

**COMPETITION COMMISSION OF INDIA**

**Case No. UTPE-99/2009 & RTPE-16/2009**

**ORDER UNDER SECTION 27 OF THE COMPETITION ACT**

**Date of Order: 23<sup>rd</sup> May, 2011**

**RTPE-16/2009**

**INFORMANT :-** Cine Prakashakula Viniyoga Darula Sangham, a registered society, at Flat No. B-002, Prasad Enclave, Barkatpura, Hyderabad-020, rep. by its president Shri G.L. Narasimha Rao

**RESPONDENTS:-** Hindustan Coca Cola Beverages Pvt. Ltd., 13, Moula Ali, Hyderabad-40, Rep. by its General Manager.

**UTPE-99/2009**

**INFORMANT :-** Consumer Guidance Society, 58-1-26, Flat No. 1, Veerapaneni Plaza, Patamata, Vijayawada – 520 010.

**RESPONDENTS:-** 1) Hindustan Coca Cola Beverages Pvt. Ltd. 13, Abul Fazal Road, Bengali market, New Delhi – 110001.

2) Inox Leisure Limited. 5th Floor, Viraj Towers (next to Andheri fly-over), Western Express Hi-way, Andheri East, Mumbai-400093.

As per R. Prasad (Dissenting)

**Facts of the Case**

1. Consequent upon the repeal of the MRTP Act, 1969, two separate complaints in Case No. UTPE 99/2009 and in case No. RTPE 16/2009 were received on transfer by the Competition Commission of India (hereinafter referred to as the `Commission') from the Office of Director General of Investigation & Registration (hereinafter referred to as

`DGIR') under section 66(6) of the Competition Act, 2002 (hereinafter referred to as the `Act'). These complaints were filed by the Consumer Guidance Society, Vijaywada and Cine Prakashakula Viniyoga Darula Sangham against Hindustan Coca Cola Beverages Private Limited, (hereinafter referred to as HCCBPL).

2. It has been alleged in the above complaints that HCCBPL has been impudently indulging in blatant restrictive and unfair trade practices contrary to the explicit provisions in MRTP Act, 1969 and Consumer Protection Act, 1986. The complainant alleged that the said company has entered into an understanding with INOX Leisure Private Limited (hereinafter referred to as ILL). In pursuance of the said agreement, HCCBPL has been supplying some of its products which include, inter-alia, the packaged drinking water and soft drinks at an inflated and exorbitant price and in sharp variance with ordinary price of these products in any prevailing market and thereby the company is wantonly enforcing two pricing for the same products of same quality, quantity, standard and package.
3. The complainant has further alleged that HCCBPL has been supplying 500 ml water bottles and 400 ml orange pulp soft drinks at a M.R.P. of Rs.20/- and Rs.40/- respectively, though these products are available in any prevailing market at Rs.10/- and 25/- respectively. HCCBPL printed these MRPs on these products in order to deceive and induce the consumers to believe that the products are being sold at the M.R.P. fixed by the manufacturer. HCCBPL has been indulging in the same

practice with impurity in order to satiate its profiteering spree and to the prejudice of public at large. The trade practices adopted by HCCBPL result in the manipulation, distortion of the terms and conditions pertaining to the supply of its products in order to impose unjustified, unwarranted, unpalatable costs on the consumers. Further, it also stifles competition as the ILL is selling the products of HCCBPL only and to that extent the consumer's right to choice is violated. Thus, the consumers' right to have access to a variety of goods at a competitive price is infringed by the company by enforcing its vertical restrictive trade agreement with INOX Leisure Limited. Thus HCCBPL is enforcing two different prices for the same products of the same quality, quantity, standard, and package without any difference of whatsoever. The complainant, therefore, alleged that the trade practices adopted by HCCBPL tantamount to Restrictive Trade Practice and Unfair Trade Practice as defined under MRTP Act, 1969.

4. The complainant has alleged that respondent Hindustan Coca Cola Beverages Pvt. Ltd. has entered into an agreement with M/s INOX Leisure Private Limited (ILL) which operates multiplexes and screens in various cities. In pursuance of the agreement, HCCBPL has been supplying beverages at an inflated and exorbitant price in comparison to the price of these products in the ordinary market. Therefore, HCCBPL is enforcing two different prices for the identical products. Such an agreement between HCCBPL and ILL is anti-competitive as ILL is selling products of HCCBPL only no choice to the consumer is available inside the multiplex and theatres.

5. The Competition Commission of India, on the receipt of the above complaint, initiated proceedings under section 26(1) of the Competition Act and after duly considering the facts of the matter found that there existed a prima-facie case from competition point of view and directed the Director General to cause an investigation into the matter.

**Findings of the DG (Inv.)**

6. On receipt of the order u/s 26(1) of the Act, a detailed investigation was made by the DG on all the allegations mentioned in the complaint by collecting information, evidences from the informant, respondents and the material available in public domain. Statement of representatives of both the aforesaid companies were also recorded and placed on record. The DG has also examined the allegations in the light of the conduct of HCCBPL and ILL, and the contents of the supply agreement between them in the relevant market. The report has also looked into following key questions relevant to the facts & circumstances of the case:
- i. Whether HCCBPL and ILL enjoyed dominant position in their respective relevant market in terms of Explanation (a) of Section 4(2) read with Section 19(4) of the Act?
  - ii. Whether HCCBPL and ILL abused their position of dominance by way of imposing unfair or discriminatory conditions of price on sale of goods; indulgence in practice of denying market access in their relevant market under section 4(2) of the Act?
  - iii. Whether the execution of the supply agreement between HCCBPL and ILL was exclusive in nature and whether it refused

to deal with other parties in contravention to Section 3(4) of the Competition Act, 2002?

7. The investigation after considering the essential element of interchangeability, characteristics, price of the product and the demand substitutability, has concluded that the relevant product market in both the cases was the 'Bottled water & Cold drinks' as per definition of Section 2(t) read with Section 19(7) of the Act. As far as the determination of relevant geographical market is concerned, the investigation after considering all the relevant factors in Section 19(6) and the peculiar nature of the trade, has held that relevant geographical market in this case is closed market inside the premises of multiplexes owned by ILL as per definition 2(s) of the Act. However, it was noted by the DG that there are two different enterprises namely, HCCBPL and ILL as defined under Section 2(h) of the Act operate on two different subset of the relevant geographical market. Thus the relevant markets have been separately delineated in respect of both the enterprises keeping in view their nature of operations and trade. The DG has therefore concluded that the relevant market for ILL is 'retail sale of bottled water & cold drinks inside the multiplexes'. While on the other hand, the relevant market for HCCBPL is the market for supply of bottled water & cold drinks to the owners of close markets of multiplexes and other commercial enterprises where it is treated as a preferred beverage supplier.
8. The DG, thereafter, in its report has examined in detail all factors of

dominance contained in Section 19(4) applicable to determine the dominance of HCCBPL and ILL in both these cases. The investigation found that HCCBPL and ILL were in a position of dominance in terms of explanation (a) to Section 4 of the Competition Act, 2002 read with Section 19(4) of the Act which have been elaborately discussed in Chapter 5B and 5C of the DG's report. It has been concluded that HCCBPL and ILL undoubtedly have the ability to act independently of the competitive forces prevailing in their respective relevant market since they are sole market leaders to dictate the business in their relevant market.

9. The Investigation also found that HCCBPL enjoys complete dominance by virtue of its supply agreement dated 1.9.2010 with ILL and others which allows it unfettered rights to supply the bottled water and other cold drinks products within the multiplexes of ILL and other closed market. The consumers of these products are completely dependent on HCCBPL and they have no countervailing power. The conditions in the agreement recognized HCCBPL as a preferred beverage provider for the multiplexes of ILL and other closed market. This condition again forecloses the competition for other whole sale suppliers of these products and, therefore, size and importance of the competitors in the relevant market become irrelevant. HCCBPL is, therefore, completely dominant in supply of its beverages in the closed market of various enterprises with whom it has entered into exclusive supply agreements since there are no competitors in the relevant market.
10. As far as the dominance of ILL in its relevant market goes, the

investigation found that ILL enjoys 100% market share in the retail sale of bottled water and cold drinks products within its premises. As it has entered into an exclusive supply agreement with HCCBPL for supply of bottled water and other soft drinks, the consumers have no countervailing power. It enjoys complete economic power and commercial advantages over its competitors and its consumers are completely dependent on it for the relevant products offered by it within its multiplexes in absence of any competitor since it does not allow entry of any outside vendor inside its premises. These conditions of business operations act as an entry barrier for other suppliers of the similar products in their premises so as to give complete dominance to ILL in the relevant market as per Explanation (a) to Section 4 of the Act.

11. The investigation after having established dominant position of both the enterprises in their relevant market has critically analyzed the action & conduct of HCCBPL and ILL and the terms and conditions of the exclusive supply agreement to assess the abuse of dominance under Section 4(2) of the Act. It found that HCCBPL had entered into exclusive supply agreement with ILL and other 12 parties which grants it a preferred beverage supply. These agreements have led to the excessive charging of beverage products to these parties, which in turn is ultimately borne by the customers. It is observed that there is difference in MRP of more than 100% the details of which can be found in the report. Thus, charging exorbitantly higher MRP, HCCBPL has abused its position dominance in the relevant market. **This has also been confirmed from the statements of the representatives of the**

**company**. Further, it is noticed that the agreement contains clauses which denies market access to its competitors. In fact, **HCCBPL has also admitted in their letter dated 25.11.2010** that there are clauses in the exclusive supply agreement which are anti competitive in nature. Therefore based on the aforesaid finding the investigation has concluded that HCCBPL has abused its dominant position by directly or indirectly imposing unfair and discriminatory pricing in sale of products in the relevant market in violation to section 4(2)(a)(ii) of the Act. Further HCCBPL **was** also found to have indulged in a practice which has resulted in the denial of market access to its competitors in the relevant market by virtue of the exclusive supply agreement and hence contravened the provisions of section 4(2)(c) of the Act.

