A-524

**THE 5TH KIIT NATIONAL MOOT COURT COMPETITION, 2017**

**8TH – 10TH SEPTEMBER 2017**

**BEFORE THE HON'BLE SUPREME COURT**

**VIKING (APPELLANT)**

**V.**

**COMPETITION APPELLATE TRIBUNAL (RESPONDENT)**

# MEMORIAL FOR THE PETITIONER

## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

### CASES

**BOOKS**



**JOURNALS & PERIODICALS**

# STATEMENT OF JURISDICTION

The Counsel for the Appellant humbly submits this memorandum for the appellant filed before this Honourable Court. The petition invokes its appellate jurisdiction under § 53T of the Competition Act, 2002.

# STATEMENT OF FACTS

## BACKGROUND

The facts of the case involve two credit card companies, Viking and Mars, in a credit card market in India. The market share for V was 40% and that of M was 30%. In 2017, Zoro entered into the credit card business in 2015. There were also other smaller players in the market. V and M separately entered into contracts with different member banks prohibiting them from issuing any other cards which included Z cards. The decision taken independently by V and M had an impact on Z hence Z filed a complaint with the Competition Commission of India alleging anticompetitive conduct on part of V and M by entering into exclusionary contract which prohibit their member banks from issuing cards for other companies. Directions were sought from CCI for imposition of penalty on V and M for abusing their dominant position.

## ORDER BY THE CCI

An application was filed for interim reliefs pending hearing and disposal of the case before CCI to restrain V and M from entering into or acting upon contracts prohibiting banks from issuing other credit cards. The CCI passed an Order holding that it appeared from the data relied upon by the Complainant itself that there was no single dominant entity in the market for credit cards in India and, rather, that there was vibrant competition between V and M. The data showed fierce competition between V and M who were business rivals in the relevant market. It denied the possibility of the existence of more than one dominant undertaking in the same market. The Complaint was accordingly rejected and the case was closed. Consequently, the application for interim relief was also dismissed.

## ORDER BY THE COMPAT

Z filed an appeal against the order of CCI before the Competition Appellate Tribunal. COMPAT observed that the conduct of entering into contracts as restrictive and anti-competitive. The COMPAT directed the Director General to investigate and present its report to the CCI. Further, the COMPAT also restrained V and M from entering into or acting upon contracts prohibiting banks from issuing other credit cards pending the final order of CCI.

**APPEAL TO SUPREME COURT**

V filed an appeal before the Supreme Court of India against the Order of the COMPAT. It is contended by V that the COMPAT failed to arrive at a *prima facie* view finding of any violation while directing the investigation. It was also argued that the present case was not a fit case for grant of interim reliefs and that Z had failed to make out a case for grant of such reliefs. The order restraining V from entering into or acting upon contracts prohibiting banks from issuing other credit cards pending the final order of CCI was bad in law and ought to be set aside. The legal issue of whether the Act recognises the concept of more than one dominant undertaking is placed before the Supreme Court. The Supreme Court hereby made issues that addressed the concerns of the parties.

## STATEMENT OF ISSUES

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

**ISSUE II:** Whether it was a fit case for grant of interim relief by COMPAT?

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

## SUMMARY OF ARGUMENTS

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

It is submitted before the honourable bench that was no *prima facie* view in the current case for the court to direct investigation. The Competition Appellate Tribunal was constituted to help improve the quality of services and goods provided to its citizens by ensuring that the economy was capable of sustaining a healthy competitive environment between various competitors in a given industry, a *prima facie* view was not obtained by COMPAT and hence it was not justified to direct investigation. Hence, it is submitted that Vikings and Mars have the right to appeal before this honourable bench with the existing facts and law present in India against the order of COMPAT.

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

It is submitted before the honorable bench that COMPAT in this particular case was not justified to grant an interim 'relief' as the current case did not have a '*prima facie'* view involved nor did it have the balance of convenience or an imminent necessity for it to have granted the relief. For passing any interim injunction the general principles of granting temporary injunction need to be followed. And, these are: (i) Whether the petitioner has made a '*prima facie'* case (ii) Whether the balance of convenience lies in his favor (iii) Whether by the denying the grant of injunction the petitioner would suffer irreparable loss or injury. These conditions weren't met by COMPAT and hence this case cannot be considered a fir case for grant of interim relief.

