A-517

BEFORE THE HON'BLE SUPREME COURT OF INDIA

(FILED UNDER SECTION 53-T OF THE COMPETITION ACT, 2002)

CIVIL APPEAL NO. ____/2017

VIKING

….APPELLANT

VERSUS

ZORO

….RESPONDENT

COMPETITION COMMISSION OF INDIA

….RESPONDENT (PROFORMA)

MARS

….RESPONDENT (PROFORMA)

MOST RESPECTFULLY SUBMITTED TO THE HONOURABLE JUSTICES OF THE SUPREME COURT OF INDIA

SUBMISSIONS ON BEHALF OF THE APPELLANT

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LIST OF ABBREVIATIONS

Abbreviation	Expansion
§	…Section
¶	…Paragraph
Act	…Competition Act, 2002
AIR	…All India Reporter
Art.	…Article
CCI	…Competition Commission of India
Co.	…Company
Comp LR	…Competition Law Reporter
COMPAT	…Competition Appellate Tribunal
DG	…Director General
E.U.	…European Union
ECJ	…European court of Justice
Ed.	…Edition
Hon'ble	…Honorable
Ltd.	…Limited

M	…Mars
OFT	…Office of Fair Trade
Ors.	…Others
Pvt.	…Private
S.A.I.L	…Steel Authority of India
SC	…Supreme Court
SCC	…Supreme Court Cases
TFEU	…Treaty on Functioning of European Union
U.K.	…United Kingdom
U.O.I	…Union of India
V	…Viking
v.	…Versus
Z	…Zoro

STATEMENT OF JURISDICTION

Viking, the Appellant, has approached the Hon'ble Supreme Court of India under § 53-T of The Competition Act, 2002.

All of which is respectfully submitted.

STATEMENT OF FACTS

I

V and M are major players in the credit card market in India with a market share of 40% and 30%, in the year 2017, respectively. Z entered the market in the year 2015 and subsequently its market share in 2017 became 7%. The market also hosted other smaller players.

II

V and M independently entered into contracts with various member banks prohibiting them from issuing any other cards, including Z's cards. Following this Z filed a complaint before the CCI alleging violations under the Act on part of V and M by entering into "exclusionary contracts" by abusing their dominant position. Z sought imposition of penalty and restrain on them entering into or acting upon such contracts. An interim relief in this regard was also prayed for.

III

The CCI rejected the complaint and dismissed the application for interim relief saying that since there was no single dominant entity in the market and rather V and M had vibrant competition amongst them. Further, the concept of more than one dominant undertaking in the same market is alien to the Act.

IV

Against the order of CCI, Z filed an appeal before the COMPAT wherein it observed that the conduct of V and M could possibly be considered as restrictive and anti-competitive. Moreover, the Act nowhere states that more than one enterprise cannot be dominant in the same market. The COMPAT directed the DG to conduct an investigation and submit its report to the CCI.

V

Against the order of COMPAT, V went to the Supreme Court of India and contended that the COMPAT failed to arrive at a *prima facie* violation while directing investigation. Further, it was not a fit case to grant an interim relief as Z had failed to make out his case. Moreover, V cannot be treated as a dominant undertaking in the market as it has fierce competition with M. The Apex Court took up the matter and framed the issues accordingly.

STATEMENT OF ISSUES

I

What is a *prima facie* view and whether in the present case COMPAT was justified in directing investigation?

II

Whether it was a fit case for grant of interim relief by COMPAT?

III

Whether there can be more than one dominant undertaking/enterprise in the same market?

SUMMARY OF ARGUMENTS

I. THAT COMPAT WAS NOT JUSTIFIED IN DIRECTING INVESTIGATION TO THE DG.

It is submitted that COMPAT was not justified in directing investigation. *First*, COMPAT was not justified in taking *prima facie* view of violation of the Act as there is no credible evidence to support the allegations meted out by the respondents. *Second*, a perusal of § 41 of the Act and various precedents, it is established that the DG is an extended arm of the CCI. However, COMPAT does not possess the power to instruct the DG since it is an adjudicatory authority. *Third*, past decisions of COMPAT are testimony that it had complete authority in remanding the matter to CCI, however, it did not order so in the present case.

II. THAT IT IS NOT A FIT CASE FOR GRANT OF INTERIM RELIEF BY COMPAT.

It is submitted that this is not a fit case for grant of interim relief by COMPAT. *First*, the COMPAT overextended its authority to grant interim relief by the exercise of its appellate authority while interfering with CCI's prudent observations. *Second*, there exists no *prima facie* case of anti-competitive conduct because no independent proof of market power or impairment of interests of consumers exists. Further, no irreparable harm is caused to the respondent as substantiated by existing established methods of calculating damages in foreclosure and "exclusionary" cases. *Third*, the balance of convenience tilts in favor of the appellants and public interest would be served in the continuing operation of the agreements.