12. Similarly in the case of ILL, the investigation found that it had abused its dominant position in the relevant market by sale of bottled water and other cold drinks supplied by HCCBPL at exorbitantly higher MRP. It had therefore imposed unfair and discriminatory conditions in purchase and pricing of beverages by collecting discount from the supplier and thereby limiting and restricting the market and, denial of market access to the competitors in violation to section 4(2)(a)(ii) and read with section 4(1) of the Act.
13. The investigation has also examined the exclusive supply agreement between HCCBPL and ILL dated 1.9.2010 which shows that it covers 29 multiplexes of ILL at various locations across India. Perusal of the agreement shows that clause 2.1, 4, 6 contain certain conditions

wherein HCCBPL was treated as preferred beverage provider which essentially created barriers to new entrants as also foreclosing the competition so as to cause appreciable adverse effect on competition under Section 3(4) (b) of the Act. The mere absence of other competitors in the relevant market makes such agreement as anti competitive which causes AAEC. Similarly it was also found by the DG that during the currency of the agreement, the rights of ILL were restricted to buy products from other parties and this tantamount to refusal to deal with other parties in violation to Section 3(4) (d) of the Act.

14. To invite objections, DG report was sent to all parties for filing replies. The objections filed by M/s ILL is discussed below:-

#### **Preliminary Objections**

15. The ILL has first raised some preliminary objections and challenged the Jurisdiction of DG over ILL on the ground that two complaints were filed in case no. UTPE 99/2009 and case no. RTPE 16/2009 before the MRTPC by the Consumers' Guidance Society, Vijayawada and Cine Prekashakula Viniyoga Darula Sangham respectively. Consequent upon the repeal of the MRTP Act, 1969, the complaints were transferred from the office of the DGIR, MRTPC under Section 66 (6) of the Competition Act, 2002 (hereinafter Act). The Hon'ble Commission passed an order under Section 26 (1) of the Act directing the DG to investigate the claims of the parties relating to dual pricing. There has been no information/complaints filed against ILL as such and ILL is not even

mentioned in the array of respondents in the matters before the Hon'ble Commission. RTPE NO. 16/2009 does not point to ILL at all whereas UTPE No. 99/2009 only gives reference of ILL as one of the parties to the agreement with HCCBPL. In fact, it is pertinent to point out that UTPE No. 99/2009 only seeks relief against HCCBPL and does not seek any relief against ILL. As no relief has been sought against ILL, the Hon'ble Commission is humbly prayed to exercise its powers under Regulation 26 of the Competition Commission of India (General) Regulations, 2009 and strike out the name of ILL from the array of respondents in the instant matter.

16. It is pertinent to note that the DG in his Report has even referred to the complaint that was filed by the Consumer Guidance Society before the Hon'ble District Consumer Forum for the same alleged vertical understanding between HCCBPL and ILL. The district forum passed an order directing HCCBPL and ILL not to resort to such unfair and restrictive trade practices. This order of the Hon'ble District Forum was set aside by the Hon'ble State Commission *vide* Order dated 26.11.2010. Despite referring to this order, the DG has set out on a path of its own which is totally unwarranted under the Act as the Act does not bestow any *suo moto* powers upon the DG. Hence, the Regulation 26 - **Power to strike out unnecessary party** - The Commission may, on an application by a party to the proceedings before it, during an ordinary meeting, stating that no relief has been claimed by or against him or that no relief has to be granted to or against him, permit the striking out of such party from the

proceedings. Scope of the DG's investigation was limited to the scope of the complaint namely the issue of charging different MRPs for the same products at different locations. Therefore, the entire Report is without any foundation and should be rejected by the Hon'ble Commission.

17. That ILL was not a named respondent in the present proceedings and RTPE No. 16/2009 did not contain even a single reference to ILL whereas in UTPE No. 99/2009, ILL was referred to as one of the parties to an agreement with Hindustan Coca-cola Beverages Pvt. Ltd. (HCCBPL). So there was no complaint filed against ILL per-se and therefore, all proceedings and findings against ILL should be set aside. In support of its claim the ILL further stated that DG, during the course of its investigation, did not issue any notice to ILL seeking a reply on the complaint. It has further stated that the DG Report mentions that ILL has filed a reply dated 9.01.2009 which was factually incorrect in the light of the fact that the order of the investigation of the Hon'ble Commission is itself dated 13.05.2009 and the said reply dated 09.01.2009 was filed by ILL not before the DG but before the District Consumer Dispute Redressal Forum in Vijaywada in CC no. 193/2008 which related to a different issue of an unfair trade practice in terms of the Consumer Protection Act, 1986.
18. Further, the ILL has raised the objection that since no allegations relating to contravention of Section 4 of the Act have been made in

the complaint, therefore, no finding on the violation of Section 4 could be given by the DG.

### **Finding on the Preliminary Objection**

19. The preliminary objections raised as above by M/s ILL were duly considered and it is found that the objections raised by ILL were earlier addressed to in the DG Report in Chapter-2. The DG in its report has already mentioned that in the case no. UTPE 99/2009, the MRTP Commission vide its order dated 13.05.2009 had directed the then DGIR to investigate the matter and submit preliminary investigation report. Accordingly, DGIR sought the comments of ILL and HCCBPL on the allegations made by the complainant. The ILL furnished its reply on 09.01.2009 stating that complainant had no locus-standi to file complaint and all allegations made by the complainant were false and frivolous. The ILL also stated in its reply that the sale of the product at a price fixed on the packages cannot be characterized or termed as an unfair trade practice.
  
20. At this stage the matter was transferred to the Competition Commission of India on repeal of the MRTP Act, 1969 on 04.03.2010 as per the provisions of sub-section 6 of section 66 of the Competition Act, 2002 which reads as under:  
*“All investigation or proceedings other than those relating to unfair trade practices, pending before the Director General of Investigation and Registration on or before the commencement of this Act shall on such commencement, stand transferred to the Competition Commission of India and the Competition*

*Commission of India may conduct or order for conduct of such investigation or proceedings in this manner as it deems fit”.*

The Competition Commission of India on the receipt of the above complaint i.e. UTPE 99/2009, initiated proceedings under section 26(1) of the Competition Act and after duly considering the facts of the matter found that there existed a prima-facie case from competition point of view and directed the Director General to cause an investigation into the matter.

21. The DG on receipt of the direction from the Commission proceeded to cause an investigation into the above complaints and submitted a report on 25.11.2010 which is the subject matter of discussion of the present order. So, the objections raised by ILL challenging the jurisdiction of the DG over this case have no merit and DG has rightly proceeded against ILL.
22. The Commission, on receipt of the DG report, issued notice to ILL when it was found in the report that a case has been made against ILL also. So far, the claim of the ILL that it has not been made party either in UTPE no. 99/2009 nor RTPE no. 16/2009, therefore, no proceeding can be initiated against it, the mere mention of the party in the complaint, the commission and consequently the DG have full authority and jurisdiction over the case if any contravention of the competition law is found to have been made by any party mentioned in the complaint/ information under section 19(1) of the Act.

## **OTHER ISSUES**

### **RELEVANT MARKET FOR ILL**

23. The first objection raised by M/s ILL is regarding the determination of relevant market by the DG. According to M/s ILL the relevant product market in the present case cannot be limited to bottled water and soft drinks and it should be enlarged to include food and all non-alcoholic beverages (including bottled or non-bottled water). Similarly, the relevant geographical market, being the closed market inside the premises of multiplexes owned/operated by M/s ILL as defined by the DG is also not correct. Thus, the entire relevant market drawn out by the DG is flawed and vitiated.
24. I do not agree with the objections raised by M/s ILL. First, there is no fixed rule or set precedence for the determination of relevant market. The Act says that for determining whether a market constitutes a "relevant market" for the purposes of this Act, the Commission shall have due regard to the "relevant geographic market" and "relevant product market". Further, the Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:—
- (a) regulatory trade barriers;
  - (b) local specification requirements;
  - (c) national procurement policies;
  - (d) adequate distribution facilities;
  - (e) transport costs;
  - (f) language;

- (g) consumer preferences;
- (h) need for secure or regular supplies or rapid after-sales services.

Similarly, while determining the "relevant product market", the Commission shall, have due regard to all or any of the following factors, namely:—

- (a) physical characteristics or end-use of goods;
- (b) price of goods or service;
- (c) consumer preferences;
- (d) exclusion of in-house production;
- (e) existence of specialised producers;
- (f) classification of industrial products.

Now, the question is whether DG has disregarded all these factors while determining "relevant market." I have gone through the Chapter- 5A of the DG's report and it is found that a detail analysis has been made by the DG while determining the relevant market- relevant geographical market and relevant product market and all factors prescribed in the Act and stated as above have been duly considered.

25. The DG has given sufficient reason for arriving at the relevant product market and the relevant geographical market in this case. It has been stated in the report that for the very reason that non-packaged beverages, except for tea and coffee, are not sold inside the cinema halls, the product choice restricts to packaged beverages. Though, the tea and coffee are also sold in the Cineplexes on pre-mixed basis

through vending machine, yet since, tea and coffee are not the subject matter of the complaints these drinks were excluded from the consideration of the relevant product market.

26. Secondly, the DG has given substitutability and interchangeability as the criterion for deciding the relevant product market in this case. According to the DG, only drinking water – bottled or otherwise can be considered as substitute for the bottled water and soft drinks products to quench the thirst of the movie spectators. Thus, the relevant product market, as determined by the DG, satisfies the conditions given in Section 19(7)(a), (b) & (c) of the Act i.e. physical characteristics or end-use of goods; price of goods and consumer preferences and I am in agreement with that.
  
27. I would like to add here that in deciding a relevant product market it is most important to find out what can substitute the relevant product under consideration. In the present case, the normal tap water provided in Cineplexes could have been a good substitute for soft drinks and bottled water as argued by M/s ILL but the kind of customers going to watch the movie in Multiplexes by paying handsome amount will not consider the normal water as provided by the multiplexes as safe for drinking. Thus, the normal tap water provided in Cineplexes cannot be a substitute for the soft drinks or packaged water.
  