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

It is submitted before the honorable bench that the Competition Act, 2002 does not recognize more than one dominant undertaking in the same market To be considered dominant, a firm must be in a position of such economic strength that it can behave, to an appreciable extent, independently of its competitors and customers, Therefore, to assess dominance it is important to consider the constraints that an enterprise faces on its ability to act independently. Moreover, the judiciary does not provide for the existence of more than one

dominant undertaking and that there is also no legislative intent to permit the existence of more than one dominant undertaking. There is well-founded rationale in the position maintained by the law and it is believed that the recognition of only single dominant entity serves to benefit the market.

## ARGUMENTS ADVANCED

## I. WHAT IS A "*PRIMA FACIE*" VIEW AND WHETHER IN THE PRESENT CASE THE COMPAT WAS JUSTIFIED IN DIRECTING INVESTIGATION

**(¶1.)** It is humbly submitted before the honourable bench that there was no '*prima facie'* view in the current case for the court to direct investigation (A). COMPAT was not justified to direct investigation (B) and hence, Vikings and Mars have the right to appeal before this honourable bench with the existing facts and law present in India.

### A. There Was No *Prima facie* View In Order To Direct Investigation

**(¶2.)** It is humbly submitted before the honorable bench that the Competition Commission of India and its appellate body, the Competition Appellate Tribunal were both constituted to help improve the quality of services and goods provided to its citizens by ensuring that the economy was capable of sustaining a healthy competitive environment between various competitors in a given industry. Section 26 of the Competition Act, 2002[1], illustrates the procedure that must be adhered to, in order to allow for an inquiry. A core element of the inquiry procedure involves a '*prima facie*' opinion framed by the commission. The section reads as follows -

"Procedure for inquiry on complaints under Section 19

(1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a '*prima facie'* case, it shall direct the Director General to cause an investigation to be made into the matter:

Provided that if the subject matter of information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

(2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19, the Commission is of the opinion that there exists no '*prima facie'* case, it shall close the matter forthwith and pass

[1] The Competition Act, 2002, §26

such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be. …"

**(¶3.)** The Moot Proposition[2] reveals that when the matter was being heard before the Competition Commission of India, the commission relied on the data provided by the informant "Z" and passed an order, convinced that the allegations leveled against "V" and "M" were baseless. It must follow that the commission relied on section 26(2), wherein the commission can pass an order if it is satisfied that the facts and circumstances do not reveal a case on the face of it i.e. '*prima facie*'. When the case was taken up by the Competition Appellate Tribunal, it ordered for an investigation to be conducted in order to determine the validity of the claim being made by the appellant. It is in this context that it becomes extremely important that we examine the nature and requirements of '*prima facie*' to derive a better understanding with regard to the procedure and reasoning that the Competition Appellate Tribunal employed.

**(¶4.)** It was in para 28 of the *Martin Burn Ltd* case[3] that the Supreme Court outlined the requirements that the Latin maxim '*prima facie*' demanded. While its literal translation means 'based on first impression', it does not reveal much in the way of legal burdens. The Martin Burns case clarifies this as follows:

"…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 support of the same were believed. 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. It may be that the Tribunal considering this question may itself have arrived at a different conclusion. It has, however, not to substitute its own judgment for the judgment in question. It has only got to consider whether the view taken is a possible view on the evidence on the record."

**(¶5.)** The interpretation given by Justice N.H. Bhagwati in this case has persevered through the high standards of linguistic precision that the legal profession holds so dear and has been cited in various other cases to illustrate the nature and requirements of '*prima facie*'. Justice

[2] Page 2, Moot Proposition, 5th KIIT National Moot Court Competition, 2017.
[3] Martin Burn Ltd. v. R.N. Banerjee, AIR 1958 SC 79.

S.B. Sinha in Sampat *B.G. v. State of West Bengal and Ors*[4] took a different approach as he independently interpreted '*prima facie* as follows:

**(¶6.)** "The expression '*prima facie*' means at the first sight or on the first appearance or on the face of it, or so far as it can be judged from the first disclosure. '*Prima facie'* case means that the evidence brought on record would reasonably allow the conclusion that the plaintiff seeks. The '*prima facie'* case would mean that a case which has proceeded upon sufficient proof to that stage where it would support finding if evidence to the contrary is disregarded."

**(¶7.)** The Martin Burn case, with special reference to its interpretation of the phrase '*prima facie*', has been validated as recently as 2013 in *Nirmala J. Jhala v. State of Gujarat and Anr*[5]where Justice B.S. Chauhan utilized the Martin Burn case in para 26 to articulate the phrase '*prima facie*' in order to begin analysis of an impugned section which used the phrase. Justice S.B. Sinha also utilized the Marin Burn case in para 18 of his judgment in *Cholan Roadways Limited v. G. Thirugnanasambanda*[6] to enlighten the reader in matters concerning the interpretation of the phrase '*prima facie*'.