III. THAT THERE CANNOT BE MORE THAN ONE DOMINANT UNDERTAKING/ENTERPRISE IN THE SAME MARKET.

It is submitted that there cannot be more than one dominant undertaking in the same market. *First*, the language of § 4 is clear, thus must be construed literally. Use of the word "an" contemplates only one dominant enterprise in the market and courts should not interfere with parliamentary wisdom in this regard. *Second*, the attempt of the legislature to incorporate the concept of "collective dominance" via the amendment of 2012 holds testimony to the fact that it does not exist in the present statute. *Third*, there exists vibrant competition between V and M and they cannot be expected to act independently of each other. *Fourthly*, a tacit coordination or an economic link is required to establish “collective dominance”. Therefore, it does not contemplate individual dominant positions held by the enterprises.

ARGUMENTS ADVANCED

I. THAT THE COMPAT WAS NOT JUSTIFIED IN DIRECTING INVESTIGATION.

¶ 1 It is most humbly submitted that the COMPAT was not justified in directing the DG to investigate into the matter. The argument is twofold. *First*, that the COMPAT was not justified in formulating a *prima facie* view of violation of provisions of the Act. *Second*, the COMPAT did not possess the power to direct the DG to investigate in the matter.

A. The COMPAT was not justified in taking a view of *prima facie* violation of the Act.

¶ 2 It is humbly submitted that a *prima facie* view taken by any authority is understood to be a situation where there is a ground for proceeding[1]. It implies a situation where the concerned authority, as in the present case the Competition Commission of India believes that there might be a ground for further investigation into the alleged violation of § 4 of the Competition Act, 2002.

¶ 3 The term '*prima facie*' has been defined as "sufficient to establish fact or raise a presumption unless disproved or rebutted".[2] Further, in the *Concise Dictionary of Collins* the phrase '*prima facie*' has been taken to be defined as at first sight or as it seems first.[3] Moreover, existence of a "*prima facie*" case does not mean that the plaintiff should have a cent percent case. What it means is that the plaintiff should have some case which requires to be gone into and is not liable to be thrown at the threshold.[4] To the same effect, it was held that "*Prima facie* case" thus, means a substantial question appearing at the first sight worth investigation and evidence.[5]

¶ 4 This Hon'ble Court observed that "A *prima facie* case does not mean a case proved to the hilt, but a case, which can be said to be established if the evidence, which is led in

[1]Sher Singh v. JitendraNath Sen, (1932) 33 Crim.L.J. (Cal.) 3.
[2] BLACK'S LAW DICTIONARY, 1382 (10th ed. 2014).
[3] Golan Daulagupu v. National Investigation Agency, (2012) 5 G.L.T. 739.
[4]Nirmal v. Lakhpat Singh, (2001) 3 P.L.R. (P&H) 556.
[5]Bishamber Lal Sud v. Ajai Kumar, (1995) A.I.H.C. 1417 (H.P.).

support of the same, were believed."[6] In its decision, the Hon'ble High Court of Delhi also observed that a *Prima facie* case means that it needs serious consideration, investigation or determination. It means bona fide dispute requiring determination without pre-judging the case.

¶ 5 It has been held by this Hon'ble Court that while determining whether a *prima facie* case had been made out, the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence.[7] It is noteworthy that the necessary doubt as to whether the plaintiff has a *prima facie* case gives the right to the plaintiff to claim that he has a serious question of law to be tried. In such cases, the court may consider the case of the plaintiff and hold it that he has a *prima facie* case because the question of law involved in the suit has to be tried.[8]

¶ 6 Applying these definitions in the instant matter, it is evident that the CCI was justified in holding the companies not in violation of the Act, *prima facie.* There is no credible evidence to substantiate the claim of the Respondent that there is *prima facie* violation of the Act. Thus, the CCI has not erred in either fact or law while passing the impugned orders.

B. The COMPAT was not justified in ordering DG to investigate in the matter

¶ 7 It is humbly submitted that the COMPAT was not justified in issuing an order, directing the Director General to investigate into the matter. The argument is twofold. *First*, under § 41 of the Act, the DG can act only on the direction of the Commission. *Second*, the COMPAT acted in excess of powers granted to it under the Act.

i. <u>Under § 41 of the Act, the DG can act only on the direction of the Commission.</u>

[6] Marlin Burn Ltd. v. R.N. Banerjee, A.I.R. 1958 S.C. 79 (India); The Management of the Bangalore Woollen Cotton and Silk Mills Co. Ltd. v. B. Dasappa, M.T., A.I.R. 1960 S.C. 1352 (India).
[7] Hindustan Petroleum Corporation Limited v. Sriman Narayan, (2002) 5 S.C.C. 760 (India).
[8] Kanraj Khatri v. Nathuram Jain, A.I.R. 1992 M.P. 92 (India).

