in the practice of imposing ban on its members. OP-1 has not argued that such condemnation of Late Shri Thilakan had any justified basis. Rather, it has tried to trivialise the evidence by stating that it was not in context of the ban imposed on the Informant. Such argument rather goes against OP-1, as the matter before the Commission pertains to the larger issue of restrictions imposed by associations, notwithstanding that the present case has been initiated from the allegations of the Informant.

7.48 Based on the evidence discussed in the aforesaid paragraphs, including the minutes of the meetings and the depositions of various players in the Malayalam film industry, the Commission is convinced that OP-1 was perpetrating the ban imposed on the Informant. Even if it is assumed that OP-1 has not imposed that ban, the fact that it was fully executing the said ban, on the instructions of OP-2, makes it equally complicit in the said anti-competitive activity.

7.49 OP-1 has contended that the ban might have been imposed by OP-2 and it has no role to play in such imposition. In this regard, it is noted that the DG has clearly brought out that OP-1 and OP-2 are closely linked and have been at times acting in concert with each other. To support its finding, DG has extracted the minutes of the Executive Committee Meetings dated 09th February, 2010, wherein it is stated that OP-1 need not participate in all decisions taken by the members of OP-2. The statement recorded in the minutes of the meeting held on 09th February, 2010 that '*Sri Vijayraghavan raised the point that AMMA was not required to stand with FEFKA on all decisions taken by their members*', further shows that there is a nexus

www.taxguru.in

between OP-1 and OP-2. Though they are not necessarily following all decisions of each other, it cannot be denied that they are following most of such decisions.

7.50 Further, in the circular dated 27th December, 2013, OP-1 has referred OP-2 as its sister association. Further, the entire discussion in the Executive Committee meeting held on 05th April, 2010, revolves around the non-observance of the ban imposed by OP-2 by the members of OP-1.

7.51 Therefore, on a collective reading of all the statements, evidence and material available on record, it is concluded that OP-1 did influence its members, producers and financers for not working with the Informant. There is a tacit understanding between the members of OP-1, pursuant to which they have boycotted working with the Informant. Such a restriction, being in the nature of practices carried on by trade association, falls under Section 3(3) of the Act and are presumed to be having an appreciable adverse effect on competition. Thus, in the absence of OP-1 being able to rebut the presumption of its practices having an appreciable adverse effect on competition in the market, the Commission holds OP-1 guilty of the contravention under Section 3(1) read with Section 3(3)(b) of the Act.

OP-2

7.52 To determine the involvement of OP-2 in the alleged contravention, the DG took into consideration the minutes of its meetings, circulars issued by it and statements of various witnesses recorded during investigation. In the following paragraphs, the Commission will deal with each of the evidence relied upon by the DG in light of the objections raised by OP-2.

7.53 The Report of OP-2's GCM held on 28th November, 2010 and the Circular dated 19th April, 2013 establish the disciplinary action initiated by OP-2 against Shri Salu K. George. OP-2 contended that the expulsion of Shri

www.taxguru.in

Salu K. George was because of disciplinary action he was facing from the FEFKA's Art Directors Union.

7.54 The Commission, however, finds this justification as a mere façade to hide the anti-competitive conduct. In his statement, Shri Salu K. George revealed that in the year 2012, after working in the Informant's film '*Dracula*', he came to know that OP-2 has issued a circular to its members not to give work to him. Later he got a call from Shri Unnikrishanan from OP-2 stating that there was no ban on Shri Salu K. George. Despite being given an opportunity, OP-2 did not seek cross-examination of Shri Salu K. George. The Commission notes that the Circular dated 19.04.2013 states as follows:

> *'As you may be aware the general council meeting held on 15.04.2013 had decided to accept the apology tendered by Salu K. George. Hence it is decided to stop the disciplinary action against Salu K. George.'*

7.55 The tenor of the excerpts of the said circular indicates that the action taken against Shri Salu K. George was not based on the disciplinary action he was facing from the FEFKA's Art Directors Union, as claimed by OP-2. Had the justification offered by OP-2 been correct, the disciplinary action by OP-2 would not have stopped upon an apology offered by Shri Salu K. George, as stated in the circular.

7.56 Thus, the statement of Shri Salu K. George, read with report of OP-2's general council meeting held on 28th November, 2012 and its Circular date 19th April, 2013, indicate that the disciplinary action against Shri Salu K. George was initiated for having worked with the Informant.

7.57 The Commission further notes that based on the report of OP-2's general council meeting held on 17th February, 2010, circulars dated 27th February, 2010 and 09th April, 2011 of OP-2, DG concluded that OP-2 banned its

www.taxguru.in

members from working with Late Shri Thilakan. The reason cited in the minutes was inappropriate statements given by the deceased actor. However, it has been established during investigation that the conflict with Shri Thilakan started when the unions enforced a boycott against him for working in a movie of the Informant. A combined reading of these circulars and minutes, along with the minutes of OP-6's meetings held on 25th February, 2010 and 11th June, 2011 reveals that OP-2, along with its sister affiliated union OP-6, imposed a ban on Shri Thilakan.

7.58 OP-2 has submitted that Late Shri Thilakan was boycotted pursuant to a unanimous decision taken by its members because of the false allegations he raised against OP-2 and its members through print and visual media. The Commission, however, finds this explanation unacceptable. The statement of Late Shri Thilakan available in public domain as well as other evidence, clearly indicates that the conflict between Late Shri Thilakan and OP-2 (and OP-1) started after he worked with the Informant, who was banned by OP-2 given the historical conflict between the office bearers of OP-1/OP-2 and the Informant.

7.59 Another relevant document that supports the allegation of the Informant is the letter dated 03rd December, 2009, sent by OP-2 to General Secretary of AIFEC wherein the issue of cinematographer Shri Rajarathnam working with the Informant was highlighted. The relevant extracts of the letter are as under:

> '*We would like to inform you that Sri Vinayan has started shooting a film in Cochin. No member of FEFKA is working in the film. ……. The most unfortunate fact is that FEFSI member Sri Rajaratnam is the cinematographer of the film. We had earlier talked to him and he had promised to that he would not do the film. But he hasn't kept his word. Also the camera belongs to Raviprasad and FEFSI technicians work as camera assistants.*

www.taxguru.in

We request you to immediately take appointment regarding Sri Vinayan's Film Chamber and the Producers Association of Kerala'

7.60 The contents of the aforesaid letter are self-explanatory. It is evident that OP-2 had directed its members not to work with the Informant. This letter also shows that along with restricting its own members, OP-2 was also trying to persuade other organisations to stop their respective members, from working with the Informant. It is also a fact on record that subsequent to this letter, Shri Raja Ratnam abandoned the Informant's film, '*Yakshiyum Njanum*' and returned the advance taken for the work. His letter dated 06th December, 2009, written to the producer of the film (M/s R.G. Production India Pvt. Ltd.) stated that his union SICA has told him not to work in the project. The said letter printed on the letter head of Shri Raja Ratnam, in verbatim, is reproduced below:

To,
The Producer,
R.G. Production India Pvt. Ltd.,

Respected Sir,

I (Mr. Raaja Ratnam) had assigned as a Cameraman for the film title "YAKSHIYUM NJANUM'' directed by Vinayan under the banner of RG Production India Pvt. Ltd. I had signed the project in the contract base Rs. 4,00,000/- and I received the advance payment Rs. 1,50,000/-.