**(¶8.)** Now having ascertained the legal standard required to meet the needs of '*prima facie*' we shall now look into whether the appeal filed by 'Z' in the Competition Appellate Tribunal meets these standards in a manner such that it would justify an investigation, assuming that the tribunal can order for an investigation in the first place.

**(¶9.)** Para 7 of the Moot Proposition[7] reveals that the Competition Appellate Tribunal could not meet the standard layer down in the Martin Burns case. The Tribunal states:

"… the COMPACT observed that the conduct of entering into contracts with banks prohibiting them from issuing other credit cards could possibly be viewed as restrictive and anti-competitive. However this may not necessarily be true and only investigation would reveal whether there was any violation of the act…"

**(¶10.)** The tribunal essentially concedes its inability to ascertain the claim made by the informants if one assumes that the evidence suggesting the contrary is absent. The precedent set in *Martin Burn Ltd.*[8] requires one to establish evidence that at the bare minimum offers the possibility of drawing a conclusion which isn't in favor of 'V' and 'M". The tribunal

[4] Sampat B.G. v. State of West Bengal and Ors,(2000)ILLJ565Cal.
[5] Nirmala J. Jhala v. State of Gujarat and Anr., AIR 2013 SC 1513.
[6] Cholan Roadways Limited v. G. Thirugnanasambanda, AIR 2005 SC 570.
[7] Page 1, Moot Proposition, 5th KIIT National Moot Court Competition, 2017.
[8] Martin Burn Ltd., AIR 1958 SC 79.

instead concedes that the information cannot be relied upon to draw a conclusion but instead merely suggests the absence commercial justification, a standard which isn't in accordance with the precedent set in Martin Burns.

### B. The COMPAT was not justified in directing investigation

**(¶11.)** Para 8 of the Moot Proposition[9] reads as follows -

"…The COMPACT accordingly directed the Director General to investigate and present its report to the CCI…."The appellant respectfully contends that not only was the tribunals order not justified, but also that it was legally untenable.

**(¶12.)** Section 16(1) grants the central government the power to appoint a Director General, defined in section 2(g) to mean as follows -

"(g) "Director General" means the Director General appointed under sub-section (1) of section 16 and includes any Additional, Joint, Deputy or Assistant Directors General appointed under that section"

**(¶13.)** The overall function of the 'Director General' is to conduct investigations when directed to do so by the Competition Commission of India, as established in Section 26 of the Competition Act. No section in the entirety of the Competition Act grants the Competition Appellate Tribunal the power to direct investigations. Adding to this point, the 'Director General' can no longer conduct investigations *suo moto*, he must wait on the direction of the Competition Commission of India[10]. This is in contrast to how the 'Director General' functioned under the Monopolies and Restrictive Trade Practices Act 1970, where he/she was given *suo moto* powers.

**(¶14.)** The cases *All India TyreDealers' Federation Informant v. Tyre Manufacturers*[11] and *T.G. Vinayakumar v. Association of Malayalam Movie Artists and Ors.*[12], both clearly state that the power to direct the Director General lies solely with the Competition Appellate Tribunal.

[9] Page 2, Moot Proposition, 5th KIIT National Moot Court Competition, 2017.
[10] M/s. Excel Crop Care Limited v. Competition Commission of India, 2013 Comp LR 0799 (COMPAT).
[11] All India Tyre Dealers' Federation Informant v. Tyre Manufacturers, 2013 Comp LR 92 (CCI).
[12] T.G. Vinayakumar v. Association of Malayalam Movie Artists and Ors., 2017 Comp LR 303 (CCI).

## II. WHETHER IT WAS A FIT CASE FOR GRANT OF INTERIM RELIEF BY COMPAT?

**(¶15.)** It is humbly submitted before the honorable bench that the COMPAT in this particular case was not justified to grant an interim 'relief' as the current case did not have a '*prima facie'* view involved (A) nor did it have the balance of convenience or an imminent necessity for it to have granted the relief. (B).

**(¶16.)** For passing any interim injunction the general principles of granting temporary injunction need to be followed. And, these are:

(i) Whether the petitioner has made a '*prima facie'* case

(ii) Whether the balance of convenience lies in his favor

(iii) Whether by the denying the grant of injunction the petitioner would suffer irreparable loss or injury.[13]

**(¶17.)** In the same case it was held that it was a clear case in concern that at least two conditions had to be satisfied after which the petitioner was entitled to some relief. Mere proof of one of the three conditions is not relevant.

