NATIONAL COMPANY LAW APPELLATE TRIBUNAL. PRINCIPAL BENCH,

NEW DELHI

Competition Appeal (AT) No. 61 of 2022

IN THE MATTER OF:

CONSUMER UNITY & TRUST SOCIETY

D-217, Bhaskar Marg, Bani Park,
Jaipur, 302 016, **...Appellant**
Rajasthan

Versus

COMPETITION COMMISSION OF INDIA

Through, Secretary,
09th Floor, Office Block, Tower -1,
Kidwai Nagar (East), Opposite Ring Road,
New Delhi: 110023, India

Presently at 09th floor, Office Block Tower-1,
Kidwai Nagar East, Opposite Ring Road,
New Delhi : 110023, India **...Respondent No. 1**

PVR LIMITED

7th Floor Lotus Grandeur Building,
Veera Desai Road Opposite Gundecha Symphony,
Andheri (West) Mumbai,
Maharashtra – 400053 **...Respondent No. 2**

INOX LEISURE LIMITED

5th Floor, Viraj Towers,
Next to Andheri Flyover,
Western Express Highway, **...Respondent No. 3**
Andheri (East), Mumbai – 400 093

Present:

For Appellant	**:**	Mr. Sajan Poovayya, Sr. Advocate with Ms. Eesha Bakshi, Advocates
For Respondent	**:**	Mr. Rajshekhar Rao, Sr. Adv. with Mr. Manika Brar, Mr. Ritwik Bhattacharya, Mr. Nishant Doshi, Mr. Arjun K., Yamini, Advocates for R2 Mr. Samar Bansal, Mr. VedantKapur, Mr. Shreeyash U. Lalit, Mr. Abhinav Aggarwal, Advocates for CCI

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is directed against the order dated 13.09.2022 passed by the Competition Commission of India (in short 'Commission') by which an application filed by the Appellant i.e Consumer Unity & Trust Society (in short 'CUTS') hereinafter referred to as 'Informant', under Section 19(1)(a) of the Competition Act, 2002 (in short 'Act'), against PVR Limited (in short 'PVR') and INOX Leisure Limited (in short 'Inox') for the alleged contravention of the provisions of Section 3(1) of the Act, has been dismissed.

2. In brief, the Informant is stated to be a global, independent, non-profit, public policy research, advocacy and capacity building organisation. PVR is stated to be a public listed company engaged in the business of exhibition, distribution and production of movies and also earns revenue from in-house advertisement, sale of food and beverages and Inox is stated to be a public listed company engaged in the business of operating and managing multiplexes and cinema theatres in India.

3. According to the Informant, both PVR and Inox have entered into an anti-competitive agreement which is likely to cause an appreciable adverse effect on competition (AAEC) in the relevant market for the exhibition of films in multiplex theatres and high-end single screen theatres in different cities in India. At the time, when the information was filed by the Informant, the Informant had the information that both PVR and Inox are going to be merged as a combined entity and is going to be called 'PVR INOX Ltd.'.

4. However, on 16.02.2023, during the pendency of this appeal, the Respondents informed this Tribunal that by order of the NCLT, Mumbai Bench, PVR and Inox have already been merged, therefore, this Court directed that this fact should be brought on record by filing an appropriate affidavit. Accordingly, an affidavit dated 23.02.2023, on behalf of the PVR, was filed alongwith the order dated 12.01.2023 of the NCLT, Mumbai Bench, Court-III passed in C.P. (CAA)/207/MB/2022 with C.A. (CAA)/201/MB/2022 by which the scheme of merger by absorption of the Inox with PVR was sanctioned and the appointed date of the scheme was fixed mutually as 1st January, 2023.

5. According to the Informant, the transaction is exempted from the notification requirement under Section 5 of the Act as it qualifies for the *de minimus* exemption. It is also the case of the Informant that because of the Covid-19 pandemic, turnover of Inox was less than Rs. 1000 Crores in FY 2020-21, otherwise, would have mandatorily be notified for approval from the Commission.

