R-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 RESPONDENT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATUTES

SUPREME COURT CASES

OTHER CASES OF INDIAN JURISDICTION

CASES OF FOREIGN JURISDICTION

BOOKS

GUIDANCE PAPERS AND NOTICES

JOURNALS AND RESEARCH PAPERS

WEBSITES

DICTIONARIES

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 Section 53-T of The Competition Act, 2002. The Respondent respectfully submits to the same.

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 justified in directing investigation.

It is humbly submitted that COMPAT was justified in directing investigation. *First, prima facie* case refers to a case that has a serious question of law to be tried and for establishing the same, merits and close scrutiny of evidence do not have to be gone into. *Second,* the CCI erred in its judgment because facts in the present case squarely make out a *prima facie* case. *Third,* as per § 53B of the Act and application of principles of interpretation of statutes, the literal rule in particular, it can be inferred that the legislature intended COMPAT to possess wide amplitude of powers including the power to direct investigation.

II. That it is a fit case for grant of interim relief by COMPAT

It is humbly submitted that the present case is a fit case for grant of interim relief by the COMPAT. *First,* as per the wordings of § 53A and § 53B of the Act and various precedents, COMPAT's power to grant interim relief in the present case is amply justified. *Second,* it was the duty of COMPAT to grant interim relief to preserve the object of the act. *Third,* after an analysis of the anti-competitive conduct with sound economic principles, a *prima facie* case is made out. *Fourth,* irreparable harm would be caused to the respondent if the relief is not granted. *Fifth,* the balance of convenience tilts in favour of the respondents and public interest would be served in the grant of interim relief.

III. That there can be more than one dominant undertaking/enterprise in the same market.

It is submitted that there can be more than one dominant undertaking/enterprise in the same market. *Firstly,* as per § 13(2) of General Clauses Act, 1897, which states that words in singular shall include plural, § 4 of the Act encompasses the concept of "collective dominance", by inclusion of 'enterprises' within the terms 'an enterprise'. *Secondly,* on interpretation of Article 102 and 82 of the TFEU which includes the concept of collective dominance, it is inferred that legally and economically independent firms can hold a collective dominant position. *Thirdly,* by way of tacit coordination two legally independent entities can also be collectively dominant in the market, without colluding with each other.

ARGUMENTS ADVANCED

I. THAT THE COMPAT WAS JUSTIFIED IN DIRECTING INVESTIGATION.

¶ 1 It is humbly submitted that the COMPAT was justified in directing the DG to investigate into the matter after formulating the view of *prima facie* violation of the provisions of the Competition Act, 2002 (hereinafter referred to as the "Act"). The argument is twofold. *First*, the COMPAT was justified in formulating a *prima facie* view of violation of the provisions of the Act. *Second*, the COMPAT was justified in directing the DG to investigate in the matter and submit its report to the CCI.

A. The COMPAT was 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 CCI believes that there might be a ground for further investigation into the alleged violation of § 4 of the Act.

¶ 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*, *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 further 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,

[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.).

which is led in support of the same, were believed."[6] This view was followed by the Hon'ble Court in its later decisions as well.[7] Moreover, it was 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.[8]

¶ 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.[9] 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.[10]

¶ 6 Applying these definitions in the instant matter, it is evident that a *prima facie* view of a violation of the Act must have been taken by the CCI since the Appellant had entered into exclusionary contracts with the member banks.. Thus, the CCI has erred in not taking a view that there is *prima facie* violation of the Act. Previous rulings have laid down certain parameters which facilitate the authorities in ascertaining whether a *prima facie* case may have been made out. This Hon'ble Court had observed that the Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith *prima facie* establish the offence or not.[11]

¶ 7 The Hon'ble Madras High Court while deciding the matter of *Nissan Motors v. CCI*[12] had observed that such view [*prima facie*] should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the

[6] Marlin Burn Ltd. v. R.N. Banerjee, A.I.R. 1958 S.C. 79 (India).
[7] The Management of the Bangalore Woollen Cotton and Silk Mills Co. Ltd. v. B. Dasappa,M.T. represented by the Binny Mills Labour Association, A.I.R. (1960) S.C. 1352 (India).
[8] Ramji Lal Mahinder Kumar v. Naresh Kumai & Anr. A.I.R. 1985 Delhi 95 (India).
[9] Hindustan Petroleum Corporation Limited v. Sriman Narayan, (2002) 5 S.C.C. 760 (India).
[10] Kanraj Khatri v. Nathuram Jain, A.I.R. 1992 M.P. 92 (India).
[11] Amit Kapoor v. Ramesh Chander&Anr.,(2012) 9 S.C.C. 460 (India).
[12] Nissan Motors Ltd. v. CCI, (2014) 5 M.L.J. 267.

Commission under the various provisions of the Act, as afore-referred. The Commission has to indicate reasons, which need not be elaborate but should be sufficient to show *application of mind.*[13]

¶ 8 In the present case, the COMPAT while forming a *prima facie* opinion regarding violation of the provisions of the Act complied with the ground rules laid down in the precedents. The Tribunal was justified in recording the information provided in the market research reports clearly stating that the market share of V and M respectively was 40% and 30%. The perusal of this information and application of mind by the COMPAT led to the obvious *prima facie* view that there was a violation of the Act by the two entities. The same was opined by the Court of Appeals, Fifth Cir. that any theory of monopolistic leveraging first depends on proof that the defendant possesses market power in a relevant market, power that it then extends into the plaintiff's market.[14]

¶ 9 It may also be noted that in the case of *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*,[15] unless rebutted by one of the Robinson-Patman Act's affirmative defences, a showing of competitive injury as part of a *prima facie* case is sufficient to establish a claim under the Act. In the same case, competitive injury was defined to be the reasonable possibility of harm.[16]

B. The COMPAT was justified in ordering DG to investigate in the matter.

¶ 10 It is respectfully averred that the COMPAT was justified in ordering investigation in the present matter in light of the provisions of the Act itself. A plain reading of § 53B(3) clearly validates the order of the COMPAT in directing the Director General to investigate and present its report to the CCI.

