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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 4845/2017 & CM No.20910/2017**

INOX LEISURE LIMITED

..... Petitioner

Through: Mr Rajiv Nayar, Sr. Advocate with
Mr Susmit Pushkar, Mr Abhijeet
Swaroop and Mr Anchit Oswal,
Advocates.

versus

**COMPETITION COMMISSION OF INDIA
AND ANR**

..... Respondent

Through: Mr Amit Sibal, Sr. Advocate with Mr
Naval Chopra, Mr Aashish Gupta, Mr
Aditya Mukherjee, Advocates for R-
2.

**CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU**

**ORDER
09.11.2017**

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VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, praying as under:-

“(a) issue an appropriate direction, order or writ in the nature of certiorari calling for the records of the case bearing Combination Registration No. C-2015 / 07/ 288 from the Respondent and thereafter quashing the impugned Order dated 2 May 2017 bearing Combination Registration

No. C-2015 / 07/ 288/ 6446 passed by the Respondent;
and

- (b) issue an appropriate direction, order or writ in the nature of mandamus directing the Respondent to conduct an investigation under the Act in regard to the breach of commitments by PVR Ltd. of the Order dated 4 May 2016 passed by CCI in Combination Registration No. C-2015/07/288 and other actions; and / or”

2. The petitioner is engaged in the business of exhibition of cinematographic films and is, apparently, aggrieved by the alleged anti-competitive conduct of M/s PVR Ltd. (hereafter ‘PVR’). It is the petitioner’s case that PVR has violated the undertaking provided to the Competition Commission of India (hereafter ‘the CCI’), which formed the part of the order dated 04.05.2016 passed by the CCI. The petitioner’s complaint that PVR had violated the order dated 04.05.2016 was rejected by the CCI, by an order dated 02.05.2017 (hereafter ‘the impugned order’). Aggrieved by the same the petitioner has filed the present petition.

3. Briefly stated, the facts necessary to address the controversy are as under:

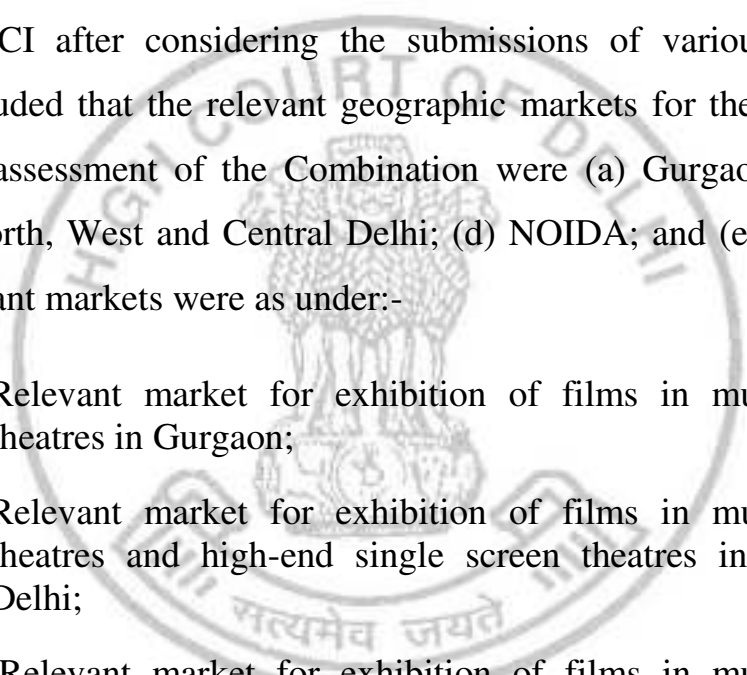
3.1 PVR is a listed company and is also engaged in the business of developing, operating and managing cinema theatres across India. Undisputedly, PVR has a significant market share of the business of exhibiting films in theatres.

3.2 PVR entered into an agreement dated 09.06.2015 to acquire the ‘film exhibition business’ of M/s DLF Utilities Ltd. The said acquisition would

significantly increase PVR's share in the business of exhibition of films. Accordingly, it issued a notice under Section 6 of the Competition Act, 2002 (hereafter 'the Act') seeking approval of its agreement to acquire the film exhibition business of DLF Utilities Ltd (the Combination).

3.3 After receipt of the aforesaid notice, CCI conducted an enquiry, which also entailed seeking responses from other entities (including the petitioner) engaged in the said business.

3.4 The CCI after considering the submissions of various concerned parties concluded that the relevant geographic markets for the purposes of competition assessment of the Combination were (a) Gurgaon; (b) South Delhi; (c) North, West and Central Delhi; (d) NOIDA; and (e) Chandigarh and the relevant markets were as under:-

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- "i. Relevant market for exhibition of films in multiplex theatres in Gurgaon;
 - ii. Relevant market for exhibition of films in multiplex theatres and high-end single screen theatres in South Delhi;
 - iii. Relevant market for exhibition of films in multiplex theatres and high-end single screen theatres in North, West & Central Delhi;
 - iv. Relevant market for exhibition of films in multiplex theatres in NOIDA; and
 - v. Relevant market for exhibition of films in multiplex theatres in Chandigarh."