28. Further, the Cine-goers are going to watch the movie in the Multiplexes for entertainment and if they are spending 200-300 rupees on getting cinema tickets they won't mind spending 30-40 rupees on soft drinks or

bottled water. This is the reason why these multiplexes in connivance with the manufacturers of the soft drinks and bottled water try to extract maximum profit out of the customer's entertainment spree. Simply because of the fact that the Cine-goers can afford paying 30-40 rupees on Bottled water/Soft drinks, that doesn't mean that their choice can be restricted. It is a duty of the Competition Regulator to ensure that the choice of the consumer should not be restricted in any manner. Here, in the present case, first you are not providing any substitute for the products in question and on the other hand you are also discriminating on the price of the products. This cannot be accepted.

29. It is the argument of M/s ILL that main business of any multiplex operator is not the sale of food and beverages but the exhibition of motion picture films, therefore, sale of food and beverages in multiplexes cannot be compared with the sale of these products in retail outlets as the retail outlets are exclusively engaged in the business of sale of such products. If this argument is accepted then M/s ILL or any multiplex should not enter into any exclusive agreement with any of the manufacturers of the soft drinks and bottled water to run a parallel business of selling bottled water and soft drinks at discriminatory price with a sole intention of earning huge profit out of that.
30. Now coming to the relevant geographical market the DG has determined the relevant geographical market as **“closed market inside the premises of Multiplexes owned by ILL”** on the ground that section 2(s) of the Act defines relevant geographical market as a market comprising the area in which the conditions of competition for supply of

goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas. The DG states in his report that in the present case, by virtue of the agreement between HCCBPL and ILL which restrict the entry of other suppliers of the similar products within the premises of Multiplexes owned by ILL, there is no availability of any other bottled water product/soft drink products inside the multiplexes. As the products of other supplies are not available inside the premises of the multiplexes, the choices of the consumers are restricted to only those products which are offered inside the premises. The consumers, thus, have no opportunity to regard any other product having similar characteristics as substitutable and interchangeable with the product available inside the premises. Therefore, the demand and also the supply of goods is distinctly homogenous inside the premises of multiplexes owned by ILL and can be easily distinguished from the conditions prevailing in the neighboring areas i.e. the market outside the premises of the multiplexes.

31. M/s ILL has, on the other hand, submitted that the determination of relevant geographical market by the DG as stated above is absolutely miss-conceived and flawed on the ground that DG has determined the geographical market solely on the basis of the point of time after which a patron enters a multiplex complex. It has failed to capture the basic and irrefutable fact that the arrival of a patron at a multiplex complex is determined exclusively by (a) the choice of films being screened; (b) the show timing for the same within a multiplex; (c) the maintenance of

punctuality in commencement, interval and closure time of a movie; and (d) the vastly different experience of a multiplex as compared to single screen theaters. These four factors are the real determinants for the purpose of visiting a multiplex complex and not the range of food and beverages offered as sales counters within the multiplex. In the support of its claim the ILL has also submitted a customer survey report conducted by it in Delhi and Mumbai by an independent agency namely Total Solutions Incorporated in a form of a supplementary reply filled on 21<sup>st</sup> February, 2011.

32. I have gone through the survey report conducted on behalf of ILL and found that it is full of flaws and errors as the survey was conducted to prove ILL's point of view and to establish that ILL is not a dominant player in the relevant market. I wish had in the survey only one question asked from the customers: "Would you mind paying 50 Rupees for buying a diet coke, 40 Rupee for Pulpy Orange and Nimbu Fresh and 30 Rupees for packaged drinking water when its retail market price is Rs. 40, 20, & 15 respectively? ILL would have got the right answer.
33. I have considered the above arguments but not inclined to accept that. The purpose of going to a multiplex may be for watching movie but in the present case the **purpose** cannot be a factor for defining the relevant geographical market. Of course, the movie goers are going to watch the movie but the purpose is not only watching a movie but a wholesome entertainment. As per the definition of Section 2(s) of the Act, the relevant geographical market is the market in which the

conditions of competition for supply and demand of goods or services must be distinctly homogenous and clearly distinguishable from the conditions prevailing in the neighboring areas. Had screening of movie and its price the subject matter of dispute, the situation would have been different whereas in the present case the main issue is the sale of single brand of soft drinks/ bottled water and its differential pricing in comparison to the neighboring market. Thus, the relevant geographical market in this case cannot be other than the closed multiplex owned by ILL.

34. M/s ILL further states that it is a natural choice and not a forced one to go for a product which is conveniently available at sales counters and as such the choice of the food and beverages available at the sales counters does not determine the decision of the customers to visit a multiplex. The logic given by M/s ILL is funny as a movie cannot be substituted by any kind of beverages or vice-versa. Thus, the decision to go for a movie would be entirely different from buying a beverage. Similarly, the choice to go for a movie would be different from choice of buying a beverage. These two things cannot be compared in any manner. So, these arguments are illogical. The argument of M/s ILL that there is no compulsion on the consumers to buy any beverages, and it is their natural choice to go for it is correct but this argument would have been valid if the alternatives/substitutes have been provided.

35. Thus, the submission of M/s ILL that the relevant geographical market in this case should have been all single screen theaters and multiplexes (whether owned by ILL or not) within the reach of the consumer in a particular territory cannot be accepted as the relevant market in that case would have been flawed and distorted as relevant product market in this case was not the screening of movie but the sale of beverages. Thus, the relevant geographical market as defined by the DG as “closed market inside the premises of Multiplexes owned by ILL” is absolutely correct.
36. Now coming to Section 19(6) of the Act, there are few factors which have been prescribed by the Act for the consideration of the Commission while determining a relevant geographical market. The DG has considered all these factors and come to the conclusion that the present arrangements wherein only HCCBPL, can supply its beverages to ILL restrict the entry of competition within the multiplexes of ILL. ILL has made some specific requirements for the beverages products to suit their supply by HCCBPL linking them with the joint promotion of each others’ products. Though, there are no regulatory barriers, however, there are strict entry barriers for other competitors. Moreover, there is no consumer preference rather the consumers are forced to consume whatever is on offer depriving them of any choice. ILL has also defined its own qualitative specifications for the products sold inside the multiplexes. Therefore, the relevant geographical market in this case, as per the DG, is the closed market inside the premises of multiplexes owned by ILL.

37. Section 19 (6) of the Act is a mandatory provision and all or any one of the factors prescribed therein must be given due consideration. Though, the DG after considering all these factors has applied the three factors i.e. the regulatory trade barriers, local specification requirement and the consumer preferences while determining the relevant geographical market, I am of the view that only one factor i.e. consumer preferences will apply in the present case. The question may be asked what exactly the consumer preference is. It is an Individual decision to choose one alternative out of a set of mutually exclusive alternatives. The consumer choice also depends on two elements: 1. Tastes (preferences) and 2. Feasible alternatives (constraints). Preferences also depend on rationality. A preference is rational if it satisfies; Completeness, Monotony and Desirability. In the present case M/s ILL has not provided any alternatives out of which the consumers (cin-goers) can choose one. Secondly, is there any variety of taste available to satisfy the completeness, monotony and desirability of the consumers? The answer is no. Thus, the arguments of ILL do not stand the test of consumer preferences as prescribed under section 19 (4), (5) & (6) of the Act. Thus, the relevant market consisting of relevant product market and the relevant geographical market as determined by DG is not flawed and vitiated as has been alleged by the ILL.

#### **DETERMINATION OF DOMINANCE OF ILL**

38. Once the relevant market is drawn it is important to find out whether ILL is dominant in that market. The DG in his report under **Chapter-5C** has described in detail the reasons why ILL is dominant in the relevant

market. DG has stated that the buyer of the products of the HCCBPL is ILL which by virtue of agreement dated 1.9.2010 does not allow the entry of other suppliers of the bottled water and other cold drinks products inside its multiplexes. The ILL enjoys complete dominance in the relevant market of sale of beverages in the geographical confines of its multiplexes.

39. Secondly, ILL does not allow any other supplier of bottled water and soft drinks inside its premises. It leaves cine goers without any choice except to consume the products offered by it. The ILL, therefore, enjoys the position of strength in the relevant market whereby it is in a position to affect its consumers in its favour.

40. Thirdly, by virtue of its agreements with BCCBPL, it is selling the relevant product items to the cine goers at much higher MRP than available in the retail market. By the same agreement, ILL is getting very high discount on these products from HCCBPL. Schedule 3 of the agreement lists out the prices of various items and the discounts on these items which are in the range of 37.5% to 40%. This has also been accepted by Shri Alok Tandon, Chief Executive Officer, INOX Leisure Limited. Relevant extract of the statement are reproduced below:

***“Q. It is seen that the similar quality and quantity of bottled water and other beverages sold inside your multiplexes have higher MRPs than those sold in the retail market. Please explain the pricing of these products and provide the details of discounts, if***

***any, offered by HCCBPL to ILL.***

***A. ILL always sells bottled water and other beverages in package form as per MRP printed by HCCBPL. As per the agreement with HCCBP there is a percentage discount to the MRP as detailed in clause 1.2 of Schedule – 3 of the agreement dated 1.9.2010.”***

41. The DG has, thereafter, analyzed the various conditions of dominance given under clauses (a) to (m) of section 19(4) of the Act. It has been stated in its report that the assessment of dominance of ILL bases on the parameters given under these clauses revealed that within the geographical market of the premises of its multiplexes, ILL enjoys 100% market share for cinema viewing as well as for the bottled water and cold drinks products sold with its premises. Again on the basis of its size and resources within its premises, it is completely dominant. It enjoys complete economic power and commercial advantages over its competitors and its consumers are completely dependent on it for the relevant products offered by it within its multiplexes in absence of any competition. As it has entered into an exclusive supply agreement with HCCBPL for supply of bottled water and other soft drinks, the consumers have no countervailing power. Within its multiplexes, the size and importance of its competitors do not matter at all so far as the sale of bottled water and cold drinks are concerned. Further, ILL also does not allow entry of any outside vendor inside its premises. Its agreement with HCCBPL only allows products of the later to be sold inside the multiplexes of ILL. This conditionality in the agreement acts as a marketing entry barrier for other suppliers of the similar products.