Shooting started on 01.12.2009 is Kerala (Kochi) on 05.12.2009 my union 'SICA' had told that not to work in this project. So I consider and obey my union. I worked for 4 days and I am returning back the advance amount of Rs. 1,00,000/- as told by the producer. Due to all the reasons I am discontinuing this project.

Yours sincerely,
Sd/-

www.taxguru.in

Production Executive

Sd/-

06.12.2009

7.61 Based on the foregoing, it can be concluded that OP-2 has not only imposed ban on the Informant but has also influenced actors and technicians, through their respective associations, who worked or started working with the Informant. It is also evident that the said influence led to many such actors dissociating with the Informant.

7.62 The DG also relied upon the statements of certain key players in the Malayalam film industry, which confirm the ban imposed by OP-2. Shri Jayasurya, a renowned actor, stated that OP-2 along with OP-1 imposed a ban on its members against working with the Informant. As explained earlier, Shri Jayasurya confirmed that Shri B. Unnikrishnan and Shri Sibi Malayil of OP-2 called him in 2013 and advised him not to work in Informant's film. The Commission further notes that Shri Jayasurya admitted that he faced the threat of losing work from other directors if he worked with the Informant. During his cross-examination, OP-2 tried to establish that Shri Jayasurya had never received any circular calling for a boycott of the Informant. Such admission will not affect the veracity of his earlier statement. The Commission observes that OP-2 was not able to deny the communication between Shri Jayasurya and Shri Sibi Malayil of OP-2. Though Shri Jayasurya admitted that he has never seen any circular calling for a boycott against the Informant, he has categorically stated that the OP associations imposed the ban in an informal manner. In this regard, it may be highlighted that the Commission does not necessarily require a formal circular or written communication to reach a conclusion. The substance is more important than the form. The fact that a witness has confirmed having been verbally communicated about the ban imposed by OP-2 against the Informant is sufficient to draw a finding, especially when such witness has been cross-examined by OP-2. From his statement and

www.taxguru.in

cross-examination, it is clear that officials of OP-2 contacted Shri Jayasurya and asked him not to work with the Informant and thus, this evidence supports the case of the Informant.

7.63 The statements of Shri P A Haris, Shri Kannan Perumudiyoor and Shri Sudheer CV have already been discussed in detail while discussing the role of OP-1 in the alleged imposition of ban against the Informant. Without repetition, it is sufficient to say that the statements by these witnesses also clearly highlight the imposition of a ban against the Informant, which was followed by the members of OP-1 and OP-2. Shri P.A. Haris stated that though he never received any formal communication, he was aware of the ban imposed by OP-1/OP-2. During his cross examination, OP-2 tried to establish that Shri P. A. Haris was related to the Informant and thus, not reliable. However, the Commission is of the view that other evidence on record corroborates his statement. He also named certain renowned actors of the Malayalam film industry (namely, Shri Prithiviraj, Late Shri Thilakan and Ms. Sheena) who purportedly informed him about the ban against the Informant.

7.64 Shri Kannan Perumudiyoor stated that office bearers of OP-2 (namely, Shri Unnikrishanan and Shri Sibi Malayil) and OP-1 (Shri Edavela Babu) called him in 2014 to pressurize him into shelving a movie project proposed with the Informant. Actors and technicians who work in the Informant's projects are not given work by the members of OP-1 and OP-2. The Commission observes that during the statement and cross-examination of Shri Kannan Perumudiyoor, he was consistent with the regard to the calls from persons who introduced themselves as Shri Unnikrishnan and Shri Sibi Malayil. Further, the media reports also corroborated that there was a ban on the Informant and he decided that he should not work with him. Further, he also gave the historical background of the dispute like other deponents, which shows the veracity of his deposition.

www.taxguru.in

7.65 With regard to Shri Sudheer CV, the Commisison observes that he categorically stated that the office bearers of OP-2 and OP-1 called him and threatened him not to work with the Informant. It was revealed in his statement that Shri Unnikrishanan from OP-2 and Shri Edavela Babu from OP-1 have called him up. He further stated that these associations have asked their members not to work with the Informant. OP-2 in its reply stated that it is evident from his cross examination that Shri Sudheeer C. V. is an ally of the Informant and he also contested elections for the Producers' Association in 2014, with the Informant as part of a single panel. The Commission observes that Shri Sudheer CV's statement is relevant in context of the present case and throws light on how OP-1 and OP-2, through their office bearers, were ensuring that the ban on the Informant is enforced with full force. These OPs were given an opportunity to cross-examine Shri Sudheer CV. However, the deponent was consistent throughout his cross-examination. His statement and cross-examination, when corroborated with other evidences, prove that office bearer of OP-2 influenced and threatened the industry to not work with the Informant.

7.66 Further, the statement given by Shri Anil Kumbazha is relevant in ascertaining OP-2's involvement in the case at hand. The relevant excerpt from his statements:

> *"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 in 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. Vyasan, Manager of popular Malayalam film actor Sh.i Dileep, enquired from me whether I*

www.taxguru.in

was interested in working in films of super stars 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 pre condition that I should abstain from working with Sh. Vinayan." (emphasis supplied)

7.67 The above excerpt is self-explanatory. It is evident that OP-2, through its members, was ensuring that Shri Anil Kumbazha does not cooperate with the Informant. During cross-examination, OP-2 could not bring anything on record, which could shake the credibility of this deponent. Based on his statement, the Commission has no hesitation in inferring that OP-2 threatened Shri Anil Kumbazha to stop him from working with the Informant.

