

COMPETITION COMMISSION OF INDIA**[Case No. UTPE 99/2009]****May 23rd, 2011*****Consumers Guidance Society******Informant***

- 1. *Hindustan Coca Cola Beverages Pvt. Ltd.***
- 2. *INOX Leisure Pvt. Ltd.***

Opposite Parties**FINAL ORDER**

Consequent upon the repeal of Monopolies and Restrictive Trade Practices Act, the present case has been received by the Competition Commission of India (hereinafter referred to as "the Commission") from the erstwhile Monopolies and Restrictive Trade Practices Commission (hereinafter referred to as "the MRTPC") on transfer under Section 66(6) of the Competition Act, 2002 (hereinafter referred to as "the Act"). The complaint in the present case was filed before the MRTPC on 01.10.2008 by the Consumer Guidance Society, Vijayawada (hereinafter referred to as "informant") against Hindustan Coca Cola Beverages Pvt. Ltd (hereinafter referred to as "HCCBPL") and INOX Leisure Private Limited (hereinafter referred to as "ILPL") for their alleged restrictive and unfair trade practices.

- 2 As per the information, the informant, Consumers' Guidance Society, is a registered voluntary consumers' organization formed by a group of professionals of Vijaywada, with the objective of espousing the cause of consumers' welfare and justice in the state of Andhra Pradesh. The opposite party, HCCBPL, is a registered company and a leading producer of bottled water and soft drinks in India as well as across the globe and opposite party, ILPL, is a company which operates many multiplexes across various locations in India.
- 3 The allegations raised by the informant in the present case, in brief , are as under:

- 3.1. The opposite parties, HCCBPL and the ILPL have entered into an agreement and in pursuance of that agreement HCCBPL has been supplying its products which, inter-alia, include the package drinking water and soft drinks at an inflated and exorbitant price which is in sharp variance with normal price of same products in open market. Thus, the HCCBPL and ILPL are indulging into discriminatory pricing policy by selling products with same quality, quantity, standard and package at different prices to different buyers' i.e. higher prices from the buyers at ILPL complex and lower prices from the buyers in open market.
- 3.2. The HCCBPL has been supplying 500 ml water bottles and 400 ml orange pulp soft drinks to ILPL with printed Maximum Retail price (hereinafter referred to as "MRP") of Rs. 20.00 and Rs. 40.00 respectively, whereas, it is supplying the same products to other sellers in the prevailing market with printed MRP of Rs. 10.00 and Rs. 25.00 respectively. The HCCBPL has been printing inflated MRP on the products supplied to ILPL so as to deceive and induce the consumers to believe that these products are being sold at the MRP fixed by the manufacturer.
- 3.3. It has been alleged that the trade practices adopted by HCCBPL imposes unjustified cost on the consumers and at the same time it also stifles competition as ILPL is selling the product of HCCBPL only. Thus, the consumers' right to have access to a variety of goods at a competitive price is infringed by the vertical restrictive trade agreement entered into between HCCBPL and ILPL.
4. After receiving the complaint the MRTPC sought comments from the HCCBPL and ILPL and after examining the complaint as well as the replies filed by the opposite parties the MRTPC vide its order dated 13.05.2009 directed the Director General (Investigation and Registration) to investigate the matter and submit preliminary investigation report. Before the preliminary investigation report could be submitted the MRTP Act was repealed and the case was transferred to the Commission in terms of section 66(6) of the Act.
5. The matter was considered by the Commission in its meeting held on 18.06.2010. After examining the entire material on record the Commission formed an opinion under section 26(1) of the Act that there exists a *prima facie* case and referred the matter to the DG for investigation into the matter.
6. After conducting the investigation the DG submitted his report to the Commission on 25.11.2010.