42. The DG has finally concluded that based on the market share, size and resources, commercial advantages, dependence of consumers, countervailing buying power of consumers and the marketing entry barriers, it is conclusively established that ILL is completely dominant in the relevant market of sale of bottled water and other cold drinks products inside the geographical limits of its multiplexes.
  
43. The ILL, on the other hand, has submitted that under the provisions of the Act, an assessment of dominance of an enterprise is essentially a determination of the nature of market power that is or can be exerted by the enterprise. In this regard, the Report submitted by the DG indicating ILL's dominance is baseless and devoid of merit inasmuch as it is only but natural that the owner/operator of a multiplex will be the only enterprise operating that said multiplex and any determination of dominance of such an owner/operator for the purposes of the Act has to be in reference to the market for screening of movies in single screens/multiplexes within a given relevant market. Consequently, if the geographical limits are restricted to ILL's own/ operated multiplexes alone, no competition analysis can be plausibly undertaken. Moreover, the ILL also stands in the position of a consumer in terms of Section 2(f) of the Act qua any supplier of food and beverages in order to make available the same to its patron.
  
44. The DG's finding that ILL enjoys a position of strength in the relevant market whereby it affects its consumers in its favour. Since the finding

of the DG as regards relevant market is misconceived and flawed, the conclusion regarding the position of strength enjoyed by ILL is bound to be faulty. Taking into consideration the relevant market as defined above, ILL does not enjoy a position of dominance as defined under the Act. It is reiterated that any determination of ILL's dominant position has to be with respect ILL's competitors operating in the relevant market.

45. It has been further stated in DG's Report that by virtue of the Agreement between ILL and HCCBPL, ILL is selling the relevant products to the patrons at a much higher MRP than available in the retail market. In response to that ILL would like to rely on the following extract of the recent order passed by this Hon'ble Commission itself in *Travel Agents Federation of India v. Lufthansa Airlines*:

***"8. It has been pointed out by the respondent in the reply that the sale of airline tickets through travel agents and sale of airline tickets through the websites of airlines constitute two distinct mediums and markets, each with its own dynamics and determinants. Further, it has been mentioned that different cost structures apply to the two markets and the prices of airline tickets sold through one or the other medium will reflect the difference in cost structures. Different sales mediums have different cost structures and as such the prices of tickets will vary according to the medium through which they are sold. Certain cost elements or factors are not present in the booking process when undertaken online and as such, a different and perhaps lower cost structure applies to it. It was stated that the***

***fares of tickets sold through the website of the respondent only reflect the cost structure of the market for online ticket purchasing which is different from the cost structure of the market in which the members of the complainant association operate.”***

46. It was further pointed out that the "Carrier Guaranteed Fare Quote", which is made available to the members of the complainant Association, incorporates several costs, including but not limited to, infrastructure costs, advertisement and marketing costs etc. It was stressed that some of these cost factors are eliminated when tickets are sold online through the website of the respondent and consequently, the benefits of the same are passed on to the purchasers, who pay a lower price. It was pointed out that the parties operate in a highly competitive market and all the stakeholders attempt to maximize sales and earnings through innovative marketing and sales strategies. The order of this Commission set out above clearly recognizes the essential principle that different sales medium will have different price structures and therefore the comparison adopted in the present case in the DG's report between the prices of food and beverage items sold through retail outlets/grocery stores with the prices of similar items sold inside multiplexes is flawed and misleading.
47. The assessment of ILL's dominance undertaken by the DG in the Report in terms of Section 19 (4) of the Act, according to ILL is critically flawed and baseless as it is not the choice of food and beverage items

available within a multiplex which drives patrons to visit ILL multiplexes, but the choice of the movies being screened, the quality of picture and sound, the timings of the said movies and the overall facilities and ambience provided by ILL in its multiplexes are the key factors which are taken into consideration by patrons. Moreover, it is convenient for a multiplex operator to deal with one supplier at a particular point in time to render qualitative food and beverage product thereby augmenting operational convenience (such as timely maintenance, periodical replacements, technical support etc.) which leads to reduction of administrative costs. In any event, the Report completely glosses over the fact that patrons have countervailing buyer power inasmuch as they decide which multiplex or single screen theatre to visit. Therefore, the DG's finding as regards the patron having no countervailing buyer power is palpably incorrect and denied. Thus, the finding of DG that ILL holds a position of strength/dominance in the relevant market as defined under the Act is baseless.

48. I have gone through the averments made both by DG and ILL. Explanation (a) to Section 4 of the Indian Competition Act defines dominant position as “dominant position means a position of strength, enjoyed by an enterprise, in the relevant market in India, which enables it to-
- (i) operate independently of competitive forces prevailing in the relevant market or
  - (ii) affect its competitors or consumers or the relevant market in its favour.

Thus, the Competition Act contains a definition of dominant position that takes into account whether the concerned enterprise is in such a position of economic strength that it can operate independently of competitive forces or can affect the relevant market in its favour. This economic strength is nothing but market power. In assessing the extent of a firm's market power, relevant factors include the number of competitors, their strength and size, the height of barriers to entry and the stability or volatility of demand. In order to demonstrate whether a firm enjoys market power, it is necessary to define the relevant market and then show that the firm holds a dominant position in that market, and finally, there are significant barriers to entry. Thus, the proof of dominant position in the relevant market and the existence of substantial barriers to effective entry create the presumption that the firm enjoys market power.

49. Now what are market power and its effect? Market power can cause injury to the three key goals of anti-trust policy: The efficient allocation of resources used to produce goods and services: avoiding undue wealth transfers from consumers to powerful sellers: and preserving and promoting the dynamic element of competition that ensures that innovative products and services are developed and efficiently allocated in the future. Market power can also be exercised to injure other market players by raising their costs, depriving them of business opportunities or driving them out of business. When market power is properly defined as power over price, it is clear that sellers of branded products often

exercise market power. Just as a pure monopolist, the seller of a branded good may face an inelastic demand curve, allowing it to raise price without losing offsetting sales revenues. The origins of single brand market power are varied, but are often linked to the flow of information available to buyers. A seller with a powerful brand, for example, may have brand-loyal consumers who will absorb price increases rather than switch to a different brand. The basis for this brand loyalty may be accurate information about the characteristics of the favored brand and all rival offerings or inter-brand restraints such as tie-ins may create market power in aftermarket because of incomplete information in the hands of the buyer. Yet another source of single brand market power is relational, arising out of long-term business relationships such as those between a franchisor and franchisee. Finally, a seller may also enjoy market power if the buyer can pass on the costs of a purchase to a third party that does not exercise cost discipline over the buyer's purchase decision.

50. In its 1992 Kodak decision, the US Supreme Court has defined market power 'as the power to force a purchaser to do something that he would not do in a competitive market'. In dealing with tie-in and attempted monopolization claims, the Supreme Court confronted the question of whether market power could be found in a single brand market. The Court described the market power issue in this way: "***The extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product in response to a price change in another, i.e., the***

***‘cross-elasticity of demand.’***” The Court went on to explain why the plaintiff’s theory of market power in a single brand’s aftermarket for parts could not be rejected at the summary judgment stage. Later, and more explicitly, in dealing with the attempted monopolization claim, the Court said:

***“Kodak also contends that, as a matter of law, a single brand of a product or service can never be a relevant market under the Sherman Act. We disagree. \* \* \* This Court’s prior cases support the proposition that in some instances one brand of a product can constitute a separate market. The proper market definition in this case can be determined only after a factual inquiry into the ‘commercial realities’ faced by consumers.”***

51. The theoretical models for perfect competition and monopoly assume that a seller sets a single price for its entire output. Monopolists are likely to strive in various ways to discriminate in price for the obvious reason that they can sell more and make more money if discrimination is possible. A seller whose brand lacks market power cannot discriminate in price- a buyer is unwilling to pay more to receive this brand and will instead readily substitute other brands.
  
52. Now, let us examine the case of ILL on above hypothesis. I find that there is no competition in the relevant market i.e. **“closed market inside the premises of Multiplexes owned by ILL”** where ILL enjoys 100% market share for cinema viewing as well as for the bottled water and cold drinks products sold within that premises. Similarly, there is

entry barrier to other competitors by virtue of agreement dated 1.9.2010 which does not allow the entry of other suppliers of the bottled water and other cold drinks products inside its multiplexes which gives ILL commercial advantages over its competitors and leaves cine goers without any choice except to consume the products offered by it.

53. Further, ILL enjoys complete economic power in the sense that its consumers are completely dependent on it for the relevant products offered by it within its multiplexes. These customers are practically locked-in customers as they cannot go outside the premises because of security reasons. The ILL's arguments, that it is only but natural that the owner/operator of a multiplex will be the only enterprise operating within the said multiplex and there can't be any competition in that market and any determination of dominance has to be in reference to the market for screening of movies within that market, is not correct as the relevant market in the present case has already been determined as closed market inside that multiplex. Further, dominance itself is not bad in law but its abuse. Any law and even the security guidelines issued by the administration do not forbid ILL or any multiplexes for that matter to deny entry to other competitors. The argument of ILL that it also stands in the position of a consumer in terms of Section 2(f) of the Act would have been valid if ILL, being consumer, would have been denied entry by other competitors.
54. ILL's further argument, that the Hon'ble Commission itself in Travel Agents Federation of India v. Lufthansa Airlines has decided that the

sale of airline tickets through travel agents and sale of airline tickets through the websites of airlines constitute two distinct markets with its own dynamics and determinants and prices of tickets will vary according to the medium through which they are sold, again not correct on two counts: one that no analogy can be drawn as the facts of the two cases are different and secondly, the benefit is not being passed on to the consumers as they are paying higher price.