7.68 Another vital evidence for determining the liability of OP-2 is the statement given by Shri P Madhavan Nair (Madhu) wherein he confirmed that he had to give up a project of the Informant after Shri Unnikrishnan, Shri Siyad Koker and other members of OP-2 came to influence him not to work with the Informant. He was told that the members had taken a decision not to cooperate with the Informant. The relevant excerpts of his statement are reproduced below:

"Question 3. Have you acted in any movie of Shri Vinayan?
Ans. I have acted in little superman and two other movies made by Shri Vinayan. For a movie in 2011 the name whereof I do not remember, I accepted an advance of Rs 50000 from Shri Vinayan. However, about a dozen functionaries of various associations of the film industry came to my house and requested me to not to act in Shri Vinayan's movie. I remember only Shri B Unnikrishnan and Shri Siyad Koker among the visitors as representatives of some of the associations. Nobody from AMMA came.

www.taxguru.in

Question 4. Are you aware of a ban imposed by any of these associations on any artist working with Shri Vinayan?
Ans. I was not aware of any boycott until they came to my house to persuade me not to act in Shri Vinayan's movie. The representatives of the directors, producers and technicians association told me that they have taken a decision not to cooperate with Shri Vinayan. They said that if I do not comply with their decision it will be a big blow to them. So in their presence I called up Shri Vinayan and explained the situation whereupon Shri Vinayan was kind enough to take the advance back." (emphasis supplied)

7.69 The above statement highlights how the functionaries of OP-2 and its affiliate trade unions were trying to influence its members and non-members to dissuade them from working with the Informant. The Commission notes that OP-2 has not denied the fact that detailed discussion happened between Shri Unnikrishnan and Shri Madhu about the dispute with the Informant. Thus, corroborated with other evidences and statements, it is clear that Shri Madhu was influenced by OP-2 for dissociating with the Informant because of the existing ban/boycott.

7.70 At this juncture, the Commission also wishes to highlight that the DG provided OP-2 an opportunity to confront the statement of the Informant. However, *vide* letter dated 23rd September, 2015, OP-2 stated that statement of the Informant mostly refers to the names of other people and OP-1. The only reference to OP-2 occurred when he refers to the withdrawal of Shri Madhu from his film. However, DG noted that allegations levelled by the Informant are duly supported by the statement of Shri Madhu. Thus, OP-2 submitted in its reply to Investigation report that no opportunity of cross-examination of the Informant has been provided to OP-2. The allegations against OP-2 are merely hearsay and no

www.taxguru.in

documentary proof has been provided by the Informant to support his case. It is pertinent to point out that the video clip of interview of late Shri Thilakan, as submitted by the Informant, appears to be doctored and contains no allegations against OP-2. The Commission observes that though OP-2 did not cross examined the Informant, however when given opportunity OP-2 did not produce sufficient arguments or evidences to counter the statement and allegations of the Informant. Moreover, the allegations of the Informant are supported by the evidences collected by the DG during investigation and the statement recorded. Thus, the Commission is of the view OP-2 along with OP-1 influenced artists, actors, technicians, *etc*. and asked them to stop working with the Informant. Few of the officials and members of OP-2 personally contacted actors, producers, technicians and threatened them of adverse consequences. The allegations levelled by the Informant are hence, duly sustained by evidences and statements available on record.

7.71 With regard to the affidavit submitted by Shri Liberty Basheer dated 19th September, 2015, the Commission notes that it mentions about the call made by the General Secretary of OP-2 to Shri Liberty Basheer, an exhibitor, not to screen the movie of the Informant. It is noted that OP-2 could not produce sufficient evidences to counter the affidavit of the deponent Moreover, OP-2 did not seek the cross examination of the deponent, which leave no scope of any doubt on the veracity of the affidavit submitted by Shri Liberty Basheer. However, dealing with the liability of OP-1, the Commission has already noted that since Shri Liberty Basheer did not appear for the cross-examination, his affidavit may not be taken into consideration. Thus, for technical reasons, the Commission is of the view that this evidence may not be relied upon even for the purposes of determining OP-2's liability. Even otherwise, in view of plethora of evidence indicating the involvement of OP-2 in the ban imposed upon the Informant, the Commission is of the opinion that leaving this evidence will not lead to any insufficiency.

www.taxguru.in

7.72 Based on the foregoing, the Commission is of the view that the allegation against OP-2 has been established by the evidence available on record and thus, OP-2 is found to be in contravention of the provisions of Section 3(1) read with Section 3(3)(b) of the Act.

OP-3, OP-4 and OP-5

7.73 The Informant has contended that the role of OP-3, OP-4 and OP-5 was not investigated by the DG, despite them being arrayed as Opposite Parties. It is pertinent to note that while issuing directions under Section 26(1) of the Act, the Commission has observed that there is no *prima facie* violation attributed against these individuals. The Commission did not find enough material against these OPs at the preliminary stage of the proceedings. Further, during the course of investigation, DG has also not recorded any adverse findings against any of these OPs, in spite of holding other individuals/office-bearers of OP associations liable under Section 48 of the Act. The Commission, therefore, is not inclined to deliberate further against OP-3, OP-4 and OP-5, for want of incriminating material or evidence against these individuals to prove their involvement in the matter.

OP-6

7.74 The Commission at the outset observes that OP-6, in its response and submissions, has not been able to deny its involvement and complicity in the alleged anti-competitive conduct. Rather, it has tried to justify the same by shielding its conduct under the garb of legitimate trade union activities. The Commission has already dealt with this issue while deciding the preliminary issue of jurisdiction. Thus, there is no need to deliberate any further.

7.75 Having stated the aforesaid, the Commission will deal with each of the evidence relied upon by the DG, in light of the objections made by OP-6,

www.taxguru.in

to reach a conclusion regarding its complicity in the alleged anti-competitive conduct.

7.76 In this regard, the Commission observed that the minutes of the meeting held on 25th February, 2010 clearly states as follows:

> *"It was decided not to co-operate with the film 'DAM 999' in which Thilakan handles a role."*

7.77 These minutes, as per the DG, were circulated to the members *vide* letter dated 06th March, 2010. OP-6 has questioned this letter stating that the DG has not provided a copy of the said letter in the investigation report. In this regard, the Commission is of the view that existence of the minutes of the meetings is sufficient to demonstrate the ban imposed on Late Shri Thilakan. It is not necessary that the copy of the letter, *vide* which this decision was communicated by OP-6 to its members, is also placed on record. Further, the contention of OP-6, that the decision not to cooperate with Late Shri Thilakan was only suggestive in nature, is unacceptable in view of the clear tenor of the minutes. It was rather in the nature of a decision prescribing a complete prohibition and members were obliged to follow it.

7.78 Further, the minutes of OP-6's meeting held on 11th June, 2011 are corroborative of the aforesaid observation. The relevant excerpts of the said minutes are reproduced below:

> "*Then the issue concerning Ali Akbar was discussed.*
> *The General Secretary informed that Ali Akbar has been called to the committee as decided earlier. Ali Akbar expressed his stand in the meeting.*
> *He said that all what he did were correct and he is not ready to change his stand. He argued that he is not having the feeling of any guilt in giving Thilakan a role in his film 'Achan' and he did not think that the permission of the union was not needed*

www.taxguru.in

for that. Ali said that he did not consider the participation of Vinayan in the pooja ceremony of his film wrong and added that he had friendship with him and he had lent his camera to Vinayan. The meeting unanimously viewed his stand and decisions as a clear anti-organisational activity. Hence the following decisions were taken:

To suspend Ali Akbar from the primary membership of the union for three months. He should not give defamatory statements against the organization to the visual/print media during the period of suspension."