**(¶18.)** In this particular case it is quite evident that not even two of the conditions have been followed to grant an interim relief to the parties and hence this particular case does not fall under the definition of a 'fit case' for the same.

### A. The COMPAT did not have a *prima facie* view to provide an interim relief

**(¶19.)** It is humbly submitted before the honorable bench that COMPAT did not look into any '*prima facie*' view to give an interim relief to Z. It is evident that Z in this case had suffered losses because of its performance in the market and there is an absolute commercial justification for V and M to have made the contract with the member banks.

**(¶20.)** The Supreme Court in the case of *Competition Commission of India v. Steel Authority of India*[14] had observed that : "The Commission while recording a reasoned order, inter alia, should a) record its satisfaction and b) find out whether it is necessary from the records before the commission that there is every likelihood to the party to the lis would suffer irreparable and irretrievable damage or there is definite apprehension that it would have adverse effect to the competition in the market"

[13] Nawab Mir Barket Ali Khan v. Nawab Zulfiquar Jah Bahadur and Ors., AIR 1975 AP 187.
[14] Competition Commission of India v. Steel Authority of India, (2010) 10 SCC 744.

**(¶21.)** It had also held that: "The power under Section 33 of the Act to pass a temporary restraint order can only be exercised by the commission when it has formed a *prima facie* view and directed investigation in terms of Section 26(1) of the Act, as is evident from the language of the provision read with regulation 18(2) of the regulations"

**(¶22.)** Moreover in the case of *Shayak v. Iqbal Ahmed*[15] it was held that "The burden of proving a *prima facie* case, balance of convenience and an irreparable loss of injury on the plaintiff lies on the petitioner"

**(¶23.)** In the Moot Proposition[16] it is very evident that the petitioners had not given any evidence as to why they will be need a relief as there is no evidence of an irreparable loss and that of which has caused damage to the parties. The act of V and M are commercially justified and hence there is no need to have received an interim relief by Z.

**(¶24.)** In *Vadivel Mudaliar v. Pachianna Gounder*[17] it was held that

"In the matter of granting temporary injunction it is the duty of the court to take into consideration the affidavits and the relevant documents before it records a finding. Taking into consideration the documents does not mean merely referring to the same in the judgment but there must be some discussion about them before any conclusion is arrived at. Interim injunction can only be granted after applying judicial mind and on proper discussion of the evidence on record. Mere reference to the documents filed and the affidavits placed before the court cannot satisfy the requirement. There must be at least a *prima facie* discussion about it"

## B. The case does not pass the Balance of Convenience test in order to get an interim relief.

**(¶25.)** It is humbly submitted that the tribunal did not follow the 'Balance of convenience' test in order to provide an interim relief to the parties.

**(¶26.)** In the case of *J Krishnamurthy v. Bangalore Turf Club Ltd*.[18] It was observed that:

"While the court is handling the issue of balance of convenience they should figure out if the plaintiff will suffer irreparable damage if the injunction is not passed. The word 'imminent' should not be literally understood. There is a possibility that the plaintiff has to wait till the last moment disastrous consequences might follow which the court cannot prevent for want of time or procedural requirements."

[15] Shayak Mohammad and Ors. v. Iqbal Ahmed, AIR 1973 Raj 115.
[16] Page 2, Moot Proposition, 5th KIIT National Moot Court Competition, 2017.
[17] Vadivel Mudaliar v. Pachianna Gounder, AIR 1974 Mad. 87.
[18] Krishnamurthy, J. v. Bangalore Turf Club and others, AIR 1975(2) KLJ 428.

**(¶27.)** In the current case, it is clearly understood that there was absolutely no 'irreparable damage' faced by Z for which an Interim relief was provided by COMPAT. Hence, the principles of the case clearly apply to this case.

**(¶28.)** Moreover, In *Dhanaraj Pillai v. M/s Hockey India*[19], the informants requested the Commission to pass an Interim Order under Section 33 of the Act restraining competitive agreements. However the commission was of the opinion that there was no irreparable or irretrievable harm to the players and the application filed by the informants should be declined.

**(¶29.)** The similar principles can be applied to our case wherein it is absolutely clear that there is no irreparable injury cause to 'Z', as 'V' and 'M' having a contract with the member banks is commercially justified as it is an oligopolistic market and hence it cannot be known as an 'imminent need'.