55. Thus, the contention of ILL that since the relevant market drawn by the DG is flawed and distorted the dominance of ILL is not proved, is not correct as it is not the DG but ILL itself has drawn the wrong relevant market in order to prove that it is not holding a dominant position in that market. In view of above, I hold that ILL is holding a dominant position as it is operating independently of its competitors in the relevant market and as a result, the consumers i.e. cine-goers are affected by not having any choice and are forced to pay a higher price.

#### **DETERMINATION OF ABUSE OF DOMINANCE BY ILL**

56. After defining the relevant market and the dominance of ILL in that market, the DG has made out a case of Abuse of Dominance by ILL on the ground that ILL has imposed restriction on the marketing of products of other beverage suppliers in the relevant market by giving 'preferred beverage supplier' status to HCCBPL. It does not allow any other competitor to enter its premises taking recourse to its agreement with HCCBPL. ILL has, thus, imposed unfair and discriminatory conditions in

purchase of goods to the disadvantages of other suppliers and has, therefore, violated the provision of section 4(2)(a)(i) of the Act.

57. The above finding is supported by the fact that there is clear understanding between the HCCBPL and ILL for printing higher MRP on the products. Though, both the parties deny that the MRP is decided on the request of ILL, however, the very fact that a very high percentage of discount has been given to ILL, which ranges from 37.5 to 44% on bottled products is suggestive of the fact that higher MRP printed on the beverages products is compensated to ILL by giving them very high margins in the form of discounts. This has also been confirmed by the representative of HCCBPL Shri Devdas Baliga, National Legal Counsel as follows:

***Q. Do you mean to say that the printing of higher MRP on your beverages is generally done on the request of the buying enterprises?***

***Ans. The higher MRP amount is not done on the request of the buying enterprises. However, the quantum of discount is negotiated with the buying enterprises. The MRP printed on products supplied to such enterprises is higher than the MRP on products supplied to retail outlets.***

58. The DG states that the above reply makes it clear that by selling these products at higher MRP to the consumer, ILL is abusing its dominance in the relevant product market of sale of bottled water and cold drinks products. According to him, the abuse of dominance is also

substantiated by the fact that the bottled water and other products sold inside the multiplexes of ILL neither differ in quality nor in quantity with the similar products available in the outside retail market. This fact has also been confirmed by the representative of HCCBPL in his deposition. The extract of that has been reproduced by the DG as under:

***Q. Do you supply the similar size packs and of similar quality to those enterprises wherever you have supply agreements?***

***Ans. Yes, there is no differentiation in quality as well as quantity.***

***Q. Do you differentiate in the pack sizes and the quality of products supplied to retail vendors in the market with those supplied to enterprises with which you have specific supply agreements?***

***Ans. No. We do not differentiate in pack sizes and quality of products supplied to various parties. However, we may from time-to-time launch certain pack sizes appropriate for a segment however, ensuring the quality remains the same. For instance, pack size of 1.25 litres would normally not be supplied to cinema halls but would be supplied in the retail trade.***

Based on the evidences in the form of agreement between HCCBPL and ILL and the statement of both the companies, DG finally concluded that ILL is abusing its dominant position in the relevant product market of sale of bottled water and other cold drinks products by selling these products at exorbitantly higher MRP. It has also imposed unfair and discriminatory conditions in purchase and pricing of goods by collecting discount from the supplier of these products by limiting and restricting the market of these products and, denial of

market access to the competitors which falls within the provisions of section 4(2)(a),(ii) and 4(2)(c) read with section 4(1) of the Act.

59. ILL, while responding to the above finding has submitted that an endorsement of such an assessment would amount to the imposition of an onerous and unjustified interference with the legal and commercial freedom of an enterprise to organize its commercial activities in the manner it deems fit. ILL is not under any obligation or mandate to offer competing brands or to purchase goods from all potential suppliers willing to sell their products to ILL. The Agreement entered into between HCCBPL and ILL is a contract between two independent entities on the commercial terms that are feasible to both and valid for a reasonable period of time. Though the aforesaid Agreement contains a provision for 'preferred beverage supplier', the same is not in perpetuity and does not bind ILL to procure its supplies for an unbridled period of time. Further, it is reiterated that even during the subsistence of the Agreement, ILL may opt out and obtain its supplies from other willing suppliers in the event of default by HCCBPL. If at the termination of such agreement, other suppliers of food and beverage items put forward more viable offers to ILL, it would be within ILL's commercial freedom to accept such offers if the same is found to be commercially viable and profitable by ILL. It must be noted that the critical purpose underlying the agreements of the nature under review by the DG in the Report is to ensure timely supply, quality and quantity of the products.
60. Further, in response to the DG's finding that ILL is abusing its dominant

position directly by imposing unfair and discriminatory pricing in the sale of goods within its premises in violation to Section 4 (2) (a) (ii) of the Act, the higher MRP amount is not fixed on the request of the buying enterprise and ILL is only involved in negotiating the quantum of discount with HCCBPL. It is therefore clear that ILL does not participate in the fixation of MRP of packaged drinks and as such humbly submits that negotiating discounts and margins with suppliers is but a natural consequence of being an independent commercial entity. ILL provides the 'Aam Aadmi' with the whole multiplex experience wherein the patron has the option of selecting from several movies screened at convenient times with high quality sound and projection equipment, a sophisticated fire safety system, safe and secure environment, a dependable security system, an option of buying food and beverages and convenience to patrons to purchase tickets through various modes. Therefore, in view of the above, ILL submits that it passes on several benefits to a patron in a more wholesome, complete and packaged manner.

61. On DG's finding that the Agreement between HCCBPL and ILL provides for 'preferred beverage provider' status to the former has denied access of relevant market to the competitors in contravention of Section 4 (2) (c) of the Act, ILL submits that while evaluating any business relationship ILL takes into account terms and conditions, commercials, services and reputation of the suppliers it proposes to enter into dealings with. The rationale behind ILL choosing HCCBPL to be its 'preferred beverage supplier' is that HCCBPL's products are in compliance with ILL's above stated standards and requirements. The

Agreement entered into between ILL and HCCBPL is not for perpetuity and does not limit the freedom of either party to the contract in any manner. ILL is not tied down to HCCBPL for perpetuity and at the end of the term of the Agreement is free to negotiate and agree to better terms with HCCBPL or with any other supplier. ILL further submits that it has, in fact held discussions with another major supplier of such beverages after the expiry of the term of the Agreement with HCCBPL on 31.12.2010.

62. In support of the submission made above, ILL further submits that it has been approached by various suppliers of products ranging from juices, smoothies, cold coffees etc that have been considered by it during the course of its Agreements with HCCBPL. At the cost of repetition, it is stated that ILL as a prudent commercial enterprise enters into dealings with the supplier best suited to meet its requirements. To substantiate the above, a table detailing the various offers that have been considered by ILL is given below:

Sr. No.	Type of Products	Name of the Company	Proposal Period
1.	Aloe Vera - Ice Cool Products & Coconut Juice	Auro Southland Food Services Pvt. Ltd.	09.07.2010
2.	Dabur - Real	Dabur India	04.02.2009

	Active Juice	Limited	
3.	Delmonte Juice & Pepsi Beverages	Yo! China	15.12.2008
4.	Tropical Smoothie & Cold Coffee	Tropical cafe	23.08.2006
5.	Nimbu Pani & Jal Jeera	Pulse India	01.12.2005

63. On the basis of the above arguments, ILL has submitted that the DG's Report appears to have been based on untenable assumptions and therefore it is vehemently denied that ILL is, in any manner, abusing its alleged dominant position.

64. I have considered both sides' arguments and counter arguments. Before coming to any conclusion let us understand what constitutes "Abuse of Dominant Position"? 'Abuse of dominance' is not defined in most competition laws. However, many competition laws enumerate some conducts which, if engaged in by an enterprise in a dominant position, amount to abuse of dominance. Different conducts have been expressly declared as abuse of dominance under the competition laws of different jurisdictions. In ***Hoffmann-La Roche & Co. AG v Commission of the European Communities***, it was observed that, "The concept of abuse is an objective concept relating to the behavior

of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition". In ***NV L'Oréal and SA L'Oréal v PVBA "De Nieuwe AMCK"***, it was held that "...the behaviour of an undertaking may be considered as an abuse of a dominant position within the meaning of Article 86 of the treaty where the undertaking enjoys in a particular market the power to behave to an appreciable extent independently of its competitors, its customers and the consumers and where its behaviour on that market, through recourse to methods different from those which condition normal competition on the basis of the transactions of traders, hinders the maintenance or development of competition and may affect trade between member states.

65. Indian Competition Law also does not define abuse of dominance. According to Section 4 (2) of the Indian Competition Act, "There shall be an abuse of dominant position under sub-section (1), if an enterprise.—
- (a) directly or indirectly, imposes unfair or discriminatory—
    - (i) condition in purchase or sale of goods or service; or
    - (ii) price in purchase or sale (including predatory price) of goods or service; or

- (b) limits or restricts—
  - (i) production of goods or provision of services or market therefore; or
  - (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or
- (c) indulges in practice or practices resulting in denial of market access; or
- (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
- (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market”.

66. Thus, section 4(2) of the Act enumerates activity which can be considered as abuse, if practiced by the enterprise holding dominant position in the relevant market. Unfair or discriminatory pricing, thus, form part of Abuse of Dominance. Unfair prices are excessively high prices, above competitive level. Discriminatory prices may be levied by charging different prices for different customers for the same product. Prices would be considered to be discriminatory when the same price is charged to different customers, though the cost of supplying the product to them varies. Discriminatory prices create an unequal position among suppliers of the same product buying at different prices, as these prices are unrelated to the quantity or characteristics of the product and can prejudice the competitive process.