7.79 The aforesaid minutes clearly show that Shri Ali Akbar was suspended by OP-6 for giving a role to Shri Thilakan in his film and for inviting the Informant to the pooja ceremony of his film. It appears that since Late Shri Thilakan worked with the Informant, there was a ban on him as well by the Opposite Parties. Further, the fact that OP-6 decided to expel Shri Ali Akbar for not following its mandates further shows that OP-6's *diktats* were not only mandatory, but were also supported by sanctions.

7.80 Another evidence that adds credence to the conclusion with regard to the culpability of OP-6 is the circular dated 05th July, 2012. *Vide* this circular, the ban against Shri Salu K. George was communicated to its members by OP-6. It was decided not to cooperate with him. OP-6 in its reply submitted that Shri Salu K. George's actions were found to be against the interests of OP-2 and its affiliated trade unions, including OP-6, when he associated himself with a politically affiliated organisation. Mere participation in any political organization or politically affiliated organization does not appear to be the reason for non-cooperation.The Commission notes that Shri Salu K George was also facing disciplinary action initiated by OP-2 for working with the Informant. In its response, OP-6 has admitted that Shri Salu K. George's actions were found to be against the interests of OP-2 and its affiliated trade unions. Thus, if all the dots are connected, it becomes

www.taxguru.in

amply clear that the real reason behind issuing the circular against Shri Salu K. George was his association with the Informant. The Commission has no hesitation in holding that OP-6, through its conduct, has participated with its parent association OP-2 to perpetrate the anti-competitive conduct of limiting and restricting the supply of services in the Malayalam film industry in contravention of the provisions of Section 3(1) read with Section 3(3)(b) of the Act by imposing a ban on the Informant.

OP-7

7.81 With regard to the preliminary objections raised by OP-7, the Commission is of the view that most of them have already been dealt with, while dealing with the liability of OP-1 and OP-2 above. The same are avoided for the sake of brevity.

7.82 The specific evidences relied upon by the DG and the objections raised by OP-7 to each such evidence, are dealt with in the following paragraphs.

7.83 The minutes of OP-7's meeting held on 11th October, 2012 wherein it was decided to seek an explanation from Shri Rajan Philip and the letter dated 11th October, 2012 sent to him pursuant to such decision are extremely relevant. The relevant excerpts from the said minutes of the meeting and the letter dated 11th October, 2012 are reproduced below:

Minutes of Meeting of OP-7 held on 11th October, 2012

"The letter mentioning that Rajan Philip, who is not a member of FEFKA or any other unions affiliated to AIFEC had worked with Director Vinayan, was taken up for discussion. The committee decided to seek an explanation from Rajan Philip regarding this." (emphasis supplied)

Letter dated 11th October, 2012

www.taxguru.in

"You may be aware of the decision that FEFKA members should cooperate with only those who have membership in FEFKA or federations that have membership in the AIFEC. But it is seen that you have committed indiscipline by working as production controller for a film of Vinayan. Hence you may furnish your explanation in the above matter within 10 days of receipt of this notice." (emphasis supplied)

7.84 The aforesaid minutes of the meeting and the contents of the letter are self-explanatory and require no further deliberation. It is clear that there was a ban on the Informant and the members were strictly instructed not to work with the Informant. The statement of Shri Rajan Philip is also corroborative in this regard. The relevant portions of the same are reproduced below:

"Question 3. In how many movies you have assisted Sh Vinayan and why you have decided not to assist Sh Vinayan in the 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 Shri Vinayan in future. Even in recent past Shri 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." (emphasis supplied)

7.85 On a collective reading of the minutes of OP-7's meeting held on 11th October, 2012, the letter dated 11th October, 2012 sent by OP-7 to Shri Rajan Philip and the statement of Shri Rajan Philip, the Commission is convinced that there was a ban imposed upon the Informant by OP-2 and its affiliated associations, including OP-7 and OP-7 has been following the same by asking its members to dissociate from the Informant.

www.taxguru.in

7.86 The Commission also notes that the General Secretary of OP-7, Shri K Mohanan, admitted that none of the members of OP-7 were being allowed to work with the Informant. His statement is reproduced below at the sake of reiteration:

> *"Question 7. There is a letter dated 11.10.2012 seeking explanation from Shri Rajan Philip production executive for having worked with Shri Vinayan, which means that the union had asked its members not to work with Shri Vinayan?*
> *Ans. As per PE Union by-laws members can work with FEFKA members only. Thus Shri Philip was questioned for working with Shri Vinayan who is not a FEFKA member.*

7.87 Though the General Secretary of OP-7, Shri K Mohanan took a flimsy ground that the Informant was not a member of OP-2 and hence, other members of OP-7 were being asked not to be work with him, the Commission is of the view that even such a restriction is anti-competitive in nature. The Commission notes that OP-7 influenced its members for working with the Informant in 2012, which is only after the dispute between the Informant and associations arose. Before the dispute, Shri Philip worked in 25 movies with the Informant and no action against him was taken. It clearly depicts that OP-7 followed the decision taken by OP-2 and influenced its members as well as non-members not to work with the Informant.

7.88 OP-7's contention that the present matter is about ego clash between the Informant and the office bearers of OP associations does not help it in any way. Rather, the said contention itself amounts to an admission of motive, which might have led to OPs' anti-competitive decision of boycotting the Informant by ensuring that none of their members or even non-members work with him. Further, the admission by General Secretary of OP-7 that members are allowed to work only with the members, is sufficient for the

www.taxguru.in

Commission to infer that OP-7 was perpetrating the ban imposed upon the Informant.

7.89 Letter dated 02nd January, 2011 which was issued by OP-7, wherein it has been communicated that the members can contact the union if names of Meghna Raj, Guatham and Sphadikam George come up for consideration in any movie' is also relevant in this regard. The Commission observes that all these actors worked in the Informant's film '*Yakshiyum Njanum*' in the year 2009 and it cannot be a coincidence that OP-7 decided to take an action against them. Though no direct reason hase been given in this letter for special permission from OP-7 for above-mentioned three artists, when read in conjunction with other evidences on record, it is clear that these actors were led to face the adverse consequences for having worked with the Informant.

7.90 Thus, the aforesaid evidence clearly indicates the involvement of OP-7 in perpetrating the ban imposed by OP-2 against the Informant.