¶ 8 It is most humbly contended that § 41 of the Act clearly states that "the DG shall, *when so directed by the Commission*, assist the Commission in investigating…"[9] Therefore, the DG can assist the Commission only when it requires to carry out investigation in a particular matter. The Commission is empowered to direct the Director General to make investigation into any contraventions of the provisions of the Act.[10] This intrinsic nature of relationship between the CCI and DG has also been established through precedents of various authorities.

¶ 9 It has been settled under law that the DG is an extended arm of the CCI[11] and therefore acts upon Commission's directions. In *Competition Commission of India* vs. *Steel Authority of India Ltd. and Anr.*,[12]the Apex court held that the DG is a wing of the CCI and the issuance of such a direction to investigate is an administrative direction to one of its own departments. Therefore, the DG is an investigative arm of the CCI and can only act when the CCI directs it to provide its assistance, the COMPAT does not possess the power to direct the DG to conduct investigation.

ii. The COMPAT acted in excess of powers granted to it.

¶ 10 It is submitted that under § 41 of the Act only the CCI is empowered to direct the DG to investigate into the matter, hence the COMPAT acted in outreach of its powers. It is trite law that a body, which is a creation of a statute, cannot assume powers which are not specifically granted to it under the Act[13] and are inconsistent with the express provisions of the Act or its scheme.[14] It has only those powers which are conferred on it by the statute.[15]

[9] § 41, The Competition Act, No. 12 of 2003.
[10] S.M. DUGAR, COMMENTARY ON THE MRTP LAW, COMPETITION LAW & CONSUMER PROTECTION LAW, 1084 (2004).
[11] Shree Cement Limited and Anr. v. Competition Commission of India and Anr., (2014) 210 D.L.T. 605.
[12] Competition Commission of India v. Steel Authority of India (2010) 10 S.C.C. 744 (India).
[13]Dr. Mohammed Tatar Khan v. Andhra Pradesh Women's Commission rep. by the Chair Person and Ors., (2008) 3 A.L.T. 209.
[14] CIT v. Manick Sons, A.I.R. 1969 S.C. 1122.
[15]Dharmatma Saran Kothiwal v. Assistant Controller of Estate Duty, (1988) 172 I.T.R. 122 (All).

¶ 11 It is averred that the Statement of Objects of the Act clearly establish that the CCI would be a regulatory authority whereas the COMPAT is an appellate authority. This Hon'ble Court has upheld the same in its decision of *CCI* v. *SAIL*.[16] The reference to the Statement of Objects and Reasons is permissible for understanding the background, antecedent state of affairs in relation to the statute, and the evil which the statute was sought to remedy.[17] An adjudicatory body has to function within the confines of its jurisdiction. Anything done by it in excess of its jurisdiction is void.[18] What is without jurisdiction will remain so.[19] The legislature has conferred regulatory power on a regulatory body. It has a sacrosanct purpose.[20] Thus, COMPAT being an appellate authority, the assumption of regulatory functions is bad in law.

¶ 12 Moreover, in *Shri Sitaram Sugar Co. Ltd.* v. *Union of India*[21] the Apex court held that "a repository of power acts ultra vires either when he acts in excess of his powers in the narrow sense or he abuses his power by acting in bad faith…" In the present matter the COMPAT had acted in excess of its powers by direct the DG to investigate into the matter and therefore the said action is ultra vires of the Act.

¶ 13 The power to direct the DG to investigate into a matter has not been specifically provided to COMPAT under the Act. Therefore, it cannot assume the same and act in excess of powers granted to it. Further, it is established that the COMPAT has the power to remand a case to the CCI for fresh consideration[22] and has exercised this power in previous rulings.[23] Since, an alternative and more appropriate remedy is available to the COMPAT, directing the DG to investigate into the matter was it acting in excess of its powers.

¶ 14 The adoption of a consistent approach of remanding the matters to CCI is a *bonafide* use of powers granted to the COMPAT by § 53B (3). It has been emphasised upon

[16] *Supra* note 12.
[17] G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION BY JUSTICE, 218 (2004).
[18] M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW, 841-842 (2013).
[19] Tata Consulting Engineers v. Workmen, A.I.R. 1981 S.C. 599.
[20] Nand Kishore Garg vs. Govt. of NCT of Delhi and Ors. (2011) E.L.R. 745 (Delhi).
[21] Shri Sitaram Sugar Co. Ltd. v. Union of India, A.I.R. 1990 S.C. 1277.
[22] Union of India & Ors. v. Umesh Dhaimode (1997) 10 S.C.C. 223.
[23] Shri Sunil Bansal and ors. v. M/s Jaiprakash Associates Ltd. and ors. Unreported Judgments, 2016.

adjudicatory authority that they ought to adopt a consistent approach.[24] It is preferable that an adjudicatory body decides the cases raising the same point in the same way, otherwise public grievances are bound to arise.[25]

II. THAT THE PRESENT CASE IS NOT A FIT CASE FOR GRANT OF INTERIM RELIEF.

¶ 15 It is humbly submitted that the CCI was justified in taking the *prima facie* view that there is no violation of the Act. Further, COMPAT is an appellate authority under the Act and ought to act as per settled principles of law regarding conduct of an appellate authority as against a court of first instance, however, it has erred in granting interim relief in the instant matter.