67. I have already held that ILL is holding dominant position and enjoying market power in preceding paragraphs. Now, it is to be established that it has also abused its market power. Since there is no fixed rule of establishing that abuse, we have to look into activity of the firm as given in section 4(2) of the Act from (a) to (e). The DG has already highlighted the agreement between HCCBPL and ILL and discussed the unfair and discriminatory conditions put in that agreement. The DG has also recorded statement of the representatives of HCCBPL who have confirmed the different prices are being charged for the same products. The 'preferred beverage supplier status' to HCCBPL and heavy discounts given in lieu of that has also been highlighted by the DG. So, on the basis of the finding given by the DG and discussed as above, I have no doubt that ILL has indulged into following activities:-

- (a) It is charging excessive and exorbitant price for the sale of bottled water and soft drinks manufactured and supplied by HCCBPL
- (b) It has entered into exclusive supply agreement with HCCBPL for the supply of packaged bottled water and soft drinks which has created entry barriers for other supplier of the same product and by indulging in such practice market access was denied to all other competitors.
- (c) It has imposed unfair and discriminatory conditions in purchase and sale of bottled water and packaged soft drinks by charging two different prices for the same product having same quantity, quality and characteristics
- (d) By giving 'preferred beverage supplier' status to HCCBPL it has put discriminatory conditions for other suppliers

The arguments of ILL that the agreement between ILL and HCCBPL is to ensure supply; quality; operational convenience and to reduce administrative and storage costs and thereby will increase efficiency cannot be accepted as the provisions of discriminatory pricing and conditions in the said agreement cannot be justified from any angle.

68. I have also discussed the Eastman Kodak case above where US Supreme Court has defined the aftermarket concept and explained how the single brand manufacturers/ suppliers abuse their market power by imposing discriminatory conditions and prices. Though the facts are not identical in present case but analogy can be drawn as the circumstances are similar. Here, in present case what ILL doing is that first it captures the customers in the name of security and then fleece those locked-in customers by not offering them any choice and charging discriminatory price. Isn't that abuse of dominance? I, therefore, hold that ILL has abused its dominant position and contravened the provisions of section 4 (2) (a) and (c) of the Act.

**RELEVANT MARKET & ASSESSMENT OF DOMINANCE FOR HCCBPL**

69. The DG in its report has defined relevant market for HCCBPL as the market for supply of bottled water and cold drinks to the owners of closed market of Multiplexes and other commercial enterprises wherever it is treated as a 'preferred beverage supplier'. The reason being that HCCBPL has entered into exclusive supply agreements with various enterprises such as air-lines, hotels, Cineplexes etc. including ILL. These are closed market in which HCCBPL is the exclusive supplier of its products as there is an entry barrier for its competitors.

70. After defining the relevant market for HCCBPL, the DG has made an assessment whether HCCBPL is dominant in that market. The DG has stated that in the relevant market HCCBPL enjoys complete dominance as a supplier of the relevant product to ILL by virtue of the agreement dated 01.09.2010 between ILL and HCCBPL. The agreement binds ILL to buy all its requirements of bottled water and other cold drinks from HCCBPL as long as it is in a position to supply these products. The agreement forecloses the competition for all other manufacturers of these products inside the relevant geographical market.
71. The DG has further stated that based on the parameters set out in section 19(4) of the Act within the relevant market, HCCBPL, thus, enjoys 100% market share and commands complete size and resources to continue supplying the relevant products to ILL in a dominant manner. Again in terms of clause (c) of Section 19(4) of the Act, size and importance of the competitors of HCCBPL does not matter as they are not allowed entry within the relevant market. Foreclosure of market in such a way also creates entry barriers to other competitors and falls foul of clause (h) of Section 19(4). The consumers of these products are completely dependent on the products of HCCBPL as they have no countervailing buying power in the relevant market which further proves the dominance of HCCBPL in terms of clause (f) & (i) of Section 19(4) of the Act. Based on its positioning in the wholesale supply of its products in the relevant market HCCBPL enjoys complete dominance by virtue of its agreement dated

01.09.2010 with ILL which enjoys complete dominance by virtue of its agreement dated 01.09.2010 with ILL which allows it unfettered right to supply the bottled water and other cold drinks products within the multiplexes of ILL. Again by virtue of this agreement HCCBPL enjoys complete market shares and commercial advantages over its competitors. On the basis of the above findings, DG finally concluded that HCCBPL is completely dominant in the supply of its beverage products in the closed market of various enterprises with whom exclusive supply agreements have been made.

#### **ABUSE OF DOMINANCE BY HCCBPL**

72. After delineating the relevant market and assessment of dominance of HCCBPL, the DG has shown how HCCBPL is abusing its dominance in the relevant market. The Investigation has found that HCCBPL had entered into exclusive supply agreement with ILL and other 12 parties which grants it a preferred beverage supplier status. These agreements have led to the excessive charging of beverage products to these parties, which in turn is ultimately borne by the customers. It is observed that there is difference in MRP of more than 100% the details of which can be found in the report. Thus, charging exorbitantly higher MRP, HCCBPL has abused its position dominance in the relevant market. **This has also been confirmed from the statements of the representatives of the company.** Further, it is noticed that the agreement contains clauses which denies market access to its competitors. In fact, **HCCBPL has also admitted in their letter dated 25.11.2010** that there are clauses in the exclusive supply agreement

which are anti competitive in nature. Therefore based on the aforesaid finding the DG has concluded that HCCBPL has abused its dominant position by directly or indirectly imposing unfair and discriminatory pricing in sale of products in the relevant market in violation to section 4(2)(a)(ii) of the Act. Further HCCBPL was also found to have indulged in a practice which has resulted in the denial of market access to its competitors in the relevant market by virtue of the exclusive supply agreement and hence contravened the provisions of section 4(2)(c) of the Act.

73. When DG report was sent to HCCBPL to invite objections, HCCBPL filled a reply dated 21.02.2011 and raised following objections:-
- (i) There is no need to undertake an analysis of the relevant market and/ or dominance for purpose of section 4 of the Competition Act, if there is no abuse.
  - (ii) DG has not confronted the HCCBPL with the finding that it has abused its dominance which is against the principle of natural justice.
  - (iii) The DG has ignored that the agreement between HCCBPL and ILL was for a very short period and terminable at will so, there cannot be any foreclosure of competition and there is no denial of market access to other competitors.
  - (iv) It is a normal business practice to enter into exclusive agreement with any party and to derive maximum benefit out of that.
  - (v) HCCBPL has no say regarding the retail prices at which ILL may sell their products at their premises to the end consumers.

- (vi) MRP is irrelevant for the purpose of competition and it is the retail price which matters. MRP only implies that a price higher than the declared MRP cannot be charged from the customers. So long as the packaged products are sold within the declared MRP, there would not be any violation of law.
- (vii) The DG has failed to provide any objective or rational basis for determining the relevant market and has failed to substantiate how HCCBPL is a dominant player in that market and how it has abused its dominance.
- (viii) So far the agreement between HCCBPL and ILL is concerned DG has failed to prove the AAEC in the relevant market.
- (ix) Since there is intense competition in the beverage industry throughout India there can't be any AAEC.
- (x) It is not the HCCBPL alone which is having this practice of exclusive agreement but the other competitors like Pepsicola etc have also adopted the same methodology.
- (xi) The exclusive agreement between HCCBPL and ILL does not act as an entry barrier for other competitors because of intense competition in the beverage market.
- (xii) The Central Excise Act also recognizes that there may be different MRP for the same product.

### **FINDING OF MERIT**

74. I have gone through both the DGs report as well as the objections raised by HCCBPL stated as above. The first objection is that abuse of dominance should be established first, thereafter only the relevant

market should be drawn and then dominance is to be found out in that relevant market. This is entirely a new concept and nowhere in the act is it prescribed. It is also not found in any competition regime. Unless a relevant market is determined and dominance is to be found out how abuse of dominance can be established?

75. So far the denial of natural justice to HCCBPL is concerned, I find that reasonable opportunities have been given to HCCBPL and even statement of its representative was recorded during the course of investigation to state their point of view. It was not necessary for the DG to convey its finding directly to the respondents. Instead it is the duty of the Commission under section 26 (5) of the Act to supply copy of the DG report to the parties concerned and invite objections from them. This procedure has been followed in the present case also.
76. On the issue of two MRPs, I am of the opinion that there cannot be two MRPs for the same product of same quantity, standard and quality if it is sold in the same market. The Competition Act does not allow such discrimination under section 4 of the Act. The decisions of some courts cited by HCCBPL in support of its arguments are not relevant for the purpose of this Act as these decisions have been given in some different context. The provisions of Excise Act cannot be applied in Competition Act.
77. Now, coming to the merit of the case the duration of the agreement – whether it is for a short period or for longer one, is not a relevant factor for deciding AAEC. Similarly, the termination at will is also not a

relevant factor for deciding AAEC. If anti-competitive agreements or conduct take place even for a single day there may be contravention of the provisions of this act.

78. HCCBPL's contention that there is no AAEC because of this exclusive supply agreement as there is intense competition in the beverage market is not correct as the exclusive supply agreement having discriminatory conditions and prices foreclose the competition and drive the competitors out of the market as a result competition is reduced/ eliminated.
79. The relevant market and assessment of dominance as determined by DG is absolutely correct because relevant market in the present case cannot be other than the closed market of various enterprises with whom it has entered into exclusive supply and there is no doubt that HCCBPL is completely dominant in the supply of its beverage products in that market. The reasons given in the DG's report are sufficient and conclusive. I have already explained in preceding paragraphs about the relevant market, the dominant position and how it is abused. So, I don't want to discuss them once again. However, for the reasons already discussed above, I am in agreement with the DG's report on the issue of relevant market, dominance of HCCBPL and how it is abusing its dominance.

### **ANTI-COMPETITIVE AGREEMENT**

80. The last allegation of the informant is that the respondent Hindustan Coca Cola Beverages Pvt. Ltd and M/s INOX Leisure Private Limited

(ILL) which operates multiplexes and screens in various cities have entered into an agreement to supply beverages at an inflated and exorbitant price in comparison to the price of these products in the ordinary market. Such an agreement between HCCBPL and ILL is anti-competitive as ILL is selling products of HCCBPL only leaving no choice to the consumer inside the multiplex and theatres.