6. The case set up by the Appellant is that the combined entity after merger would be the largest player in the film exhibition industry in India, which would be operating 1546 screens in 341 commercial properties across 109 cities of India, resulting in significant market share in most relevant markets which will lead to consolidation of the film exhibition industry. Leaving it with four players, namely, PVR Inox Ltd., Cinepolis, Miraj Cinemas and Carnival Cinemas. The Informant has shown its concern that the merger is likely to cause an AAEC in India as it will lead to reduction in consumer choice, adverse impact on consumers in terms of high prices and

deterioration in food and service quality, prevention of other cinema theatres from accessing movies from distributors and advertising content, high bargaining power of the combined entity that will likely to lead to onerous terms for distributors, especially for comparatively low-budget films and vendors (including food and beverage suppliers) and a situation that real estate owners/developers will have no option but to accept one sided terms of the combined entity because of their high bargaining power. Therefore, the Informant prayed before the Commission to initiate an investigation in the allegations made and impose suitable penalty as required. It is further prayed that PVR Inox be directed to suitably amend the proposed agreement so as not to cause an AAEC in India and ensure that the combined entity does not abuse its dominant position.

7. The Commission observed that the Informant has filed the information on apprehension on account of the proposed merger and that it will be dominant in terms of Section 4 of the Act on account of being owner of 1646 multiplex screens out of 3200 multiplex screens approximately in India. The Commission has observed that even for attracting Section 3(1) of the Act there has to be an agreement between two or more parties and the agreement should be of the nature which may result in an AAEC or a likelihood thereof but no case was found to be made out merely on an apprehension that the agreement may give rise to a conduct in the future which would thereafter cause AAEC in the market. It also noticed that the Informant has not specifically alleged contravention of Section 4 of the Act rather the information contains averments that after PVR and Inox become a single entity then it would be dominant entity in future. It was observed that

not only entity has not come into being because at by that time the merger was in offing but also dominance per se is not found to be anti-competitive and only conduct would fall under Section 4 of the Act. Therefore, the Commission did not agree with the contention of the Appellant observing that this kind of assessment is ex-ante which can be undertaken by the Commission in appropriate cases when legal requirement for such examination would attract and it further observed that the conduct of an anti-competitive nature is missing in the case for an analysis from the standpoint of provisions of Section 3 or 4 of the Act. However, it also observed that post facto if any matter of abusive conduct under the provisions of the Act is brought or comes to the notice of the Commission, the same may be examined at that stage in terms of the provisions of the Act but it did not found any prima facie case either under Section 3 and 4 of the Act and thus the information filed by the Informant was closed in terms of Section 26(2) of the Act.

8. Counsel for the Appellant has vehemently argued that the Commission has committed an error on the ground that actual conduct is not being shown whereas the word used in Section 3(1) of the Act is 'likely' which mean something which is probable or something which might well happen as it conveys the sense of probability as distinguished from a mere possibility.

9. It is further submitted that the Competition Act is modelled on the competition law in the European Union i.e., Treaty on the Functioning of the European Union (TFEU) and Section 3 of the Act and Article 101 of the

TFEU are pari materia and comparable as they both deal with anti-competitive agreements.

10. It is further submitted that while Section 3(1) of the Act uses the term 'likely to cause', Article 101(1) uses the term 'may affect' when it refers to the agreement it restricts competition. In support of the submission, he has referred to a decision of the Hon'ble Supreme Court in the case of *Competition Commission of India Vs. Steel Authority of India Limited & Anr., (2010) 10 SCC 744.*

11. On the other hand, Counsels for the Respondents have submitted that the information filed under Section 19(1)(a) of the Act for contravention of Section 3(1) of the Act is not per se maintainable. According to the Respondents, Section 3 deals with anti-competitive agreements which means that two independent parties which collaborate in some manner but still maintain their separate identities despite the agreement to coordinate and even after the agreement is performed whereas in the agreement between the parties which has been sanctioned as a scheme by the Tribunal is a combination which means the original two parties would loose their separate identity and one composite entity is to emerge as a result of the transaction then it is governed by Section 6 of the Act. It is further submitted that even there is a different criteria for evaluation for an application for contravention of Section 3 and 6 of the Act because Section 19(3) of the Act lays down the criteria for violation of Section 3, whereas Section 20(4) lays down the same for Section 6 of the Act. It is also submitted that there are different inquiry procedure provided in the Act as for the purpose of examining violations of Section 3, the procedure in