7 **Findings of the DG Report**

The gist of the DG findings is as follows:

- 7.1 For the purpose of investigation the DGT has identified two issues, (i) Whether HCCBPL and ILPL are in a dominant position in their respective relevant market and whether any of the parties has abused its dominant position in the relevant market; (ii) Whether HCCBPL and ILPL have entered into any agreement in contravention of section 3 of the Act.
- 7.2 During the course of investigation into the matter the DG has considered the information and replies submitted by the opposite parties. The information on packaging and pricing details under which the products are sold by the HCCBPL to ILPL and ILPL to the customers were also taken into consideration. Besides, the certified copies of the annual audited accounts of HCCBPL, copies of agreements between HCCBPL and ILPL for the last three years, details of restrictions imposed by police department on bringing outside food material inside the complex of ILPL and other conditions of sale at the said places were also examined. The DG also recorded the statements of Shri Devdas Baliga, National Legal Counsel, HCCBPL and Shri Alok Tandon, Chief Executive Officer, ILPL.
- 7.3 The DG has delineated two relevant markets for the purpose of investigation in the matter, one relevant market for HCCBPL and other for ILPL. The relevant market for ILPL has been defined as “market of retail sale of bottled water and cold drinks inside the multiplexes of ILPL”, whereas the relevant market for the HCCBPL has been taken as “the market of supply of bottled water and cold drinks to the owners of closed market of multiplexes and to other commercial enterprises where it is treated as the preferred beverage supplier”.
- 7.4 After analysing the factors set out in section 19(4) of the Act the DG has come to the conclusion that HCCBPL enjoys complete dominance as a supplier of the relevant product to ILPL by virtue of its agreement dated 01.09.2010 with ILPL which allows it unfettered rights to supply the bottled water and other cold drinks within the multiplexes of ILPL. Further, the agreement confers the status of preferred beverage provider on HCCBPL which forecloses the competition by not allowing the competitors of HCCBPL to enter the relevant market.

- 7.5 Further, the DG has concluded that ILPL enjoys complete dominance in the relevant market of sale of beverages within its multiplexes for the following reasons :-
- (i) The ILPL does not allow any outside vendor to sell bottled water and soft drinks inside its premises.
 - (ii) It enjoys 100% market share in sale of bottled water and cold drinks within its premises as there is entry barrier.
 - (iii) On the basis of its size and resources within its premises it enjoys complete economic power and commercial advantage over its competitors and consumers are completely depend on it.
 - (iv) Because of exclusive supply agreement with HCCBPL for supply of bottled water and other soft drinks, the consumers have no countervailing power within the premises of ILPL.
- 7.6 The DG has come to the conclusion that the Act of HCCBPL in selling relevant products to ILPL at higher MRP is clear cut case of abuse of its dominant position by directly or indirectly imposing unfair and discriminatory pricing in sale of goods and therefore contravenes the provisions of section 4(2)(a)(ii) of the Act.
- 7.7 As per DG report since HCCBPL has been conferred a status of 'preferred beverage provider' by virtue of its agreement with ILPL, it results in complete foreclosure of competition due to marketing entry barrier for the competitors. Therefore, HCCBPL has violated the provisions of section 4(2)(c) of the Act by indulging into a practice which has resulted in denial of market access to its competitors in the relevant market.
- 7.8 The DG has also noted that by giving 'preferred beverage supplier' status to HCCBPL, ILPL has imposed restriction on the marketing of products of other beverage suppliers in its premises and has thus imposed unfair and discriminatory conditions in purchase of goods in violation of provision of section 4(2)(a)(i) of the Act.
- 7.9 The DG has also come to the conclusion that by selling bottled beverages to the cine goers at higher MRP, ILPL is abusing its dominant position by imposing unfair and discriminatory pricing in the sale of goods within its premises in violation of section 4(2)(a)(ii) of the Act.