81. The DG examined the complaint as to whether the execution of the supply agreement between HCCBPL and ILL was exclusive in nature and whether it refused to deal with other parties in contravention to Section 3(4) of the Competition Act, 2002? The investigation examined the exclusive supply agreement between HCCBPL and ILL dated 1.9.2010 which shows that it covers 29 multiplexes of ILL at various locations across India. Perusal of the agreement shows that clause 2.1, 4, 6 contain certain conditions wherein HCCBPL was treated as preferred beverage provider which essentially created barriers to new entrants as also foreclosing the competition so as to cause appreciable adverse effect on competition under Section 3(4) (b) of the Act. The mere absence of other competitors in the relevant market makes such agreement as anti competitive which causes AAEC. Similarly it was also found by the DG that during the currency of the agreement, the rights of ILL were restricted to buy products from other parties and this tantamount to refusal to deal with other parties in violation to Section 3(4) (d) of the Act.

82. M/s ILL, in response to the above finding of DG, has submitted a detail reply which is given as under:

*“That ILL and HCCBPL entered into an agreement dated 10.06.2008 for the supply of certain beverages, bottled water, fruit-based drinks etc. from time to time, to ILL by HCCBPL. This agreement was superseded by another agreement dated 01.09.2010 (hereinafter "Agreement"). In a gist, the Agreement between ILL and HCCBPL allows the latter to supply certain beverages and bottled water in accordance with the supply requirements of ILL. The beverages and bottled water must comply with the quality standards set by the applicable laws and statute. The term of the Agreement is for a period of four months, after which, ILL is free to enter into a contract of supply with any other supplier of beverages and bottled water. During the currency of the Agreement, ILL can procure supplies from the open market, in the event that HCCBPL fails to supply its requirements within fifteen (15) days of demand raised by ILL. Furthermore, ILL has the ability to reject beverages supplied by HCCBPL by reason of supply of defective or inferior goods. The Agreement also allows HCCBPL to undertake certain marketing activities during the currency of the Agreement.*

83. The DG’s assumption that the "hidden agenda of the agreement is clearly to foreclose the competition" is incorrect and flawed. An objective analysis of the Agreement between ILL and HCCBPL keeping in view the market dynamics and the nature of the industry, it is necessary to examine the effects of such an agreement in its specific context. Firstly, the purpose of the Agreement between the parties is to ensure that there is security (including adequacy) of supply to ILL

during the currency of the Agreement. Secondly, ILL being a commercial enterprise is justified in looking at the commercial aspects of any agreement with its trading partners. If certain partners provide better commercial terms, then ILL would be justified in doing business with such partners. In fact, if ILL generates surplus, it would be able to use those funds to provide better ambience including services or technology to its customers. It must be noted that the Agreement is not in perpetuity and its term does not exceed four months. The very purpose of negotiating a short period of four months is to enable ILL to replace HCCBPL with another beverage manufacture, if the latter is able to provide better products or terms and conditions to ILL.

84. In the context of the previous agreement (dated 10.06.2008) it must be noted that under Clause 6.4 of the said agreement, ILL had the right - at all times - to terminate the agreement without any cause by giving three months' notice to HCCBPL. The purpose of inserting such an exit option is to ensure that if ILL is offered better products or terms and conditions by a competing beverage manufacture, it can easily terminate the contract and switch suppliers. The DG in its Report has stated that the Agreement between the parties has been continuing for a "long period of time", and, as such, it is evidence that the agreement is anti-competitive. Although, the previous agreement (dated 10.06.2008) stands terminated as on date and has been replaced by an agreement which only has a tenure of four months, it is pertinent to note that all long-term agreements are not per se anti-competitive. On the contrary, such agreements act as an incentive where the supplier

has to make any client-specific investment in order to be able to supply. In the present case, HCCBPL is supplying equipment (on a bailment basis) to ILL in 19 out of 29 locations.

85. In his Report, the DG has arrived at a finding that the Agreement between ILL and HCCBPL has created barriers to entry and driven out HCCBPL's competitors out of the market'. The DG has also stated that "ILL has also defined its own qualitative specifications for the products sold inside its multiplexes". It is submitted that these conclusions of the DG are mere conjectures arrived at without appreciating facts that were made available by ILL. Furthermore, the DG has not provided any reasons for coming to the view that the Agreement between the parties creates entry barriers for new entrants and drives away competition. ILL has not imposed any "qualitative specifications" on HCCBPL. Clause 7.2 (iii) of the Agreement between ILL and HCCBPL reads as: "HCCBPL shall ensure the availability of best quality of said products and shall comply with all applicable laws and statutes, including but not limited to laws pertaining to Standards of Weights & Measures Act, Food laws and such other applicable laws. Any default of any of the laws applicable to the Products shall amount to a material breach of this Agreement'.
86. It is clear from the above reading of that the only "qualitative specification" that ILL demands and its supplier have to follow and comply with the standards laid down by any law, rule or regulation. In other words, ILL has not imposed any other additional condition with

regard to quality other than those imposed under law. As each beverage manufacturer has to - at all times - comply with such laws, rules or regulations, it grants ILL the flexibility to quickly substitute HCCBPL for a competing beverage manufacturer. ILL wishes to submit that it is guided by the interest of its customers and, therefore, it insists that only the best quality products are supplied to it. This is amply clear from a reading of Clause 4.1 (iv) of the Agreement which reads as: "Products shall be of best quality and properly packed and delivered..." (emphasis supplied). Thus, the combined reading of Clauses 4.1 (iv) and 7.2(iii) along with the termination provisions under Clause 6 of the Agreement, makes it clear that the HCCBPL does not have any "unfettered rights to supply the bottled water and other cold drinks products within the multiplexes of ILL", as suggested by the DG. Keeping in view the submissions as set out above, ILL submits that it has not contravened the provisions of Section 3 (4) (b) read with Section 3 (1) of the Act.

87. It is submitted that the DG has erroneously come to the view that the agreement between ILL and HCCBPL tantamount to 'refusal to deal' under Clause (d) of Section 3(4) of the Act. The DG should not apply a per se approach in coming to its findings and must objectively assess the effect of the Agreement. At the cost of repetition, it must be stated that the Agreement between the two parties is only for a short period of four months, after which, ILL is free to deal with any manufacturer of beverages. The restriction of four month yields certain efficiencies which would otherwise not been available to both ILL and HCCBPL.

From the perspective of ILL, these efficiencies include: (a) security of supply; (b) assured quality; (c) reduced administrative and storage costs; and (d) operational convenience. Furthermore, assuming that HCCBPL is able to achieve certain economies of scale, these benefits are passed onto ILL and it is able to provide better services to its customers. Hence, ILL submits that no case under Section 3 (4) (d) read with Section 3 (1) can be made out against ILL.

88. ILL submits that the Agreement between itself and HCCBPL speaks of certain marketing and advertising rights. These rights allow both parties to undertake joint promotional activities with the purpose of "creating customer awareness" for new products and services. These provisions promote consumer welfare by making them aware of products and schemes that are coming into the market. In the context of this Agreement, it should also be noted that ILL has undertaken promotional campaigns and displayed advertisements of other beverage manufacturers. Furthermore, it is in ILL's sole discretion to decide the movie in which the advertisement of HCCBPL will be displayed.
89. ILL further submits that the findings of the DG in his Report are not based on correct assumptions or reasoning. The Report adopts an extremely narrow approach in its analysis and, if such Report is accepted by this Hon'ble Commission, then it would curtail the operational flexibility of all multiplex operators and restrict their freedom of trade besides subjecting them to operational inconvenience.

90. It is submitted that the preamble of a statute is an admissible aid for construction of legislation. Although not an enacting part, the preamble is expected to express the scope, object and purpose of the statute. It may recite the ground and cause of making the statute, the evils sought to be remedied". The preamble of the Act states its intent and purpose as under:

*'An act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto" (emphasis supplied)*

91. A necessary concomitant of 'freedom of trade' or the 'freedom to contract' is the ability of an enterprise to choose its trading partners. As a general proposition, most legal systems in countries with a market economy adopt the view that enterprises should be allowed to contract with whomsoever they wish; compulsory dealing is not a normal part of the law of contract. In the Indian context, the freedom of trade is a fundamental principle that is enshrined in our constitutional scheme and the law of contract. In other words, an enterprise has no duty to contract with third parties with whom it does not wish to have dealings. Any contrary rule would effectively require an enterprise to deal with any and all available suppliers. This would be an onerous and unjustified interference with a company's freedom to organize its

commercial activities in the manner it best sees fit.

92. It is submitted that if the conclusion of the DG are accepted, it will lead to a situation where ILL's operational freedom will be stifled and it would be forced to deal with other beverage suppliers in the market who may not be able to provide the level of quality of product and service; variety of beverages; pricing; proven track record; established supply channels; and commitment to supply as provided by HCCBPL. Moreover, the administrative and logistical costs involved in facilitating the provision of providing a wide selection of beverages will be excessive. In such an event, ILL would be required to provide storage facilities, dispensing apparatus, coolers, water purifiers, compressors, etc requiring additional space in the multiplex. Each of these equipments may differ according to the specific requirements of each supplier. Additionally, these will have to be procured for each multiplex cinema. ILL will also require trained staff to dispense the beverages of each individual supplier. It will also require additional staff to monitor the inventory of each supplier and make requisitions from time to time. The net effect of all these efforts will be that ILL overhead costs will increase exponentially and it would be forced (in order to remain profitable) to raise the prices of movie tickets and of the products sold' at the multiplexes. As such, the welfare of the 'Aam Admi' or the 'Common Man' will be severally harmed.