Conclusion

7.91 Based on the foregoing analysis of the evidence collected by the DG with respect to each of the Opposite Party *i.e.* OP-1, OP-2, OP-6 and OP-7, in light of the objections raised by them and the justifications offered by them, the Commission is of the firm view that these Opposite Parties have contravened the provisions of Section 3(1) read with Section 3(3)(b) of the Act. This case brings into sharp focus the conduct of these associations, who have used their clout to disrupt competition and fair-play in the market through their anti-competitive *diktats*. It is evident that OP-1 and OP-2 are mighty organisations in the Malayalam film industry, having renowned actors and other players as their members. Further, OP-2 is a registered trade union and a federation of 17 sub-unions of different types of technicians / workers employed in the Malayalam film industry, including

www.taxguru.in

OP-6 and OP-7. It appears that it is highly difficult, if not impossible, for any director/actor/producer *etc.* to operate and flourish in the Malayalam film industry without their concurrence. Despite there being no written declaration or agreement or official circular bearing signature of the office bearers of any of the associations (*viz.* OP-1, OP-2, OP-6 or OP-7) declaring that no one should co-operate with the Informant, it is apparent that the players operating in the industry knew that they have to follow the ban imposed upon the Informant. The fact that even renowned actors like Late Shri Thilakan, Shri P. Madhavana Nair, Shri Jayasurya *etc*. were also influenced or threatened by these associations, and were bound to abide by their anti-competitive *diktats*, speaks volumes about the anti-competitive effects which such associations are capable of having on the market.

7.92 OP-2, OP-6 and OP-7 have contended that since these organisations are not comprised of players engaged in similar trade, Section 3(3) of the Act cannot be invoked. The Commission is not impressed with this argument. The members of these 17 sub associations may be engaged at different levels, but within their own sub-associations, OP-6 and OP-7 comprise of players operating in similar trade. Further, OP-2 is admittedly the umbrella organisation and the main perpetrator behind the kind of anti-competitive *diktats* found to be in existence in this case. As visible from the evidence on record, OP-6 and OP-7 are closely connected with OP-2 and work as sub-unions of OP-2. Even if all the members of OP-2 are not similarly placed, it comprises of different sub-groups, which comprise of similarly placed players. Thus, the argument that all the players are engaged in different types of activities or providing different services will not exonerate OP-2 as an association when its decisions are implemented by various sub-groups which are made up of players who are similarly placed. It is apparent that sub-unions, including OP-6 and OP-7, follow the *diktats* issued and decisions taken by OP-2. In such a scenario, OP-2 cannot be exempted from the purview of the Act only because it comprise of different set of players operating in the film industry.

www.taxguru.in

7.93 Even otherwise, the Commission has clarified in its previous orders that the scope of Section 3 of the Act is much wider than the scope of agreements illustrated under Section 3(3) and 3(4) of the Act. Even if an agreement does not fall within the ambit of Section 3(3) or Section 3(4), the same can still be viewed under Section 3(1) of the Act, if the same has an appreciable adverse effect on competition (AAEC). As already stated in the preceding paragraphs, OP-2 is a mighty organisation in the Malayalam film industry consisting of 17 sub-unions engaged in different facets of filmmaking. Many of the witnesses have deposed that because of the ban imposed by OP-1 and OP-2, they have not been able to deal with the Informant or any non-member. Some of the witnesses even admitted that they had to withdraw their advance and disassociate from the Informant after initially agreeing to work with him. It is also revealed that the Informant, who is a renowned director and producer in the Malayalam film industry, has suffered because of the ban imposed by these OPs. The 17 constituent sub-unions of OP-2 are listed below:

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

www.taxguru.in

15. All Kerala Cine Costume Designers Union
16. Cine Audiographers Association of Kerala
17. FEFKA Music Directors Union

7.94 The aforesaid list of the constituent sub-unions takes away all doubt about the influence and control OP-2 has on the Malayalam film industry. It is apparently impossible for any player to operate in the Malayalam film industry without the blessings of OP-1, OP-2 and its affiliate sub-unions. At the cost of repetition, the fact that renowned actors withdrew from the Informant's films shows the extent of OP-2's control and influence on the Malayalam film industry. Thus, it can be safely concluded that any ban imposed by them or an anti-competitive decision taken by them will have an AAEC on the Malayalam film industry. In view thereof, even if the argument of OP-2, that it does not comprise of similarly placed players is accepted, the same will not exonerate it from liability under the provisions of the Act.

7.95 Based on the foregoing discussion, the Commission holds OP-1, OP-2, OP-6 and OP-7 guilty of contravention of the provisions of Section 3(1) read with Section 3(3)(b) of the Act.

Issue 3: Role of persons responsible, under Section 48 of the Act, for the conduct of OP-1, OP-2, OP-6 and OP-7

7.96 Having found OP-1, OP-2, OP-6 and OP-7 to be responsible for the contravention of the provisions of Section 3 of the Act, the next issue is to determine whether the office bearers of these associations, identified by the DG, are liable under the provisions of Section 48 of the Act.

7.97 Section 48(1) of the Act provides that where a person committing contravention of any of the provisions of this Act is a company (including a firm or an association of individuals), every person who, at the time when the contravention was committed, was in charge of, and was responsible

www.taxguru.in

for the conduct of the business of the company/firm/association, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. Further, the *proviso* to Section 48(1) of the Act entails that such person shall not be liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the occurrence of such contravention. Thus, Section 48(1) of the Act is triggered when the party in contravention is a company (including a firm or an association of individuals) and a person/individual officer/office bearer is found to be in-charge of, and responsible for the conduct of the business of the contravening company/firm/association. Once Section 48(1) of the Act is triggered, it is for such person/officer/office bearer to then prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention, in order to be absolved of liability under Section 48(1) of the Act.

7.98 Juxtaposed to Section 48(1), Section 48(2) of the Act attributes liability on the basis of the *de-facto* involvement of an officer. It states that *'[n]otwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly*'.

7.99 In light of the aforesaid provisions, the Commission will examine the evidence on record to ascertain the role of each of the office bearers of OP-

www.taxguru.in

1, OP-2, OP-6 and OP-7, identified by the DG, to be responsible for the anti-competitive conduct of their respective associations.

Shri Innocent (President of OP-1)

7.100 The DG has observed that Shri Innocent, the President of OP-1, was the overall in-charge of the affairs of OP-1. He has been found to be actively involved in the meetings of OP-1, minutes of which have been relied upon by the Commission to reach a conclusion against OP-1. Shri Innocent presided over the meeting dated 05th April, 2010, wherein the decision to expel Late Shri Thilakan was taken. In fact, this decision was communicated by Shri Innocent himself to the other members present at the meeting. Even the meeting dated 27th June, 2010 was presided over by Shri Innocent where Shri Captain Raju was called upon to explain why he acted in the Informant's film despite the instructions of OP-2. The counsel appearing for Shri Innocent reiterated the submissions made on behalf of OP-1 but for brevity, the same are not reproduced again.

7.101 The Commission notes that Shri Innocent held a position of utmost responsibility in OP-1. He was the President of the association and it is improbable that any decision could have been taken without his concurrence or active involvement. His active involvement in the meetings as cited above further supports this inference, which is sufficient to trigger the liability under Section 48(1) of the Act. Further, despite being given an opportunity, Shri Innocent did not present any material or evidence before the Commission to counter the inference of his involvement or to avoid liability under the Act. Thus, the Commission has no hesitation in holding Shri Innocent liable under Section 48(1) as well as Section 48(2) of the Act, for the contravention of Section 3 of the Act by OP-1.