- 7.10 As per the findings of the DG, ILPL has also denied access of relevant market to the competitors in violation of section 4(2) (c) of the Act by conferring 'preferred beverage provider' status to the HCCBPL in the agreement.
- 7.11 The DG has lastly concluded that both HCCBPL and ILPL have violated the provisions of section 3(4)(b) and 3(4)(d) read with section 3(1) of the Act by entering into anti-competitive agreement dated 01.09.2010 which has completely foreclosed the competition within the relevant production market of bottled water and other soft drinks within the premises of multiplexes owned by ILPL by choking the entry for competitors.
8. The Commission considered the investigation report submitted by DG and decided to send a copy of the investigation report to both the parties. The Commission also directed the informant and the opposite parties to appear for oral hearing, if they so desire. HCCBPL submitted its reply on 21/02/2011. ILPL submitted its reply on 13.01.2011 and additional reply on 21.02.2011. The informant also submitted its comments on 12.01.2011. The counsel for opposite parties also made oral submissions on 22.02.2011 and 23.02.2011.

9. Reply of HCCBPL to DG Report

The submissions made by HCCBPL in its reply, in brief, are as follows :

- 9.1 It has been submitted by HCCBPL that the DG has based his findings that HCCBPL has contravened the provisions of section 3 and 4 of the Act essentially on the basis of erroneous premises that, firstly, by entering into an exclusive supply contract with ILPL it has knocked out competition from ILPL multiplexes and secondly, HCCBPL has declared different MRPs for the same products sold at ILPL multiplexes when compared to retail market.
- 9.2 The HCCBPL has submitted that DG findings are untenable and there is no case in the matter. The DG has ignored the fact that the agreements between HCCBPL and ILPL are of short duration in nature and can be terminated at will at any time before expiry of the agreement period. Therefore, such agreements are incapable of foreclosing competition and causing appreciable adverse effect on competition (AAEC) in India.

- 9.3 On “exclusive supply agreements” it has been submitted that such agreements cannot be treated as anti-competitive per se unless it is proved that it results in AAEC in India. The DG findings on this issue are without any cogent basis and are liable to be rejected.
- 9.4 It has been contended that the mere act of declaring differential MRPs cannot constitute an abuse in terms of section 4 of the Competition Act, and it is common business practice all over the world and declaration of MRP in agreement with ILPL or with any other entities is legally permissible. In fact declaration of MRP is irrelevant for consideration of breach of competition law because retailers such as ILPL are free to charge any price up to or equal to the MRP and HCCBPL has no control over the same.
- 9.5 It has been submitted that the DG has failed to provide any objective or rational basis and has reached erroneous conclusions as to i) definition of relevant market, ii) position of HCCBPL in that relevant market, and iii) effect on competition because of the alleged practices of HCCBPL.
- 9.6 It has also been contended that there is intense competition in the beverage industry throughout India and a large number of competitors in the market are vigorously competing with each other for sale of their respective products. In respect of certain outlets buyers enter into agreement with the suppliers on ‘preferred beverage supplier’ or even ‘exclusive supply agreement’. But there is intense competition amongst suppliers for obtaining such contracts so as to sell their products. Every competitor has full opportunity to negotiate and obtain such contracts. It is evident from the fact that a large competitor of HCCBPL (PEPSICO) has entered into similar agreements with a large number of multiplexes having about 600 screens as against the multiplexes where HCCBPL has been able to enter into such agreements relating to only about 214 screens in India. These facts clearly show that neither there can be any AAEC in India as a result of alleged agreement between HCCBPL and ILPL, nor any refusal to deal or denial of market access.
- 9.7 Further, the fact that competing suppliers are also able to obtain such contracts even at locations where supplies were being made earlier by other competitors clearly shows free and intense competition amongst competing suppliers for obtaining contracts for supply of products to multiplexes.
- 9.8 It has been submitted that the supplies of products made to multiplexes constitutes even less than 0.3% of the total supplies of such products sold in market. In such

situation, supplies of only an insignificantly small quantity of the products to the multiplexes, cannot, in any event, result in AAEC in India.

9.9 If the reasoning of DG regarding exclusive supply agreement is accepted, it could mean that every agreement for exclusive supply would be hit by section 4(2)(c) of the Act, which is not the intention of the Act.