3.5 The CCI also concluded that the Combination was likely to have an

appreciable adverse effect on competition in the relevant markets for (i) exhibition of films in multiplex theatres in Noida; (ii) exhibition of films in multiplex theatres in Gurgaon; and (iii) for exhibition of films in multiplex theatres in high end single screen theatres in South Delhi.

3.6 After considering the same, the CCI, by its order dated 04.05.2016, approved the proposed Combination under Section 31(7) of the Act subject to certain conditions. The operative part of the said order is set out below:-

“127. Pursuant to the above, the Commission hereby approves the Proposed Combination under sub-section (7) of Section 31 of the Act, subject to the Parties complying with commitments in relation to (a) relevant market for exhibition of films in multiplex theatres in NOIDA; (b) relevant market for exhibition of films in multiplex theatres in Gurgaon; (c) Co-operation Agreement; and (d) Non-Compete Agreement as detailed Annexure A and carrying out the Modification to the Proposed Combination as detailed in Annexure B.

128. It is however to be noted, that the Commission is granting the present approval, under sub-section (7) of Section 31 of the Act, and that such approval is being granted, pursuant to the underlying competition assessment, based upon the information/details provided by the Parties, in the notice given under subsection (2) of Section 6 of the Act. This approval should not be construed as immunity in any manner from subsequent proceedings before the Commission for violations of other provisions of the act. It is incumbent upon the Parties to ensure that this *ex-ante* approval does not lead to ex-post violation of the provisions of the Act.”

4. The petitioner alleges that PVR has violated its commitment pertaining to exhibition of films in multiplex theatres in the relevant market in NOIDA and in Gurgaon. This allegation is based on the fact that PVR has entered into letters of intents (LOI) / deals in respect of properties located in NOIDA and in Gurgaon for acquiring further screens in those areas.

5. The petitioner filed an application dated 09.11.2016 before the CCI alleging that PVR had violated its commitments forming a part of the CCI's order dated 04.05.2016. The petitioner alleged that with the PVR acquiring further properties/screens, its market concentration would increase and accordingly, requested the CCI to carry out a thorough investigation and to direct PVR to terminate the letters of intent (LOI's) in respect of sites located in NOIDA and Gurgaon, which were specified in the application.

6. The petitioner's complaint (application) that PVR had violated its commitments, was rejected by the impugned order; the CCI concluded that PVR had not breached the commitments given in the order dated 04.05.2016 passed under Section 31(7) of the Act.

7. The limited controversy that falls for consideration of this Court in this petition is whether the decision of the CCI that PVR had not violated its undertaking is erroneous and unsustainable.

8. Before proceeding to address the aforesaid controversy, it would be relevant to set out the relevant commitments made by PVR, which formed the part of the order dated 04.05.2016. The relevant extract of Annexure A to the said order is set out below:-

“A. Commitments pertaining to Relevant Market for Exhibition of films in Multiplex Theatres in NOIDA

The Commission accepts the commitments offered by the Acquirer regarding the relevant market for exhibition of films in multiplex theatres in NOIDA subject to the Acquire complying with the following:

- i. The Acquirer shall, within thirty (30) days from the date of issue of the Order ("Effective Date"), submit a letter confirming that it has terminated its lease agreement dated 31st March, 2015, entered into with International Recreational Parks (P) Ltd for development of a multiplex in Garden Galleria, along with a copy of the termination notice issued by the Acquirer. The said letter will be co-signed by the authorized signatory of International Recreational Parks (P) Ltd. The Parties shall not consummate the Proposed Combination till this requirement is complied with.
 - a. For a period of three (3) years from the date on which the Proposed Combination, as modified by the Order is consummated (Date of Completion), the Acquirer shall, within fifteen (15) days of end of each financial year, submit a certificate issued by its statutory auditor to the effect that,

During the preceding financial year, PVR has not expanded its presence in business of exhibition of films through multiplex theatres in NOIDA, i.e., it did not open through organic expansion or takeover through inorganic acquisition, any new screens (either single screen or multiplex).

- ii. For a period of five (5) years from the date of completion of the Proposed Combination, the

Acquirer shall, within fifteen (15) days of end of each financial year, submit a certificate issued by its statutory auditor to the effect that,

- a. During the preceding financial year, PVR has not acquired any direct or indirect influence or ownership or interest in Garden Galleria.
- b. PVR is in compliance with the commitments offered by it to the Commission regarding the relevant market for exhibition of films in multiplex theatres in NOIDA.