Shri Edavela Babu (Secretary of OP-1)

www.taxguru.in

7.102 The DG has observed that Shri Edavela Babu has been actively running the day-to-day affairs of OP-1 and was instrumental in the anti-competitive decisions taken in the meetings of OP-1. In the meeting dated 27th June, 2010, Shri Edavela Babu called upon Shri Captain Raju to explain his side as to why he worked in the Informant's film despite contrary instructions by OP-2. His involvement in various meetings of OP-1 is apparent from the minutes. Further, Shri Kannan Perumudiyoor, in his statement, has categorically identified Shri Edavela Babu as the person, on OP-1's behalf, who told him not to work with the Informant otherwise the film will not be released and he may have to bear a financial loss. Further, another witness, Shri Sudheer CV submitted that he had planned to make a film with the Informant as director and gave an advance amount to him for the same in the year 2012. However, shortly thereafter he was called up by Shri Unnikrishnan of OP-2 and Shri Edavela Babu of OP-1, who told him not to work with the Informant, otherwise other artists and technicians will not cooperate in the making of the film.

7.103 The above evidence clearly illustrates the active involvement of Shri Edavela Babu in perpetrating the ban imposed against the Informant. Further, the Commission observes that various circulars of OP-1 have been issued under the signatures of Shri Edavela Babu as the Secretary of OP-1. Moreover, given his position in OP-1, it is not only improbable but impossible that OP-1 could have taken any anti-competitive decisions or carried out anti-competitive practices without his knowledge or involvement. It is apparent that Shri Edavela Babu does not merely hold the position of responsibility of the Secretary of OP-1, but he has gone further in personally propagating the anti-competitive conduct by threatening producers not to work with the Informant, as mentioned in statements of certain producers *viz.*, Sh. Kannan Perumudiyoor and Sh. Sudheer CV, as discussed above.

www.taxguru.in

7.104 The Commission, therefore, holds Shri Edavela Babu liable under Section 48(1) as well as Section 48(2) of the Act, for the contravention of Section 3 of the Act by OP-1.

Office bearers of OP-2, OP-6 and OP-7

7.105 Before individually dealing with the office bearers of OP-2, OP-6 and OP-7, the Commission observes that during the hearing dated 05th January 2017, some discrepancies were found in the submissions made by the parties, with regard to functionaries of OP-2, OP-6 and OP-7 during the period under investigation. The Commission, thus, directed the Informant as well as these OPs to file, on affidavit, the list of position holders of OP-2, OP-6 and OP-7 from May 2009 till date to decide the officer in charge of the affairs of these associations as the relevant time for the purposes of Section 48 of the Act. From the affidavits filed by these parties, the Commission observes that the that the list submitted by the Informant is similar to that filed by the OPs (OP-2, OP-6 and OP-7). Thus, there is no discrepancy at present with regard to the various key position holders of OP-2, OP-6 and OP-7.

7.106 Based on the evidence gathered by the DG during investigation and in light of the submissions and affidavits filed by the parties, the Commission has dealt with the role of each individual identified by the DG under Section 48 of the Act in the following paragraphs.

Shri Sibi Malayil, President of OP-2 and Shri Unnikrishnan, General Secretary of OP-2

7.107 Pursuant to the opportunity granted by the Commission, Shri Sibi Malayil and Shri Unnikrishnan have filed a common written response dated 28th November, 2016 to the investigation report and appeared before the Commission in the hearing held on 05th January, 2017 through a common counsel.

www.taxguru.in

7.108 With regard to OP-2's general council meeting held on 28th November, 2012, it has been stated that in the said meeting, the matter of actress Ms. Meghna Raj was discussed, who was introduced by the Informant in the Malayalam film industry. It was claimed that even after she worked with the Informant, she has worked with the members of OP-2 without any problem. Thus, the allegations regarding ban on the Informant by office bearers of OP-2 are baseless.

7.109 It is further submitted that the letter dated 3rd December, 2009 was written to AIFEC only to inform about unskilled technicians being employed by the Informant. It has been AIFEC's policy that its members work on a member to member basis, to ensure a effective platform for collective bargaining and dispute resolution.

7.110 To counter Shri Jayasurya's statement, it is stated that OP-2's office bearers never contacted Shri Jayasurya, who is an active member of OP-1, asking him not to work with the Informant. In his cross-examination, Shri Jayasurya admitted that he has never seen any circular calling for boycott of the Informant. He also mentioned that he was not sure whether he called Shri Unnikrishanan or Shri Unnikrishanan called him.

7.111 Shri Sibi Malayil and Shri Unnikrishnan further stated that the statement of Shri Kannan Perumudiyoor contradicts with his cross-examination, which was overlooked by the DG. From his cross-examination, it is evident that he never read about any alleged ban imposed by OP-2 upon the Informant. It is also pertinent to mention that despite the request from OP-2, DG did not obtain the CDRs of Shri Kannan Perumudiyoor, to corroborate whether Shri Unnikrishnan ever contacted Shri Kannan Perumudiyoar. Shri Sibi Malayil and Shri Unnikrishnan countered the statement of Shri Sudheer CV on account of him being an ally of the Informant. It was also highlighted that despite requests, the DG never called for CDRs of Shri Sudheer CV to verify any contact between him and the General Secretary

www.taxguru.in

of OP-2. Shri Unnikrishnan also stated that Shri Madhu (actor) admitted that he was not aware of any boycott of the Informant. It was further stated that the DG overlooked the admission of Shri Salu K George that he got a call from the General Secretary of OP-2 stating that there was no ban on him. With regard to Shri Liberty Basheer, it was stated that he was related to the Informant and therefore, his statement should not be relied upon.

7.112 Lastly, with regard to the statement of Shri P A Haris, Shri Sibi Malayil and Shri Unnikrishnan have submitted that his statement in hearsay in nature, which is inadmissible as an evidence as per the Evidence Act, 1872. The cross examination of PA Haris also revealed his professional relations with the Informant.