10. **Reply of ILPL to DG Report**

The gist of submissions made by ILPL in its reply dated 13.01.2011 is as under:

10.1 The ILPL has submitted that it should be removed as a party to the proceedings because there is *per se* no complaint against it. It is only referred to as one of the parties to an agreement with HCCBPL in the case.

10.2 The DG while delineating the relevant market has not taken into account all the essential facts and circumstances. Apart from the bottled water, ILPL also offers free drinking water at its multiplexes. DG has not been able to shed any light on how and which competition is adversely affected.

10.3 It has been submitted that the conclusion drawn by DG is inherently flawed as he has overlooked the basic facts that multiplexes compete with each other in the business of exhibition of motion picture films and are not competitors in the food and beverage industry.

10.4 It has been further submitted by ILPL that:

- i) The agreement between it and HCCBPL is only for a short period of four months between two independent entities on the commercial terms that are feasible to both and the conclusion drawn by DG that such agreement forecloses the competition or causing AAEC is without any sound reasoning.
- ii) The DG has failed to consider the dynamics and reality of business in multiplex industry. There are approximately 10,000 screens in India out of which 9,100 are single screens. The sale of bottled water, beverages as well as food items within multiplexes are ancillary part of their main business, i.e, exhibition of

motion picture films and sale of these products in multiplexes cannot be compared to the sale of these products in retail outlets.

- iii) The DG has failed to take into account the significant overhead costs incurred by multiplex operators in offering a range of food and beverage products to enhance the overall movie-going experience of patrons.
 - iv) The ILPL also offers various non-package products such as fountain beverages, tea, coffee and food items such as popcorns, snacks etc. but DG while delineating the relevant product market has excluded these items without any justification.
 - v) The assessment of relevant geographical market by DG is absolutely misconceived and flawed and it should constitute all single screen theatres and multiplexes in a particular territory. If the geographical limits are restricted to ILPL's multiplexes alone, no competition analysis can be plausibly undertaken.
 - vi) If the reasoning underlining the findings of DG is accepted, it would lead to absurd conclusion that every grocery store, retail outlet operating in any part of India will be dominant within the physical area of the store / outlet.
 - vii) The primary focus of ILPL is to screen films which constitutes approximately 73% of the total revenue generated by its multiplexes. The sale of beverages and food only constitute 20% of its total revenue.
- 10.5 It has been submitted by ILPL that it has not violated provisions of either section 3 or section 4 of the Act.

11. **Comments of the Informant to DG Report**

11.1 In its comments dated 05.01.2011 the informant has submitted that:

- i) It is in complete agreement with the DG findings about the contravention of the Act by HCCBPL and ILPL.

- ii) The admitted agreements between HCCBPL and ILPL establishes that these agreements are anti-competitive and adversely affecting the choice of consumer.
- iii) The DG investigation should cover the issue of pilferage to the treasury of the government because of the said agreements.
- iv) The MRTP Commission in case no. RTP 17/1981 has held that differential pricing is a restrictive trade practice.
- v) The contention of HCCBPL that sale of its product under two MRP system is legally correct, has no substance.
- vi) The HCCBPL has been continuing with its anti-competitive trade practices of selling its product under two MRP by entering into vertical agreements with entities like ILPL.

12. Decision

- 12.1 The Commission has carefully gone through the material submitted by the informant, the Report of the DG, the replies filed and oral submissions made by the HCCBPL and the ILPL before the Commission and all other relevant materials and evidence available on record.
- 12.2 It is noted that the activities being performed by the HCCBPL and the ILPL is covered in the definition of 'enterprise' under section 2 (h) of the Act.
- 12.3 From the facts and circumstances of the case, the issue which emerges for consideration before the Commission is whether the HCCBPL and the ILPL have violated the provisions of section 3 and/or section 4 of the Act.
- 12.4 On perusal of the record it seems that whole story in this matter is woven around the 'exclusive supply agreement' entered between HCCBPL and ILPL. Copy of impugned agreement has been placed at Annexure-10 of the DG report. Perusal of this agreement discloses that it was entered between HCCBPL and ILPL on 01.09.2010 and it expires on December 31, 2010 unless renewed by both the parties. It stipulates that during the currency of agreement, HCCBPL will act as 'preferred beverage provider' for