## III. WHETHER THERE CAN BE MORE THAN ONE DOMINANT UNDERTAKING /ENTERPRISE IN THE SAME MARKET?

**(¶30.)** It is humbly submitted before the honorable bench that the Competition Act, 2002 does not recognize more than one dominant undertaking in the same market (A) The judiciary does not provide for the existence of more than one dominant undertaking (B) and that there is no Legislative intent to permit the existence of more than one dominant undertaking (C). There is well-founded rationale in the position maintained by the law (D) Recognition of only single dominant entity serves to benefit the market (E) There exist several dangers of there being more than one dominant undertaking in the same market (F).

### A. The Competition Act, 2002 does not recognize more than one dominant undertaking in the same market

**(¶31.)** It is humbly submitted before this honourable bench that there cannot be more than one dominant undertaking or enterprise in the same market under Indian Law. The existence of more than one undertaking or enterprise which assumes a dominant position is known as collective dominance. In order to answer the above issue it becomes imperative to examine the definition of what constitutes a dominant undertaking/enterprise.

[19] DhanarajPillai v. M/s Hockey India, 2013 Comp LR 543 (CCI)

**(¶32.)** According to Section 4 of the Competition Act, 2002, dominance and abuse of dominance are defined as under:

S.4. Abuse of dominant position: (*1*) No enterprise or group shall abuse its dominant position.

(*2*) There shall be an abuse of dominant position under sub-section (*1*), if an enterprise or a group,—

(*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.

(*b*) limits or restricts— (*i*) production of goods or provision of services or market therefor; 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 in any manner; 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.

*Explanation*.—For the purposes of this section, the expression—

(*a*) 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;

(*b*) predatory price‖ means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors;

(*c*) group shall have the same meaning as assigned to it in clause (*b*) of the *Explanation* to Section 5.[20]

[20] The Competition Act, 2002 § 4

**(¶33.)** As per the Act [Explanation (a) to Section 4 (2)], dominant position, therein means a position of strength, enjoyed by an enterprise in the relevant market to:

(a) operate independently of competitive forces or

(b) affect its competitors or consumers or the relevant market in its favour.[21]

**(¶34.)** To be considered dominant, a firm must be in a position of such economic strength that it can behave, to an appreciable extent, independently of its competitors and customers, Therefore, to assess dominance it is important to consider the constraints that an enterprise faces on its ability to act independently.[22] A dominant firm is one that has the strength to not only resist influences of existing competitive forces in the relevant market but also one that can affect its competitors, consumers and relevant market as a whole. Through this requisite alone, it becomes evident that there definitely cannot be more than one dominant undertaking in the same market. This is because, if there exists more than one dominant entity in the market, there will never truly be one entity that is strong enough to affect all the other players as they would be equally strong, thereby being unable to be completely rid of the competitive forces in the market resulting in the inability to exclusively function independently and consequently falling short of the definition of being dominant as dealt with under the Act. In such a case, none of the entities will be seen as being truly dominant and in such a situation only conclusive collusive conduct and other such anti-competitive agreements would be addressed rather than a focus on dominance in the market.

**(¶35.)** Section 4 of the Act accordingly provides that no enterprise or "group" shall abuse its dominant position. The definition of group under Section 5 (b) [Explanation] is as follows:

(*b*) ―group means two or more enterprises which, directly or indirectly, are in a position to—

(*i*) exercise twenty-six per cent or more of the voting rights in the other enterprise; or

(*ii*) appoint more than fifty per cent of the members of the board of directors in the other enterprise; or

(*iii*) control the management or affairs of the other enterprise;[23]

[21] ARIJIIT PASAYAT KUMAR, SM DUGAR GUIDE TO COMPETTITION LAW, 400-433 (Lexis Nexis 6th edition 2016).
[22] *Id*. at 423
[23] The Competition Act, 2002, § 4

**(¶36.)** Thus, it becomes evident that the definition of "group" is restricted to entities under the same management or control. The term "group", as under the Act generally implies a degree of connection, cooperation, or common interest among its members. The expression "controlled directly or indirectly" is to be read as envisaging both *de jure* and *de facto* control. Two enterprises would normally be considered part of a group if they are operating in the same relevant market. There is nothing in the definition of enterprise under Section 2(h)[24] or in the provisions of Section 4 of the Act to suggest that two or more independent entities are capable of holding a position of joint or collective dominance. Hence, this clarifies the position of the Act to mean that only one of more undertakings whose control and functioning lie with the other are permitted to exist as in the paradigm of competition in the same market, they shall essentially function as the same unit, thereby not leading to adverse effects that the Act aims at weeding out.[25]

**(¶37.)** It is note-worthy that the Competition Act uses the article "an" and not "any" before the word "enterprise" in sub-section (2) of Section 4, thereby signifying the expectation and recognition of singularity. For a plural interpretation of "an" the combined entity should be an identifiable artificial judicial person such as association of persons or a body of individuals. Thus it is for the specific reason of discounting the existence of more than one dominant undertaking in the relevant market that the Act includes the term "group" separately because a group of firms with joint management control can have collective decision making and can exercise joint dominance[26] as the same shall function as a singular entity for all intents and purposes as opposed to the functioning of two independent dominant undertakings in the same market resulting in their collective dominance.