A. CCI was justified in denying the grant of interim relief to the Respondent

¶ 16 It is averred an interim injunction will be granted if the court is satisfied that a serious question will be tried, damages are not an adequate remedy for the party, and the balance of convenience lies with the claimant.[26] There can be no gainsaying that while exercising its discretion under § 33 of the Act, the Commission has to keep in mind the principles laid down by the Supreme Court and High Courts for exercise of similar power by the regular Courts.[27]

¶ 17 Thus, in order to grant interim relief the court must be satisfied that (i) the applicant has a *prima facie* case to go for trial; (ii) that protection is necessary from that species of injury known as "irreparable injury"; and (iii) that the mischief or inconvenience likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.[28] In the absence of any of these three ingredients, court would be justified in declining to issue the injunction.[29]

i. *<u>There exists no prima facie case of anti-competitive conduct on part of Viking and Mars.</u>*

[24] Union of India v. Paras Laminates (1990) 4 S.C.C. 454.
[25] *Supra* note 18.
[26] American Cyanamid Co. v. Milk Marketing Board, (1984) A.C. 130 (H.L.).
[27] Fast Track Call Cabs Pvt. Ltd. v. CCI, Unreported Judgments, 2016.
[28] Kalu Haji v. Nabin Chandra Bora, (1985) 1 Gau. L.R. 281 (India); Bharat Law House v. Wadhwa & Co. Pvt. Ltd., A.I.R. 1988 Del. 68 (India).
[29] Hazarat Surat Shah Urdu Education Society v. Abdul Sahab, (1988) 14 A.L.R. 776 (India).

¶ 18 It is submitted that the plaintiff has failed to establish the minimum standards necessary for presenting a case of violation of the competition law. The following factors are required to be proven for a *prima facie* case:[30]

¶ 19 Market Power: Determining market power is essential to determine whether harm to the competitive process is possible.[31] In absence of independent proof market power[32], an exclusive dealing restraint is at worst harmless, and may well be pro-competitive.[33] In the instant matter, neither V nor M is the exclusive leading player in the industry and there is no information pointing towards any anti competitive effects.

¶ 20 That impairment in fact allows defendant to harm consumers: In all cases, if there is no adverse effect on price, output, quality, choice, or innovation in the market as a whole, the degree of foreclosure will not help the plaintiff prevail.[34] Due to vibrant competition between V and M neither of them can afford to act in a way that ultimately harms consumers as consumers see these credit cards as interchangeable.

¶ 21 It is submitted that V and M's conduct is commercially moral while adopting commercially fair practices among competitors.[35] The exclusive contracts entered into by both the parties are covered by the rule of reason.[36] The true test of legality is whether the restraint imposed is such as merely regulates and thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine this question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied.[37] Further, there is no "naked exclusion" in the present case and ample justifications exist. A material reduction in the choices available is no different in kind

[30] Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure" and Consumer Harm, in* Antitrust Law J. 311-369 (70 vol., 2nd ed., 2002).
[31] SCFC ILC, Inc. v. Visa USA, Inc. 36 F.3d 958, 965 (10th Cir. 1994); Valley Liquors, Inc. v. Renfield Imps., Ltd., 822 F. 2d 656, 666-67 (7th Cir. 1987).
[32] PepsiCo, Inc v. Coca-Cola Co. 114 F. Supp. 2d at 257-58; Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993).
[33] Todd v. Exxon Corp., 275 F.3d 191, 207-08 (2nd Cir. 2001).
[34] *Supra* note 30.
[35] *Supra* note at 326.
[36] Standard Oil Co. of California & Standard Stations Inc. v. United States, 337 U.S. 293 (1949).
[37] Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

than a reduction in quality and it is accepted that a deterioration in quality is a cognizable form of consumer harm.[38]

¶ 22 Establishment of dedication and loyalty: In the credit card market, the manufacturers deal with issuing banks instead of end consumers, directly. The exclusive contract is merely a means to encourage a more dedicated sale, service, and quality effort by the affected distributor or retailer and to prevent a conflicting interest from preventing the distributor to promote their product efficiently. This interest of a supplier has been recognized legally.[39]

¶ 23 To avoid free riding: It is submitted that the defendants are primarily profit making and competitive entities and thus have an interest in protecting their dealer specific counselling and training accorded to the banks to be used by the banks in support of a competing brand.