supply of non-alcoholic beverages to ILPL owned multiplex cinema theatres located in various cities in India. Further, under the agreement both HCCBPL and ILPL have been given right to terminate it in the event of breach of any terms and conditions by other party.

- 12.5 It is also noted that HCCBPL in its reply has submitted that there is intense competition between suppliers of non-alcoholic beverages to compete for obtaining such contract with multiplexes and to buttress this argument they have pointed out that many multiplex owners like Adlabs/Big Cinemas, Cinemax and Waves Cinema have been switching over their suppliers periodically. HCCBPL has also submitted that it has been able to enter into such agreements with multiplexes having only 214 screens in India whereas its competitor PEPSICO has entered into similar agreements with a large number of multiplexes having about 600 screens.
- 12.6 It is also noted that ILPL has submitted that there are around 10000 screens in India out of which 9100 are single screen theatres and ILPL owns / operates 38 multiplexes in India.
- 12.7 In view of the facts and circumstances of the present case and aforesaid uncontroverted submissions of the opposite parties, the findings of DG that HCCBPL and ILPL enjoy dominant positions in their respective relevant markets appear to be based on flawed delineation of relevant market. Considering the fact that there are about 900 multi-screen theatres out of which HCCBPL is having exclusive supply agreement with multiplexes having 214 screens and PEPSICO with multiplexes having 600 screens, the relevant geographical market cannot be confined to the closed market inside the premises of multiplexes owned by ILPL who is only operating 38 multiplexes in India. If the relevant geographical market is taken as defined by the DG it would certainly lead to illogical conclusion and in that case every retail outlet, restaurant or store having exclusive supply agreement with a supplier will be deemed dominant within the boundaries of its premises and at the same time because of such agreements supplier will also be deemed dominant within the closed premises of that retailer. All this leads to the irresistible conclusion that there is not sufficient material on record to establish that either HCCBPL or ILPL is enjoying dominant position in the relevant market, properly so defined.
- 12.8 Furthermore, in the present case the impugned agreement, which is for a short period of four months and that too is terminable by either party by giving 30 days notice, cannot be said to have resulted in denial of market access to the competitors. Even

otherwise, the fact that multiplexes are switching over their supplier on periodical basis goes against the conclusion that competition is getting foreclosed.

12.9 In the light of above analysis it is evident that no contravention of section 4 of the Act can be found to have been established against HCCBPL and ILPL.

12.10 Similarly the conclusion of the DG that both the parties have contravened section 3(4) of the Act by entering into 'exclusive supply agreement' cannot be accepted in the absence of proper assessment of AAEC in the present case by the DG. If the reasoning advanced by the DG in his report is accepted then every exclusive supply agreement will become per se anti-competitive. It has been brought by the HCCBPL in its reply that the supply of products made to multiplexes constitute less than 0.3% of the total supply of such products sold in India. Taking into account the volume of business of total beverages market in India, there can be hardly any appreciable adverse effect on competition because of exclusive supply agreement between HCCBPL and ILPL.

12.11 In the light of foregoing discussion, the Commission is of the opinion that no violation of provisions of section 3 and 4 of the Act has been established against HCCBPL and ILPL in the present case. Thus, the conclusion drawn by the DG in his investigation is erroneous and cannot be accepted. In view of the above findings the matter relating to this information is disposed off accordingly and the proceedings are closed forthwith.

13. Secretary is directed to inform the parties accordingly.

Member (G)

Member (R)

Member (P)

Member (GG)

Member (AG)

Member (T)

Chairman