93. It is also submitted that disallowing ILL the freedom to choose a trading partner that matches its expectation as to quality, variety, quantity and

price is against consumer welfare and, thus, against the most basic tenet of the Act. A cine-goer visiting a multiplex is looking for a good 'multiplex experience'. In the event that a cine-goer is served a bad quality product, his/her 'multiplex experience' will be disappointing and his/her marginal utility stands diminished.

94. ILL further submits that it is in the business of screening films and this constitutes approximately 70% of the total revenue generated by its multiplexes. The sale of food and beverages - together - only constitutes approximately 20% of its total revenue. ILL's customers are provided with a wide selection of Hindi, English and regional movies, state of the art facilities in terms of modern projection and acoustic systems, interiors of international standards, stadium styles high back seating with cup-holder arm-rests etc. The primary focus of ILL's commercial strategy is to screen a wide selection of films and screen them at convenient times. The sale of food and beverages is an ancillary activity carried on by it to provide a complete experience to its customers. ILL does not carry out its activities as a retail grocery shop and, therefore, cannot be expected to carry all products that are available in the market. Nor do the customers visiting ILL's multiplexes come with the same expectations (with regard to variety) as they would if they were entering a retail shop. A significant number of ILL's customers do not even purchase any food or beverage from the retail counter.

95. It is submitted that competition law protects competition and consumers, not a particular competitor. Unless it is clear that there are

substantial benefits to competition in interfering with contractual freedom, rather than benefits to the profits of a particular third party, competition law should not order intervention. For the reasons enumerated above, it is submitted that serious consumer harm may ensue if ILL is forced to provide a wide variety of food and beverages.

96. I have gone through the entire reply filed by the ILL and HCCBPL and also the DG report. Section 3(4) of the Act enlists certain agreements as illegal. The section reads as under:

“Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provisions of services including:-

- (a) Tie-in arrangement;
- (b) Exclusive supply agreement;
- (c) Exclusive distribution agreement;
- (d) Refusal to deal;
- (e) Resale price maintenance.

Further, “exclusive supply agreement includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person.”

“Refusal to deal includes any agreement which restricts, or is likely to restrict, by any method, the persons or classes of persons to whom goods are sold or from whom goods are bought.”

97. It is clear from the above definition that any exclusive agreement or arrangement restricting the purchaser from buying or procuring any goods or services from any other supplier is anti-competitive as such exclusive arrangements limit the sources of supply and therefore, limit the competition. Similarly, any agreement which refuses to deal with any other person other than the person with whom exclusive agreement has been made is anti-competitive. These exclusionary practices are vertical agreements and they infringe the law if they have the effect of reducing/limiting competition.
98. In the present case also, what is important to examine is whether the agreement between HCCBPL and ILL has the effect of reducing or limiting competition. It is a fact that both M/s HCCBPL and M/s ILL had entered into an agreement dated 1.9.2010 in respect of supply and distribution of beverages in the premises of multiplexes owned by ILL. By this agreement, other suppliers of the same product were prohibited and denied entry in the multiplexes owned by ILL for sale and supply of such products. Since, other competitors are not allowed inside the premises of the Multiplex competition is eliminated. The ILL cannot take the plea that the agreement continued only for four months and can be terminated any time and therefore, the agreement has no effect on competition. The Act does not prescribe any time limit for the operation of any agreement which has the effect of limiting competition. Similarly, the ILL's plea that it is the requirement of the business and to ensure quality standards the exclusive agreement with HCCBPL has been made. This also does not negate the fact that competition is lessened or

eliminated because of exclusive agreement between HCCBPL and ILL which restricted the entry of other competitors. The ILL's contention is also not justified that ILL being a commercial enterprise has to see its own commercial interests while pursuing its business.

99. Further, the arguments of the ILL that DG has given reasons for coming to the view that agreement between the two created entry barriers for the new entrants and eliminated competition. Instant it was for the ILL to prove that this agreement has not created any entry barrier to other competitors which ILL has failed to do so.
100. ILL has tried to justify the exclusive agreement between them on the ground that this agreement the customers are getting the products to the best of its quality. How can ILL say that the other suppliers of the same product do not maintain the same quality.
101. On the issue of "refusal to deal" the ILL contains that DG has applied per-se rule in arriving that the finding that the agreement between ILL and HCCBPL amounts to refusal to deal. The DG should have objectively assessed the effect of the agreement which he has not done. Had he done the analysis in that perspective it would have found that because of this agreement the efficiency in the supply of the products has increased and the benefits of this efficiency has ultimately passed on to the consumers. Therefore, no case is made out against ILL under Section 3(4)(d) of the Act. This argument cannot be bought. In the name of maintaining standard and quality ILL is charging excessive and exorbitant price which is from no angle cannot be justified. There are

many other competitors who can supply the products of the same standards and quality at much cheaper price. Even the HCCBPL is supplying these products outside the multiplexes at much cheaper price. Even on the ground of operating cost, the action of ILL cannot be justified as the price charged is not in proportion to the operating costs.

102. In view of the reasons stated above, I hold that the exclusive supply agreement entered into between ILL and HCCBPL has contravened the provisions of section 3(4) of the Act as this agreement has created appreciable effect on competition by creating entry barriers to other entrants in the relevant market and foreclosing competition by driving out the competitors from the relevant market. As a result the benefits of the competition have not accrued to the consumers/ customers.

103. In the end, ILL has raised a very fundamental issue that the finding of the DG as discussed above is against 'freedom of trade' being a fundamental right enshrined in the constitution and preamble of the Act. According to ILL, it is the 'right to freedom of trade' is nothing but the ability of the enterprise to choose its trading partners and enter into any contractual agreement as a part of its commercial activities. ILL apprehends that if Commission accepts the view of DG, the right to freedom of trade will not be ensured.

104. In this regard, it is necessary to refer to the Preamble to our Constitution which reads as under:-

The people of India, having solemnly resolved to constitute India into a [Sovereign socialist secular democratic republic] and to secure to all its citizens:

Justice, social, economic and political;

Liberty of thought, expression, belief, faith and worship;

Equality of status and of opportunity; and to promote among them all;

Fraternity assuring the dignity of the individual and the [unity and integrity of the nation];

In our constituent assembly this twenty-sixth day of November, 1949, do hereby adopt, enact and give to ourselves this constitution.

The Preamble to the Competition Act reads as under: -

*'An act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto'*  
(emphasis supplied)

From a comparison of the two preambles it is clear that there should be equality and equality of opportunity. Under the Competition Act, there should be economic development and this is also enshrined in the Directive Principles of Policy in the Constitution. If in the Constitution, a citizen should have economic justice and liberty of thought and expression, in Competition Law a consumer's interest should be protected by seeing that the market does not become anti-competitive. Freedom of trade is part of the preamble to the Constitution and is especially mentioned in Article 19 of the Constitution. Freedom of trade

is also mentioned in the Competition Act. Thus, the elements of the Constitution are enshrined in the Competition Act.

105. Thus, the interpretation of the constitution and the preamble of the Act by M/s ILL is not in right perspective. Freedom of trade doesn't mean that in the name of this freedom the interests of the citizens (here in the case of consumers) are not protected. That is the reason why it is given in the preamble that the Commission is to protect the interests of the consumers and to ensure freedom of trade carried on by other participants in market. It means that it is the duty of the Commission to ensure not only the freedom of trade but also to ensure that other participants should also pursue the same freedom of trade. It is the fundamental principle of Competition Law that if all competitors carry their trade in a fair manner the competition will automatically come and the consumers will get the best quality of products at cheaper rates. Here, in the present case what ILL and HCCBPL are doing is to further their own interests by way of an exclusive agreement restricting other competitors to enter into that market. As a result, competition is reduced/ eliminated and the consumers are getting the products at exorbitant price. Thus, the argument of ILL cannot be justified in any manner as it is against the spirit of the Constitution and the Competition Law.
106. Further, I would like to add here that Section 18 of the Act casts duty on the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interest of consumers and ensure freedom of trade carried on by other

participants, in markets in India.” Accordingly, under the Act, the Commission is to take action against anti-competitive agreements (such as cartels) and abuse of dominant position (such as predatory pricing and unfair or discriminatory conditions of prices). These provisions find their origin in the preamble of the Act. The constitution of India, the fountainhead of all laws in India, also guarantees the economic freedom to all its citizens. Frederic Jenny, the authority on the Competition Law, has said “enforcing competition laws brings economic democracy, which goes together with political democracy. Competition Law ensures there will not be barriers preventing people from moving into certain markets. It also makes sure there will be no exploitation of consumers by firms tempted to abuse their market power.”

107. In view of the above, there is no doubt that the action of the ILL and HCCBPL have contravened the provisions of Section 4(2) (a) & (c) of the Competition Act, 2002 as they have first captured the customers in the name of security and then fleece those locked-in customers by not offering them any choice and charging discriminatory price. This is clearly an abuse of dominant position and infringes the provisions of section 4 (2) (a) and (c) of the Act.
108. Similarly, the exclusive supply agreement entered into between ILL and HCCBPL has contravened the provisions of section 3(4) of the Act as this agreement has created appreciable effect on competition by creating entry barriers to other entrants in the relevant market and foreclosing competition by driving out the competitors from the relevant market. As a result the benefits of the competition have not accrued to

the consumers/ customers in regard to the factors mentioned in section 19(3) of the Act.

109. I, therefore, am of the considered opinion that this is a fit case where following directions under Section 27 of the Act need to be issued:

- 1) M/s Inox Leisure Limited and M/s Hindustan Coca Cola Beverages Pvt. Ltd are directed to immediately stop from charging discriminatory prices from the customers.
  
- 2) The discriminatory conditions mentioned in the agreement dated 10.06.2008 and any other subsequent agreement to this effect be changed immediately to allow other competitors of the same product within the premises of multiplex owned by ILL.
  
- 3) A penalty of 5% of the average of the turnover for the last three preceding financial years is imposed upon M/s ILL and HCCBPL for deliberately entering into exclusive supply agreement to foreclose the competition and driving the competitors out of the market.

**R. Prasad**  
**Member (R)**