¶ 24 Volume commitments for economies of scale: Exclusive contracts can assure assurances of volume sufficient to enable the seller to achieve economies of scale and, thus, to reduce production and selling cost.[40] This has been recognized in the Sewell Plastics case.[41]

¶ 25 Maintaining confidentiality: If the bank is carrying a competing line, any confidential promotional strategy could be leaked, advertently or inadvertently spoiling the supplier's promotion and creating a disincentive for future promotional activities. Exclusive dealing eliminates this problem by forcing the dealer to focus on a single line.[42]

¶ 26 Reducing monitoring and transaction costs: It is submitted that an exclusive contract rules out concerns for monitoring dealer banks issuing rival products. Multiple brand dealers

[38] National Macaroni Manufacturers Ass'n v. F.T.C., 345 F.2d 421 (7th Cir. 1965).
[39] Joyce Beverages v. Royal Crown Cola Co., 555 F. Supp. 271, 276-77 (S.D.N.Y.1983).
[40] *Supra* note 30.
[41] Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196, 1207-12 (W.D.N.C. 1989); Great Lakes Carbon Corp., 82 F.T.C. 1529.
[42] *Supra* note 39; RW. Int'l Corp. v. Welch Foods, Inc., 88 F.3d 49 U.S.

may also cause suppliers and dealers to incur increased transaction costs in ensuring proper separation of competing product lines at the point of sale.[43]

ii. *That no irreparable harm would be caused to the respondent if no interim relief is granted*

¶ 27 It is submitted that irreparable injury rule is the principle that equitable relief (such as an injunction) is available only when no adequate legal remedy (such as monetary damages) exists.[44] However, in the present case, there exist methods of quantification of damages in the event that the CCI rules in favour of the Respondent. Guidance paper by the European Commission provides much needed clarity into quantification of damages through analysis of US models.[45] According to the Commission, the "central question" in quantifying damages from antitrust violations is "to determine what is likely to have happened absent the infringement."[46] The Commission identifies two principal approaches in calculating antitrust damages. The Commission identifies that these techniques can be used to quantify the harm "suffered because of an exclusionary practice."[47]

¶ 28 In a foreclosure case, the objective is primarily to calculate the loss of profit suffered by the excluded plaintiff[48] and the U.S. courts use the before-and-after approach to compute lost profit damages in cases in a competitive period."[49] It was further noted, once a suitable comparator-based method has been established, various techniques are available to implement in practice."[50] U.S. Courts accept the regression analysis as a reliable means by which economists may prove antitrust damages."[51]

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[43] *Id*. at 275- 277.
[44] *Supra* note 2 at 958.
[45] European Commission Draft Guidance Paper on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union of June 2011, *available at* http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf.
[46] *Id*. at ¶11.
[47] *Id*. at ¶174.
[48] PHILLIP E. AREEDA ET AL., ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES & THEIR APPLICATION, ¶391 (2nd ed. 2000).
[49] Godix Equip. Export Corp. v. Caterpillar, Inc., 948 F. Supp. 1570, 1583 (S.D. Fla. 1996).
[50] *Supra* note 45, at ¶53.
[51] Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1238 (3d Cir. 1993); In re Live Concert Antitrust Litig., 247 F.R.D. 98, 146 (C.D. Cal. 2007)

iii. That balance of convenience lies in favour of the appellants

¶ 29 It is submitted that balance of convenience is a test that courts use to decide whether to issue a preliminary injunction stopping the defendant's allegedly infringing or unfair practices, weighing the benefit to the plaintiff and the public against the burden on the defendant.[52] There exist ample justifications for the appellants to enter into the exclusionary contracts however, no sufficient evidence is present to tilt the balance of convenience in their favour and prove that the harm caused to them is not due to their own inefficiencies but due to the defendant's conduct.

¶ 30 Interim injunction is a discretionary remedy and the claimant must show that he has a superior equity in his favour, entitling him to the grant of an injunction.[53] Even if it is argued that no harm would be caused to the Appellants on grant of interim relief, it is a legal principle that an injunction will not be granted on the principle that it will do no harm to the defendant if he has not done the act complained of.[54]

¶ 31 The interests of the opposite party are as important as the interest of the party asking for injunction.[55] The prayer for interim injunction cannot be decided by assuming that the allegations made in the information have been proved.[56] Where the merits and the question of convenience are fairly evenly balanced, there will be no injustice in requiring that the party seeking relief demonstrate good prospects of success before imposing almost certain prejudice on the other side.[57]

iv. That no public interest would be served in grant of the interim relief.