B. Commitments pertaining to Relevant Market for Exhibition of films in Multiplex theatres in Gurgaon

The Commission accepts the commitments offered by the Acquirer regarding the relevant market for exhibition of films in multiplex theatres in Gurgaon subject to the Acquirer complying with the following:

- i. The Acquirer shall, within thirty (30) days from the Effective Date, submit a letter confirming that it has terminated its agreement dated 18 September 2015, entered into with Reach Promoters Private Limited for the development of a multiplex in Airia Mall, along with a copy of the termination notice issued by the Acquirer. The said letter will be co-signed by the authorized signatory of Reach Promoters Private Limited. The Parties shall not consummate the Proposed Combination till this requirement is complied with.
- ii. For a period of three (3) years from the Date of Completion of the Proposed Combination, the Acquirer shall, within fifteen (15) days of end of each financial year, submit a certificate issued by its statutory auditor to the effect that:

- a. During the preceding financial year, PVR has not expanded its presence in business of exhibition of films in multiplex theatres in Gurgaon, i.e., it did not open through organic expansion or takeover through inorganic acquisition, any new screens (either single screen or multiplex).
- iii. For a period of five (5) years from the Date of Completion of the Proposed Combination, the Acquirer shall, within fifteen (15) days of end of each financial year, submit a certificate issued by its statutory auditor to the effect that:
 - a. During the preceding financial year, PVR has not acquired any direct or indirect influence or ownership or interest in Airia Mall.
 - b. PVR is in compliance with the commitments offered by it to the Commission regarding the relevant market for exhibition of films in multiplex theatres in Gurgaon.”

9. Mr Nayar, learned Senior Counsel appearing for the petitioner had contended that admittedly PVR had entered into transactions to acquire multiplex screens at various sites located in Gurgaon and NOIDA and, therefore, there could be no doubt that PVR had breached its undertaking. He also drew the attention of this Court to the order wherein the CCI had assessed the market share of various entities engaged in the film exhibition business. He submitted that the action of PVR in acquiring further sites would materially reduce the market share of other entities in the relevant markets and, therefore, there could be no dispute that PVR had acted contrary to the CCI's order dated 04.05.2016.

10. Lastly, he submitted that the petitioner had also pointed out that PVR had entered into an arrangement with another entity, namely, MMR and this itself would have an appreciable adverse effect on the competition.

11. There is no dispute that PVR has entered into MOU's / letters of intents in respect of screens located at various sites in NOIDA, Greater Noida and Gurgaon. However, PVR claims that it has not violated its commitment as it has not opened any new screen and has no intention of violating any of its commitments.

12. In view of the above, the controversy revolves around to the question whether PVR had committed/undertaken not to enter into LOI's for opening new screens in future.

13. Plainly, the answer to the above must be in negative. A plain reading of the commitment offered by PVR indicates that it agreed to furnish a certificate by its statutory auditor to the effect that it had not "*expanded its presence in business of exhibition of films through multiplex theatres in Noida (Gurgaon), i.e., it did not open through organic expansion or takeover through inorganic acquisition, any new screens (either single screens or multiplex)*".

14. There is no ambiguity that PVR's commitment was not to open new screens in the relevant markets for a period of three years from the date on which the Combination as modified by the CCI's order is consummated; PVR's commitment did not extend to refraining from entering into any transactions from opening the screens after the period of three years, as specified in the undertaking/order, was over. The contention that PVR's

stand would run contrary to the CCI's assessment of PVR's market share as indicated in its order dated 04.05.2016 is not material as the only question to be examined is whether PVR had contravened the order or had fallen short of performing its commitments.

15. The contention that the acts of PVR amounts to effectively overreaching the CCI's order dated 04.05.2016 is also unpersuasive. The embargo of not opening new screens for a period of three years in NOIDA and Gurgaon is by itself a significant restriction and this Court finds no reason to interpret the CCI's order or PVR's commitment in an expansive manner.

16. More importantly, any violation of the CCI's order passed under section 31 of the Act has penal consequences. In terms of section 42(2) of the Act any person who fails to comply with the orders or directions of the CCI is punishable by fine which may extend to rupees one lakh for each day subject to maximum of rupees ten crores. In terms of section 42(3) of the Act failure to pay the fine imposed is liable to be visited with punishment of imprisonment for a term which may extend to a period of three years. It is well settled that a statute imposing penalty must be strictly construed, and therefore there is little scope of expanding the scope of commitments that are not expressly clear from the plain language of Annexure A to the order dated 04.05.2016.

17. In *Tolaram vs State of Bombay : AIR 1954 SC 496*, the Supreme Court had held that

“it is a well settled rule of construction of penal statutes

that if two possible and reasonable constructions can be put upon a penal provision, the Court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the Court to stretch the meaning of an expression used by the Legislature in order to carry out the intention of the Legislature.”

Thus unless, the court is satisfied that the offence is within the plain meaning of the words used, no penal action can be taken against the person accused of such violation.

18. In view of the above, this Court finds no infirmity with the impugned order rejecting the petitioner's contention that PVR had violated its commitment.

19. It is clarified that this Court has not examined the issue whether further developments as reported by the petitioner, that is, PVR entering into deals/transactions and arrangements with other entities including MMR falls foul of the Act as the same does not arise for consideration in this petition. It would be open for the petitioner to approach the CCI in this regard. Needless to state that if any information or complaint is made to the CCI, the same would be considered in accordance with law.

20. The petition and pending application are dismissed. No order as to costs.

VIBHU BAKHRU, J

NOVEMBER 09, 2017
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