## B. The judiciary does not provide for the existence of more than one dominant undertaking

**(¶38.)** The Judiciary has further, in several cases, established that there cannot be more than one dominant undertaking/ enterprise in the same market. Over several orders, adjudicating bodies such as the CCI have categorically denied the applicability of joint dominance in

[24] The Competition Act, 2002, § 2 (h)
[25] VINOD DHALL, COMPETITION LAW TODAY (Oxford University Press 3rd edition 3007).
[26] Consumer Online Foundation v. Tata Sky Limited, Dish TV India Ltd, Reliance Big TV Ltd and Sun Direct TV Pvt Ltd., Case No. 2/2009.

Indian Competition Law,[27] with member R. Prasad being the sole dissident on one notable instance.[28] The only reading of plurality that was allowed into Section 4 is one where the dominant firms were legally or structurally linked.[29]

**(¶39.)** In *Royal Energy v. IOCL, BPCL and HPCL*[30], in determining whether the actions of three oil marketing companies amounted to an infringement of the Act, the CCI explicitly held that the concept of collective dominance was not envisaged under the provisions of section 4 of the Act. Since each company was an independent legal entity and no one company exercised control over another enterprise, the CCI also found that the three companies could not collectively form a group.

**(¶40.)** In *Consumer Online Foundation v. Tata Sky & Ors*.[31], the CCI observed that:

"Indian law does not recognize collective abuse of dominance as there is no concept of 'collective dominance' in the Act, unlike in other jurisdictions such as Europe. The Act recognizes abuse of dominance by a 'group', which does not refer to a group of completely independent corporate entities or enterprises; it refers to different enterprises belonging to the same group in terms of control of management or equity."

**(¶41.)** The position of collective dominance and the unlikelihood of the recognition of existence of more than one dominant enterprise was demonstrated through the judgement of the Competition Commission of India (CCI) in a case where the complaint filed by Dish TV, a Direct-To-Home (DTH) operator against six Multi-System Operators (MSOs), including Den Networks and Hathway Cable & Datacom, alleging that they abused their dominant market position by charging high carriage and placement fee for carrying and placing their channels on the desired bandwidth on their cable network was rejected by CCI. While perusing S.4 of the Act and referring to an earlier judgment of the *Commission in Consumer Online Foundation Informant v. Tata Sky Ltd.* (Case 2/2009), the CCI held that Indian law does not recognize collective abuse of dominance as there is no concept of "collective

[27] Royal Energy Ltd v. IOCL and others, 2012 Comp LR 563 (CCI); N. Sanjeev Rao v. Andhra Pradesh Hire Purchase Association, CCI Case No. 49/2012; Consumer Online Foundation v Tata Sky Ltd & Ors., CCI Case No. 2/2009.
[28] Consumer Online Foundation v. Tata Sky Ltd & Ors, CCI Case No. 2/2009.
[29] DLF Park Place Residents Welfare Association v. DLF Ltd. Haryana Urban Development Authority Department of Town and Country Planning, 2011 Comp LR 490 (CCI).
[30] M/s Royal Energy Ltd. v. M/s Indian Oil Corporation Ltd., M/s Bharat Petroleum Corporation Ltd. and M/s Hindustan Petroleum Corporation Ltd., 2012 Comp LR 563(CCI).
[31] Consumer Online Foundation v. Tata Sky Ltd &Ors, CCI Case No. 2/2009.

dominance" in India and held that there was no *prima facie* case against the Multi-System Operators.[32]

**(¶42.)** In the case of *Manappuram Jewellers Pvt. Ltd., v. Kerala Gold & Silver Dealers Association, Thrissur, Kerala and Ors.*[33], the CCI further held that "Although the informant has submitted that the comparative sale figures should not be the sole determining factor for assessing the dominance and the members of KGSDA are dominant on the basis of their numerical strength, and they can certainly impact the business of informant but in the view of Commission the dominance of an enterprise or group can be assessed only within the parameters provided in Section 4 and the factors enumerated in Section 19(4) of the Act. Furthermore, the concept of collective dominance is not envisaged under Section 4 of the Act though the DG has categorically stated that even on collective basis the market share of members of KGSDA is less than that of informant. The informant has failed to show the dominance of any individual member of the Association in terms of the relevant provisions of the Act."[34]