Section 26 which is initiated either by a complaint from a third party, government body or suo motu by the CCI, but does not impose any positive obligation on the parties to the agreement to give prior intimation to the Commission in any manner and the matter is thereafter investigated by the DG. On the other hand, the procedure for merger is provided in Section 6 and 29 which is different from the procedure laid down for inquiry to be made for breach of Section 3 because Section 6(2) contemplates a mandatory prior notification procedure by the parties to the proposed combination within a specified period. It further prescribes certain statutory forms to be submitted by the parties to notifiable combinations and even prescribes a Green Channel procedure for expedited approvals for certain categories of combinations which is conspicuous by its absence in Section 3 of the Act. It is further submitted that Section 6(2A) sets out an outer limit of 210 days for approval of the combination once notified failing which there is a deemed approval but no such outer limit is provided for deemed approval exists in a Section 3. It is further submitted that statutory exemption from inquiry and different remedies in both the scenario but in no case the merger of the PVR with Inox as a one entity would fall within the definition of Section 3 of the Act. It is further submitted that the Judgment relied upon by the Appellant is not applicable to the facts and even the European Law do not support it.

12. We have heard Counsel for the parties and perused the record.

13. Most important aspect of the matter is that the Informant has filed the information invoking Section 19(1)(a) of the Act alleging contravention of

Section 3(1) of the Act. It is therefore necessary to refer to Section 19(1)(a) of the Act and Section 3(1) of the Act. Which are reproduced as under:-

> "**19. Inquiry into certain agreements and dominant position of enterprise** –
> (1) The Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of Section 3 or sub-section (1) of Section 4 either on its own motion or on –
> (a) receipt of any information, in such manner and accompanied by such fee as may be determined by regulation, from any person, consumer or their association or trade association; or
>
> **3. Anti Competitive Agreements.** – (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

14. Section 3(1) deals with the anti competitive agreements whereas Section 5 of the Act talks of combination which says that "the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises"

15. There is no dispute to the fact that the scheme to amalgamate and consolidate any business of Inox with PVR has been sanctioned by the order dated 12.01.2023 by the Tribunal with the specific orders that "the scheme of merger by absorption is hereby sanctioned, and the appointed date of the scheme is fixed mutually as 1st January, 2023".

16. It is apparent that both PVR and Inox have now become a single entity after merger and the effect of a combination as defined under Section 5 of the Act which is regulated by Section 6 of the Act has nothing to do with Section 3(1) of the Act which deals with the anti-competitive agreements in which both the entities retain their separate identities even after the

agreement is entered into unlike the merger of two entities which takes effect of a combination in terms of Section 5 of the Act. It has come in the order itself that since the merger of PVR and Inox was not falling within definition of Section 5 because of the issue of threshold, therefore, the information under Section 19(1)(a) has been filed by the Appellant alleging the contravention of Section 3(1) of the Act despite knowing that both entities have become one and do not fall within the definition of Section 3(1) of the Act. Thus, in view of this matter, the application by itself is not in accordance with law for the purpose of initiating action under Section 19(1)(a) of the Act.

17. In so far as, the arguments of the Appellant that the word used in Section 3(1) is likely to cause an AAEC in India is concerned, that is also of no consequence as the violation of Section 3(1) is not made out because it is not a case where the Respondents have entered into anti-competitive agreement rather they have merged with each other and fall within the definition of combination.

18. As regards, Section 4 of the Act is concerned, it is pertaining to abuse of dominant position for which the Commission has rightly observed that even if the proposed transaction is concluded (merger), dominance per se is not anti-competitive and it is only the conduct which falls within the provisions of Section 4 of the Act. The Commission has also further observed that post facto, if any matter of abusive conduct under the provisions of the Act is brought, or comes to the notice of the Commission, the same may be examined at that stage in terms of the provision of the Act. Which means a liberty has been given to the Appellant or the same even be exercised suo

motu by the Commission if it comes to its notice that the dominant position has been abused but until and unless there is any such allegation which prima facie prove the conduct, the action under Section 4 could not also be taken. Since, the issue before us is very clear with the interpretation or the provision of the Act and there is hardly any requirement to go into the nitty gritty of the Judgment relied upon by the Appellants much less the decision of the European union which has nothing to do with the merit of the present case.

19. In view of the aforesaid facts and circumstances, we do not find any merit in the present appeal and the same is hereby dismissed. No costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

New Delhi

10th August, 2023.

Sheetal