¶ 32 It is submitted that the balance of convenience tilts in favour of the appellant because the exclusionary contracts not only serve the purpose of achieving greater efficiency but also ensure that the firm's resources can be greater directed towards innovation and resource

[52] *Supra* note 2, at 326.
[53] State of Madhya Pradesh v. J.P. Saraswat, (1982) M.P.W.N. 731 (India).
[54] Coffin v. Coffin, 156 U.S. 432 (1895).
[55] Jammu Forest Co. v. State of Jammu & Kashmir, (1968) Kash. L.J. 134 (India).
[56] *Supra* note 27.
[57] Australian Broadcasting Corporation v. O'Neill, (2006) H.C.A. 46.

development.[58] This is especially relevant in the case of credit card manufacturing where best and better practices by manufacturers can greatly increase consumer welfare in the form of better security in financial transactions. The focus on innovation is apparent in the parallel market wherein Visa and MasterCard are leading players and also by virtue of strength are leaders in innovation.[59] In such cases, failing rivals would be unduly protected for the duration of the proceedings and innovative rivals may not have sufficient resources to overcome the barriers which this undue protection is raising.[60]

B. That COMPAT has erred in granting the interim relief in the present case.

¶ 33 It has been held that appellate court shall not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where it was exercised arbitrarily, or capriciously or perversely or ignoring settled principles of law regulating grant/refusal of interlocutory injunctions.[61] Interim relief should be granted in rare cases, under compelling circumstances.[62]

¶ 34 It has been held that once the court of first instance exercises its discretion to grant/refuse relief of temporary injunction and the said exercise of discretion is based upon objective consideration of the material placed before it, supported by cogent reasons, the appellate court will be loathed to interfere simply because on a *de novo* consideration of the matter it is possible for the appellate court to form a different opinion on the issues of *prima facie* case, balance of convenience, irreparable injury and equity.[63]

III. THAT THERE CANNOT BE MORE THAN ONE DOMINANT UNDERTAKING / ENTERPRISE IN THE SAME MARKET.

¶ 35 It is humbly submitted that the concept of dominant undertakings finds its place under § 4, Competition Act. The argument shall be dealt with application of rules of

[58] RICHARD H.BORK, THE ANTI-TRUST PARADOX, 309 (1978).
[59] Forbes, THE WORLDS MOST INNOVATIVE COMPANIES, https://www.forbes.com/innovative-companies/#669079d31d65 (last visited July 20, 2017).
[60] Jean-Yves Art, *Interim relief in EU competition law: A matter of relevance*, Art. No. 80361, CONCURRENCES REV., (2016), *available at* www.concurrences.com.
[61] Wander Ltd. vs. Antox India (P) Ltd., (1990) 1 Supp. S.C.C. 727 (India).
[62] Sinclair Refining Co. v. Midland Oil Co., 55 F. 2d 42.
[63] Skyline Education Institute (India) (P) Ltd. v. S.L. Vaswani & Anr. A.I.R. 2010 S.C. 3221 (India).

interpretation and seeking resort to the Parliamentary wisdom besides rulings of the European Courts and their Competition Legislation & Regulations.

¶ 36 The position of law is that the words of a Statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning unless that leads to some absurdity or unless there is something in the context, or in the object of the statute to suggest the contrary.[64] The intention of the legislature always has to be gathered by words used by it, giving to the words their plain, normal, grammatical meaning.[65]

¶ 37 Thus, for the words in § 4, stating that *"No enterprise or group shall abuse its dominant position in the market"* it is clearly established that there is only one entity which has been contemplated to be dominant and which is prohibited from abusing its dominant position if it attains so. Further, when the words of a statute are clear, plain[66] or unambiguous[67] i.e. they are reasonably susceptible to only one meaning[68], then no more can be necessary to expound those words in their natural and ordinary sense[69] and the courts are bound to give effect to that meaning[70] irrespective of consequences[71] and accept the expressed intention of the Legislature[72].

¶ 38 The interpretation of the Explanation to the Section, it is clear that the use of article "an" also indicates that law recognises the dominance of only a *single* entity. Lord Cranworth had stated that "To adhere as closely as possible to the literal meaning of the words used, we launch into a sea of difficulties which is not easy to fathom."[73] Jurists warn us that a departure from the literal construction outside the recognised limits in the guise of liberal