7.113 The Commission has considered the submissions made by Shri Sibi Malayil and Shri Unnikrishnan. It is observed that Shri Malayil, being the President, was the overall in-charge of the affairs of OP-2 during the period of contravention. The meetings relied upon by the Commission, (meeting dated 28th November, 2012 and report of the general council meeting dated 17th February, 2010) to find contravention against OP-2, were presided over by Shri Malayil. Further, the minutes of meetings, indicate Shri Malayil's active participation in those meetings. It is apparent that he has been instrumental in the decisions taken by OP-2. His active role in propagating the anti-competitive conduct of OP-2 has been indicated in the minutes of meeting dated 28th November, 2012 of General Council of OP-2. Similarly, Shri Unnikrishnan's involvement is also apparent from the minutes of these meetings. These meetings were attended by Shri Unnikrishnan in the capacity of OP-2's General Secretary. It is observed that he has been instrumental in the anti-competitive decisions taken in the meetings of OP-2 and as General Secretary of OP-2, he has signed various circulars/letters of OP-2 through which the anti-competitive decisions of OP-2 were communicated to the members/non-members.

www.taxguru.in

7.114 One of the vital evidence in this regard is the letter dated 03rd December, 2009 issued by OP-2 to AIFEC which has been signed by Shri Malayil as the President along with Shri unnikrishnan, the General Secretary of OP-2. This letter, as explained above, is regarding intimation by OP-2 to AIFEC about one of the cinematographer (Shri Rajaratnam) working with the Informant. In the letter, Shri Malayil and Shri Unnikrishnan have informed AIFEC that none of OP-2's members are working in the Informant's film and they have requested AIFEC to take action against its erring members. Further, the role of Shri Malayil in the anti-competitive conduct of OP-2 is also apparent from the statements of various witnesses. Shri V.M. Jayan (Jayasurya) confirmed that he received a call from Shri Sibi Malayil and Shri Unnikrishnan advising him not to work with the Informant, till the issues are resolved. Further, Shri Kannan Perumudiyoor also submitted that he had planned to make a film with the Informant as director in the year 2014 for which he also gave an advance amount of Rs 50000 to him. However, shortly thereafter, he received a call from Shri Unnikrishnan and Shri Malayil who told him not to work with the Informant, otherwise his film will not be released.

7.115 With regard to Shri Unnikrishnan, the Commission further observes that the involvement of Shri Unniksrishnan is clear from the statement of Shri Sudheer CV who submitted that he had planned to make a film with the Informant as the director and he gave an advance amount to him for the same in the year 2012. However, shortly thereafter, he was called up by Shri Unnikrishnan of OP-2 and Shri Edavela Babu of OP-1, who told him not to work with the Informant, otherwise other artists and technicians will not cooperate in the making of the film. Further, Shri Madhu, a renowned actor, also deposed that he accepted an advance of Rs 50000 from the Informant for a film in the year 2011. However, about a dozen functionaries of various associations of the film industry went to his house and requested him not to work in Informant's movie. He specifically took Shri Unnikrishnan's name amongst those who visited him.

www.taxguru.in

7.116 It is hence clear that the anti-competitive conduct of OP-2 was carried on with the knowledge and consent of Shri Sibi Malayil and Shri Unnikrishnan and they were actively involved in the said contravention. They are, thus, held liable under Section 48(2) of the Act, for the contravention of Section 3 of the Act by OP-2, apart from being liable under Section 48(1) of the Act because of the respective positions of responsibility held by them.

Shri Siddique, President of OP-6 and Shri Kamaluddin, General Secretary of OP-6

7.117 Shri Siddiqui and Shri Kamaluddin have also filed a common response dated 28th November, 2016 and were represented by a common counsel. The learned counsel appearing on their behalf has submitted that the actions taken by the office bearers of OP-6 are the collective decisions of OP-6 and no individual member can take an action without the stamp and authority of the general body of OP-6.

7.118 It is highlighted that Shri Kamaluddin was not the General Secretary of OP-6 during the period of investigation and that he assumed office, as the General Secretary of OP-6 only on 30th December, 2014. The learned counsel criticized the investigation conducted by the DG for being pre-determined and prejudicial in nature.

7.119 The Commission has considered their submissions and has taken note of the evidence gathered by the DG. It is noted that Shri Siddique was not the President of OP-6 at the relevant time during which the anti-competitive decisions were taken by OP-6. Further, the minutes of OP-6's meeting relied upon by the Commission, to reach a finding against OP-6, also do not highlight his complicity as such. In such a situation, in view of the insufficiency of evidence, the Commission does not find it appropriate to hold him liable under Section 48(1) of the Act. With regard to Shri

www.taxguru.in

Kamaluddin also, the Commisison observes that as per the affidavit filed by the Informant and OP-2/OP-6/OP-7, he was not the General Secretary during 2010 to 2014. Although presently he holds that charge and the response dated 12th October 2015, filed before the DG on behalf of OP-6, is signed under his name, the same cannot be held against him personally. He was merely submitting response with regard to his association. Further, the Circular dated 05th July, 2012, relied upon by the Commission, was signed by Shri Jose Thomas as the General Secretary. Thus, the Commission does not find it appropriate to hold him liable under the provisions of Section 48 of the Act.

7.120 The Commission observes that the meeting dated 25th February, 2010 was presided over by the then Vice President, Shri G.S. Vijayan and the meeting dated 11th June, 2011 was presided over by Shri Sibi Malayil, the then President of OP-6. Also, the minutes of these meetings and the Circular dated 05th July, 2012 indicates that Shri Jose Thomas was the General Secretary of OP-6 during the relevant time. The complicity of Shri Sibi Malayil in perpetrating the anti-competitive conduct has already been discussed above in his capacity as OP-2's President. With regard to Shri G.S. Vijayan and Shri Jose Thomas, the then Vice President and General Secretary of OP-6, the Commission is of the view that since neither of them have been provided an opportunity to offer their comments/objections during the proceedings in the matter with regard to their involvement, it will be inappropriate to give any finding regarding their involvement in the matter.

Shri Girish Vaikom, President of OP-7 and Shri K. Mohanan, General Secretary of OP-7

7.121 Shri Girish Vaikom and Shri K. Mohanan filed a common written response dated 28th November, 2016 and were represented by a common counsel in the hearing held on 05th January, 2017. It has been submitted that the actions taken by the office bearers of OP-7 are the collective decisions of

www.taxguru.in

OP-7 and no individual member can take an action without the stamp and authority of the general body of OP-7. It is further highlighted that Shri Girish Vaikom was not the President of OP-7 during the relevant period of investigation and he assumed office only on 01st May, 2013. Further, Shri K. Mohanan submitted that all the members of OP-7 have the right to accept or refuse an offer to work in a movie. It is further submitted that it is AIFEC's policy that its members work on a member to member basis; the primary reason to bring such a policy is to ensure an effective platform for collective bargaining.

7.122 With regard to Shri Girish Vaikom, the DG observed that he is liable owing to his position (President) in OP-7. With regard to Shri K. Mohanan, the DG noted that he has been actively running the affairs of OP7 and has been instrumental in the anti-competitive decisions taken in the meetings of OP7 and all circulars / letters including those found to be propagating anti-competitive conduct of the union are under the signature of Sh. K. Mohanan.