**(¶43.)** In the case of *Indian Sugar Mills Association v. Indian Jute Mills Association*[35] *and K.Sera Sera Digital Cinema Pvt. Ltd. v. Digital Cinema Initiatives, LLC and Ors.*[36], the CCI further reiterated the absence of any provision relating to collective dominance and that enterprises cannot be said to be dominant jointly as the concept of collective dominance is not envisaged under the provisions of Section 4 thereby denying recognition of more than one dominant enterprise/ undertaking in the same market.

### C. There is no Legislative intent to permit the existence of more than one dominant undertaking

**(¶44.)** It is not just the judiciary that has denied the possibility of consideration of more than one dominant player in the market, but the Legislature, despite having the opportunity to include the same under Indian Competition Law chose not to. This opportunity was that of the Competition (Amendment) Bill, 2012 in India which sought the inclusion of "collective dominance" aspect under Section 4(1).It had been proposed that Section 4(1) was to be amended with the inclusion of the words "joint or singly". Accordingly, the proposed revision of the wordage of Section 4(1) would be:

[32] Dish TV India Ltd. v. Hathway Cable & Datacom Ltd., Case No. 78 of 2013, decided on March 6, 2014).
[33] Manappuram Jewellers Pvt Ltd. v. Kerala Gold & Silver Dealers Association, 2012 Comp LR 548 (CCI).
[34] 2012 CompLR 548 (CCI).
[35] Indian Sugar Mills Association v. Indian Jute Mills Association, 2014 Comp LR 225 (CCI).
[36] K.Sera Sera Digital Cinema Pvt. Ltd. v. Digital Cinema Initiatives, LLC and Ors., 2016 Comp LR 1098 (CCI).

"No enterprise or group, jointly or singly, shall abuse its dominant position".

**(¶45.)** However, the fact that the Bill was not enacted into a law clearly demonstrates that the legislative will was to retain the recognition of only one dominant undertaking in a certain market and any other kind of collective dominance was not considered in the eyes of law. The Act thereby does not recognise the concept of 'collective dominance' by enterprises that are unrelated to each other by structural or control-based links arising from common corporate ownership.

### D. There is well-founded rationale in the position maintained by the law

**(¶46.)** Collective dominance is not often found in other jurisdictions, such as the EU and hence the likelihood of the same is one that is minimalistic and it would be impractical and irrational for the law to cater to an exception rather that a rule.

**(¶47.)** European Community law initially showed a similar reluctance in recognising collective dominance, despite wording that allowed it to do so in Article 102 of the Treaty on the Functioning of the European Union which reads as thus – "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States…"

**(¶48.)** In 1992, however, the Court of First Appeal admitted the possibility of collective dominance for the first time in EC law in the Italian Flat Glass case[37], when it opined that where several independent firms were tied by economic links which allowed them to dominate the remainder of the market, they could collectively be dominant.[38] The cases which have followed, notably including *Almelo*[39], *Compagnie Maritime Belge*[40]and *Irish Sugar*[41] have developed twin requirements of the existence of linkages that facilitate parallel behaviour, and a magnitude of joint control that would afford the participants a relative freedom from competition – though these standards are arguably of limited utility. The Competition Act of Canada allows explicitly allows plurality in its Abuse of Dominance provisions, and the Competition Bureau has not shied away from implementing the same, even if only sparingly. It too, however, is lacking in set standards for implementation, thereby

[37] Institutio Chemioterapico Italiano Spa and Commercial Solvents v. Commission, [1974] ECR 223.
[38] Societa Italiano VetroSpA v. Commission of the European Communities, ECJ Case T-68/89 joined with T-77/89 and T-78/89.
[39] Municipality of Almelo v. NV EnergiebedrijfIjsselmij, ECJ Case C-393/92.
[40] Compagnie Maritime Belge Transports SA v. Commission of the European Communities, 5th Chamber Cases C-395/96 P joined with C-396/96 P.
[41] Irish Sugar plc. v. Commission of the European Communities, ECJ Case T-228/97.

providing no concrete standard for the determination and deciding upon the dominant mature of the multiple entities.