[64] Crawford v. Spooner, (1846) 4 M.I.A. 179 (P.C.) 181.
[65]Mahadeolal Kanodia v. Administrator General of West Bengal, A.I.R. 1960 S.C. 936 (India).
[66] Om Prakash Gupta v. Dig Vijendrapal Gupta, A.I.R. 1982 S.C. 1230 (India).
[67] Union of India v. Hansoli Devi, A.I.R. 2002 S.C. 3240 (India).
[68]Thakur Amar Singhji v. State of Rajasthan, A.I.R. 1955 S.C. 504 (India); Croxford v. Universal Insurance Co. Ltd., (1936) 1 AII E.R. 151.
[69] In Re Sussex Peerage , (1844) Eng. Rep. 822 (H.L.); Sri Ram Daya Ram v. State of Maharashtra, A.I.R. 1961 S.C. 674 (India).
[70]State of Jharkhand v. Govind Singh, A.I.R. 2005 S.C. 294 (India); Natha Devi v. Radha Devi Gupta, A.I.R. 2005 .S.C 648 (India).
[71]Gurudevdatt VKSS Maryadit v. State of Maharashtra, A.I.R. 2001 S.C. 1980 (India).
[72]Gopal Vinayak Godse v. State of Maharashtra, A.I.R. 1961 S.C. 600 (India).
[73] Grundy v. Pinniger, (1852) 1 L.J. Ch. 405.

or strict construction leads to unwarranted expansion or restriction of the meaning of words.[74] This Hon'ble Court held that being a word of everyday use it must be construed in its popular sense, with which the statute is dealing with would attribute to it.[75]The usage of the singular form of "enterprise" with "an" is testimony to the inclusion of only a single entity within the purview of the Section.

¶ 39 In *R* v. *Archibshop of Canterbury*,[76] Lord Deman observed:

> "My brother Coleridge's admirable argument has confirmed me in the opinion of the danger of exposing an Act of Parliament, and the most simple construction of the plainest language...to the speculation of those who will bring their forgotten books down and wipe the cobwebs from decretals and canons before they can find one argument for disturbing the settles practice of 300 years.

¶ 40 Further, it is trite law that where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case words of the Statute speak the intention of the legislature.[77] It is established that where the words of the statute are clear enough, it is not for the courts to 'travel beyond limits' under the doctrine of implementing legislative intention.[78] Thus, the plain language of § 4 is sufficient to substantiate the claims that there cannot be more than one dominant undertaking in the same market.

¶ 41 In the case of *Union of India v Elphistone Spinning and Weaving Co Ltd & Ors.*[79] it was held that the duty of judges is to expound and not to legislate. It was further held that the courts are not entitled to usurp legislative function under the guise of interpretation and they must avoid the danger of determining the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somehow fitted.

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[74] G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 92 (2012).
[75]Ramavtar Budhiprasad v. Asst. Sales Tax Officer, A.I.R. 1961 S.C. 1325 (India).
[76] R v. Archibshop of Canterbury, (1848) 11 Q.B. 665.
[77]Indubhai v. Vyankati Vithoba Sawardha, A.I.R. 1966 Bom. 64 (India).
[78]Commr. Of Wealth Tax v. Hashmatunissa Begum A.I.R. 1989 S.C. 1024 (India).
[79]Union of India v. Elphistone Spinning and weaving Co. Ltd. & Ors., (2001) 4 S.C.C. 139 (India).

¶ 42 This Hon'ble Court itself was of the opinion that the Parliamentary wisdom of seeking changes in an existing law by means of an amendment lies within the exclusive domain of the legislature and it is not the province of the Court to express any opinion on the exercise of the legislative prerogative in this regard.[80] Thus, it must be interpreted that the provision in question in the literal manner to avoid any difficulties and misjudgement. Further, the legislative function of creating new laws or amending existing laws must not be taken up by the Courts.

¶ 43 The second leg of the argument deals with the attempt of the legislature to incorporate the concept of 'collective dominance' in the Indian realm. The Ministry of Corporate Affairs had proposed an amendment to § 4, adding the words '*jointly or singly*' as an attempt to cover, within the purview of the Act, those anti-competitive practices where two or more enterprises may collectively assert and abuse their dominance in the market.

¶ 44 This proposal is testimony that there did not exist any law on this aspect before and that there was a requirement of an amendment. The issue of collective dominance was aimed to be dealt with in the Indian jurisprudence by including the words 'jointly or singly' to the Section, however, the Standing Committee Report[81] on this subject stated that "considering the fact that India's competition regime is at a nascent stage, the proposed amendment to include the concept of joint dominance in § 4 of the Competition Act should be reconsidered by the Government."

¶ 45 This analysis by the expert body comprises of as an essential legislative function which should ordinarily not be subject to intervention or interference by the Court.[82]This Hon'ble Court had observed that in order to ascertain the true meaning of ambiguous words in a statute, reference to the reports and recommendations of the Commission or Committee which preceded the enactment of the statute are held legitimate external aids

[80]Common Cause: A Registered Society v. Union of India, (2017) 5 S.C.A.L.E. 333 (India).
[81]Standing Committee on Finance, The Competition (Amendment) Bill, 2012, 2013-14, Lok Sabha, 83 (India).
[82] *Supra* note 79.

to construction.[83] Thus, the report of the Standing Committee holds value in scrutinizing the Bill intended to be passed. In the present matter, the purpose of the amendment as well as the Report conclusively establishes that a concept like collective dominance was supposed to be introduced in Indian law for the first time. On the same lines, the CCI had also denied the existence of a concept like collective dominance in Indian realm, which then was re-affirmed by the COMPAT.[84]