7.123 The Commission, however, is not convinced with the findings of the DG with regard to Shri Girish Vaikom. The meeting dated 11th October, 2012 was presided over by Shri Aroma Mohan. This meeting and the letter dated 11th October, 2012, which was sent pursuant to this meeting, were mainly relied upon by the Commission to reach a finding against OP-7. Thus, the Commission does not find it appropriate to record a finding against Shri Girish Vaikom under Section 48(1) of the Act as he did not hold the position of the President of OP-7 during the meetings which have been relied upon by the Commission to find a contravention against OP-7. Further, in the absence of any evidence with regard to his *de-facto* involvement in the anti-competitive conduct of OP-7, the Commission finds it inappropriate to give any finding against him under Section 48(2) of the Act as well.

www.taxguru.in

7.124 With regard to Shri K. Mohanan, it is clear from the minutes of meetings, letters and circulars that he was the General Secretary of OP-7at the relevant time period. Thus, owing to the position held by him, the Commission finds him liable under Section 48(1) of the Act. Further, Letter dated 02nd January, 2011, which was issued by OP-7, was signed by Shri K. Mohanan. Through this letter, the members of OP-7 were informed that they have to contact the union (*i.e.* OP-7), if names of Meghna Raj, Guatham and Sphadikam George come up for consideration in any movie'. As observed earlier, all these actors worked in Informant's film '*Yakshiyum Njanum*' in the year 2009 and it can be inferred that OP-7 decided to take an action against them for this reason only. It is further noted that letter dated 11th October, 2012 sent by OP-7 to Shri Rajan Phillip seeking an explanation for working with the Informant is signed by Shri K. Mohanan as the General Secretary of OP-7.

7.125 Thus, the Commission finds Shri K. Mohanan responsible under Section 48(1) and Section 48(2) of the Act, for the conduct of OP-7 being in complicit and actively involved in its affairs.

ORDER

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 anti-competitive 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 (Sectretary, 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-

www.taxguru.in

competitive in terms of the provisions of Section 3 of the Act in the preceding paras of the order.

10. With regard to penalty under Section 27 of the Act, the Commission is of the considered view that the said anti-competitive conduct is required to be penalized to cause deterrence in future among the erring entities engaged in such activities. It has been seen that the present OP-1, OP-2, OP-6, OP-7 and possibly other association in the Malayalam film industry, including other sub-unions of OP-2 at different levels in the film industry, indulge in such anti-competitive activities. It is apparent how these associations affect the free and fair competition in the market and create hurdles for those who do not mend their ways to work as per the whims and fancies of these associations. Their mightiness is also reflected by the fact that even renowned actors and players in the industry are not able to ignore or disregard their demands. Accordingly, it is required that penalty be imposed upon them which will be adequate enough to create deterrence.

11. Having regard to all these factors, the Commission feels it appropriate to impose a penalty on OP-1 at the rate of 5% of its average income based on the financial statements filed by it as follows:

OP-1 (Income in Rupees)

Year	Income during the Year (in Rupees)
2011-12	5868423.47
2012-13	6620660.71
2013-14	11514809.59
Total	24003893.77
Average	8001297.923
5% of Average Income	400065

12. Resultantly, a penalty of Rs. 4,00,065/- (Rupees Four Lacs and Sixty Five) is hereby imposed on OP-1.

13. With regard to OP-2, the Commission feels it appropriate to impose a penalty at the rate of 5% of its average income based on the financial statements filed by it as follows:

www.taxguru.in

OP-2 (Income in Rupees)

Year	Income during the Year (in Rupees)
2011-12	2257976.00
2012-13	702784.15
2013-14	2174866.00
Total	5135626.15
Average	1711875.383
5% of Average Income	85594

14. Resultantly, a penalty of Rs. 85,594/- (Rupees Eighty Five Thousand Five Hundred and Ninety Four) is hereby imposed on OP-2.

15. In case of OP-6 and OP-7, the Commission notes that they are affiliated associations of OP-2 which were only executing the decisions taken by OP-2. The participation of the functionaries of OP-2, namely Shri Sibi Malayil (President of OP-2) and Shri B. Unnikrishnan (General Secretary of OP-2) in the Meetings of OP-6 is indicative of the fact that OP-6 was only following the dictates of OP-2. Similarly, OP-7 is also affiliated to OP-2 and the decisions of OP-2 were followed during the meetings of OP-7. Thus, considering this as a mitigating factor, the Commission is of the view that a penalty at the rate of 5% of its average income be imposed based on the financial statements filed by OP-6 and OP-7 as follows:

OP-6 and OP-7 (Income in Rupees)

Year	OP-6 (Income in Rupees)	OP-7 (Income in Rupees)
2011-12	5451131.70	671721
2012-13	7896870.8	1508647
2013-14	9833249.3	1219270
Total	23181251.8	3399638
Average	7727083.93	1133212.67
5% of Average Income	386354	56661

16. Resultantly, a penalty of Rs. 3,86,354/- (Rupees Three Lacs Eighty Six Thousand Three Hundred and Fifty Four) and Rs. 56,661/- (Rupees Fifty

www.taxguru.in

Six Thousand Six Hundred and Sixty One) is hereby imposed upon OP-6 and OP-7, respectively.

17. With regard to penalty on office bearers of OP-1, OP-2and OP-7, the Commission feels it appropriate to impose a penalty at the rate of 3% of their income based on the income statements (ITRs) filed by them as follows:

Office Bearers of OP-1, OP-2, OP-6 and OP-7 (Income in Rupees)

Year	Innocent (President of OP-1)	Edavela Babu (Secretary of OP-1)	Sibi Malayil (President of OP-2)	B. Unnikrishnan (General Secretary of OP-2)	K. Mohanan (General Secretary of OP-7)
2012-13	-	-	1658479	-	984259
2013-14	-	-	2144581	1047853	851443
2014-15	1600817	708624	2832581	453109	937978
2015-16	1831019	565579	-	1701637	-
Total	3431836	1274203	6635641	3202599	2773680
Average	1715918	637101	2211880	1067533	924560
3% of Average Income	51478	19113	66356	32026	27737

18. Resultantly, a penalty of Rs. 51478/- (Rupees Fifty One Thousand Four Hundred and Seventy Eight) is imposed upon Shri Innocent, a penalty of Rs. 19113/- (Rupees Nineteen Thousand One Hundred and Thirteen) is imposed upon Shri Edavela Babu, a penalty of Rs. 66356/- (Rupees Sixty Six Thousand Three Hundred and Fifty Six) is imposed upon Shri Sibi Malayil, a penalty of Rs. 32026/- (Rupees Thirty Two Thousand and Twenty Six) is imposed upon Shri B. Unnikrishnan and a penalty of Rs. 27737/- (Rupees Twenty Seven Thousand Seven Hundred and Thirty Seven) is imposed upon Shri K. Mohanan.

19. The aforesaid parties are directed to deposit the amount of penalty within 60 days of the receipt of this order.

www.taxguru.in

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

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(U. C. Nahta)
Member

Sd/-
(Justice G. P. Mittal)
Member

New Delhi
Dated: 24/03/2017

www.taxguru.in