**(¶49.)** The United States laws on Competition Law, the oldest in the sphere, do not offer explicit recognition to Collective Dominance. Section 5 of the Federal Trade Commission Act, which prohibits 'unfair methods of competition', is ambiguous on whether conscious parallelism is prohibited under the provision. Typical to the cautious approach of United States competition regulators, cases such as *Boise Cascade*[42] and *Ethyl Corp.*[43], while not ruling out such a prohibition, have greatly limited its applicability.

**(¶50.)** Thus, where instances of developed economies themselves have no objective metric for the adjudication of joint dominance, the constantly developing economy of India will only attract the harms from the uncertainties and possible adverse effects of the recognition of existence of multiple dominant entities in the market economy.

### E. Recognition of only single dominant entity serves to benefit the market

**(¶51.)** The existence of only one dominant undertaking as legally recognised is beneficial in several ways, both to the consumers as well as other market players. The rise of a single dominant player ensures the consumer welfare through the practices of the dominant undertaking in pursuance of the incentive to remain dominant. This results in constant innovation on the part of the dominant undertaking to maintain its dominance and to prevent being beaten by other players in the market, as well as incentivises all the other enterprises to improve and brainstorm with the hope of one day achieving dominance. This ensures all round uniformity and maintenance of quality in the goods and services of not only the dominant undertaking but also the other undertakings in order to dominate the rat race within the market to finally dethrone the existing dominant enterprise to be one themselves. Thus the single dominant undertaking acts as a benchmark in the standards of the market structure thereby inspiring the spirit of healthy competition so as to attain that standard and therein reap the benefits.

**(¶52.)** Another important benefit is the factor of accountability. A single dominant undertaking provides ample opportunity for both monitoring and regulation without the confusion arising out of multiple entities capable of influencing the market system and therein makes the dominant entity accountable towards any anti-competitive practice

[42] Boise Cascade Corp. v. Federal Commission of Trade, 637 F.2d 573 (9th Cir. 1980).
[43] Ethyl Corp. v. Federal Commission of Trade, 729 F.2d 128 (2d Cir. 1984).

associated with the relevant market, considering its unfettered influence over the market system. Hence the enforcement of laws in connection with the market conditions and competition becomes much more practicable and efficient when the number of dominant undertakings is limited to one.

### F. There exist several dangers of there being more than one dominant undertaking in the same market

**(¶53.)** Given the complexities involved in establishing abuse of dominance cases, the CCI and the COMPAT have been bold in finding violations since they were granted their enforcement powers. Legally, however, the treatment of collective dominance appears somewhat confused world over. The test that European Economic Community jurisprudence has supplied is an insufficient one – necessitating that firms, to be dominant jointly, must show 'connecting factors' that allow them to act similarly in a relevant market, in doing which they would be able to function independently of the competitive forces in the market. No effectual objective parameters have been developed to determine where such dominance exists. In practice, factors used to demonstrate collusive behaviour under anti-competitive agreement provisions are often re-hashed to prove the existence of 'economic links'. Consequently, the practical utility of the addition, other than in specific circumstances such as the block exemptions in *Compagnie Maritime Belge*[44]has thus far been limited. This makes the standard to prove joint dominance even more difficult than that of determining at the hands of a single entity. Such subjectivity in adjudication could be severely detrimental to the players in the market evaluated by these inadequate and inconsistent standards and further cause severe consumer misguidance thereby resulting in the losses to the market economy as a whole.

**(¶54.)** Thus on the basis on the above averments, it is honourably submitted that, it is evident that there can be no instance of the existence of more than one dominant undertaking under Indian Law and hence it is both legally untenable and unacceptable that it is absolutely impossible that Viking ('V') and Mars ('M') could have been collectively dominant in the market as there is absolutely no possibility that more than one enterprise can dominate the market. Hence, the claims against the appellant on the abuse of collective dominance with 'M' stand to fail as such a practice is not condemned under law.

[44] Compagnie Maritime Belge Transports SA v. Commission of the European Communities, 5th Chamber Cases C-395/96 P joined with C-396/96 P.

## PRAYER

In light of the issues raised, arguments advanced and authorities cited, the Counsel for the Appellant humbly prays that the Hon'ble Court be pleased to adjudge, hold and declare:

1. That, the appeal shall be allowed.
2. That, the order of the COMPAT shall be set aside.
3. That, according to the law there cannot be more than one dominant undertaking in the same market.

**AND/OR**

*Pass any order that this Hon'ble court may deem fit in the interest of equity, justice and good conscience.*

*And for this act of kindness, the counsel for the Appellant shall duty bound forever pray.*

Sd/-

(Counsel *for* Appellant)