¶ 46 Further, it is submitted that market share is of considerable importance when evaluating the market power of the undertakings, consequently examining the existence, creation or strengthening of a dominant position.[85] When two undertakings have a considerable market share/market power in the same market, this is indicative of a fierce competition in the market. There is a constant tussle to gain more market power and so, this cannot be claimed to be dominance by two or more enterprises. To put it another way, it would be strange if competition law mandates firms should behave irrationally, by not acting in parallel, in order to be found to infringe the law.[86]

¶ 47 Further, in a market, competitors are aware of each others' presence and are bound to match each other's marketing strategies[87]. The economic concepts of 'game theory' and 'the Prisoner's dilemma' hold importance where the competitors by matching each other's conduct will be able to achieve and charge a profit- maximum price without communicating with one another[88]. Thus, in a situation with two or more strong competitors with higher market share act in consonance with actions of the either, it cannot imply that they are dominant undertakings. To substantiate it further, this behaviour of firms is in contradiction with the definition of a "dominant enterprise" in § 4 which requires that the dominant enterprise must act independently of its competitors in the market.

[83] R. S. Nayak v. A. R. Antulay, A.I.R. 1984 S.C. 684 (India).
[84] N. Sanjeev Rao & Anr. v. Andhra Pradesh Hire-Purchase Association & Ors. Unreported Judgments, 2014.
[85] United Brands Co. v. Commission of the European Communities, 1978 E.C.R. 207, ¶281-82.
[86] RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 566 (2011).
[87] All India Tyre Dealers' Association v. Tyre Manufacturers, (2013) Comp. L.R. 92 (India).
[88] EINER R. ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW & ECONOMICS 860, 861 (2011).

¶ 48 Heavy reliance is placed on Article 102 of the Treaty on Functioning of the European Union (TFEU) where the words 'two or more undertakings' giving the regulatory authorities and the judiciary a wide scope of dealing with anti-competitive practices by abuse of collective dominance. The European Union Court of Justice held "in order for such a collective dominant position to exist, the undertakings in the group must be linked in such a way that they adopt the same conduct on the market."[89]

¶ 49 The General Court of the European Union confirmed that "a relationship of *interdependence* existing between parties to a tight oligopoly" which created a likelihood of coordination was sufficient to establish collective dominance."[90] Further, that a joint dominant position is the coming together of numerous undertakings to adopt a common policy owing to a *connection between them* and act to a considerable extent independently of their competitors, their customers, and ultimately consumers.[91] In the *Airtours*[92] judgment, the Court had set out a three limbed test establishing that *first*, each firm knew how other members were behaving; *second*, tacit co-ordination was sustainable over time; and *third*, the foreseeable reactions of competitors and customers would not jeopardize the results expected from the common policy.

¶ 50 Henceforth, the establishment of tacit co-ordination or an economic link[93] is a requirement for proving collective dominance. The concept recognises that *any two or more* undertakings might assert dominance by *collectively or jointly* attaining that position of strength in the market thus denying existence of individual dominance of undertakings. Thus, it is vehemently asserted that there cannot be more than one dominant undertaking in the same market and that the situation is of vibrant and tight competition in the market which must not be construed as dominance of more than one firm.

[89]Amelo v. NV EnergiebedrijfIjsselmij, 1994 E.C.R. I-1477.
[90]Gencor v. Commission, 1999 E.C.R. II-753.
[91]Irish Sugar plc v. Commission, 1997 O.J. (L 258) 1; France & Ors. v. Commission, 1998 E.C.R. I-1375, ¶ 221.
[92] Airtours v. Commission, 2002 E.C.R. II-2585.
[93]SocietaItalianaVetroSpA v. Commission, 1992 E.C.R. II-1403, at 357-358.

PRAYER

WHEREFORE, in the light of the facts of the case, issues raised, arguments advanced and authorities cited, it is most humbly and respectfully prayed that this Hon'ble Court may be pleased to:

1. Allow the instant appeal filed by Viking seeking to set aside the impugned order of the Hon'ble Competition Appellate Tribunal;

2. Set aside the order of the Hon'ble Competition Appellate Tribunal directing the Director General to carry out investigation;

3. Set aside the order of the Hon'ble Competition Appellate Tribunal granting interim relief to restrain V and M from entering into exclusionary contracts with member banks;

4. Declare that there cannot be more than one dominant undertakings in the same market;

5. Pass any other order that the Hon'ble Court may consider proper in the facts and circumstances of the case.

The Hon'ble Court may also be pleased to pass any other order, which this Hon'ble Court may deem fit in the light of justice, equity and good Conscience.

All of which is most humbly prayed

Counsel for the Appellant