¶ 11 The language of the provision provides wide amplitude of powers to the COMPAT to pass an order *'as it thinks fit'* in the appeal brought against it, thus empowering it to

[13] SAIL v. Jindal Steels & Power Ltd., (2010) 100 S.C.L. 56 (India).
[14] Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1 of Tangipahoa Parish,309 F.3d 836 (5th Cir.2002).
[15] Falls City Indus., Inc. v. Vanco Beverage, Inc.,460 U.S. 428 (1983), 434-35.
[16] Id.

order investigation to DG. Delving into the literal interpretation of the provision, it is amply clear that the provision is inclined towards providing power to the COMPAT to do so.

¶ 12 The literal interpretation of the words of the Statute has been given the most weightage than any other interpretation.[17] The rule of literal interpretation implies that if the language used by the legislature is clear and unambiguous, a court of law at the present day has only to expound the words in their natural and ordinary sense; *'Verbis plane expressis amnino standum est.*[18]

¶ 13 Another legal maxim substantiating the rule of interpretation is stated as: '*Absoluta sentantia expositore non indigent' i.e.* plain words need no exposition. It is an established principle in law when the words of the Statute are clear enough, it is not for the courts to 'travel beyond the permissible limit' under the doctrine of implementing legislative intention.[19]

¶ 14 Heavy reliance is placed on the above settled principles of law which establish that the literal meaning of the phrase '*as it thinks fit*' must be construed in the literal sense which naturally means that the COMPAT has been empowered to apply its judicial mind and pass an order after due consideration in the matter in hand since the maxim still holds good in law that *Verbis Legis Non Est Recedendum* meaning that from the words of law there should not be any departure.[20]

¶ 15 Thus, '*as it thinks fit*' must be literally interpreted, so as to ensure that the powers of the Tribunal are not restricted unnecessarily and are construed in the broadest of its meanings. Further, grant of power in general terms standing by itself, must be construed in its widest sense and considering the broadness of certain phrases as in the present instance, *Lindley*, L.J. had opined that 'to interpret words of this kind which have no very definite meaning and which perhaps were purposely employed for that

[17] Browder v. United States, 312 U.S. 335 (1941); C.C.E. v. Bhalla Enterprises, (2005) 8 S.C.C. 308 (India).
[18] M.N. RAO, N.S. BINDRA'S INTERPRETATION OF STATUTES, 435 (2008).
[19] Commissioner of Wealth-tax v. Hashmatunissa Begum, A.I.R. 1989 S.C. 1024 (India).
[20] Vacher & Sons Ltd v. London Society of Compositors, (1912) U.K.H.L. 3.

reasons, we must look at the object to be attained. [21] It is not for the court to lay down a definition of a broad term which Parliament has chosen not to define.[22]

¶ 16 It is submitted that for the COMPAT to ensure the effective exercise of its powers encompassed within § 53, it is most reasonable to provide it with powers to pass orders directing the DG to investigate into the matter. Where legislature confers jurisdiction to do thing, it impliedly also grants power of doing all such acts as are essentially necessary for its execution. The authority conferred with a power has the power to do whatever is necessary to make the power effective, so that the order or decision is not a "barren success".[23] Thus, directing investigation is a necessary order passed by the COMPAT to ensure that there is effectual performance of such orders.

¶ 17 Further, in the *Gujarat Industries Power Ltd* v. *CCI*[24] the COMPAT had ordered the DG to investigate in the matter and submit its report to the CCI, thus this order and the instant action of COMPAT are covered by the decision of this Hon'ble Court that the powers of the appellate authority are co-terminus with the powers of the sub-ordinate authority.[25] Similar stance was taken in the recent judgment of *The Air Cargo Agents Association of India* v. *Competition Commission of India*[26] where the COMPAT ordered investigation to the DG and ordered to submit the report to CCI.

¶ 18 Thus, in light of the arguments averred and judicial pronouncements, it is submitted that the there existed a *prima facie* case in the present matter and that the CCI erred in holding that contrary. Further, The order is well within the powers given to the COMPAT under § 53 of the Act and hence, the COMPAT was justified in directing the investigation and passing the impugned order.

II. THAT IT WAS A FIT CASE FOR GRANT OF INTERIM RELIEF BY THE COMPAT

[21] Nutton v. Wilson, [1889] 22 Q.B.D. 744.
[22] F.A.R. BENNION, BENNION ON STATUTORY INTERPRETATION, 1168 (2008).
[23] Viswasrao Chudaman Patil v. Lok Ayukta, State Of Maharashtra, A.I.R. 1985 Bom. 136 (India).
[24] Gujarat Industries Power Company Ltd. v. Competition Commission of India, 2017 Comp.L.R. 74 (India).
[25] Jute Corporation of India Ltd. v Commissioner of Income Tax, A.I.R. 1991 S.C. 241 (India).
[26] The Air Cargo Agents Association of India v. Competition Commission of India, 2016 Comp.L.R. 1223 (India).

¶ 19 It is most humbly submitted that the present matter was a fit case for grant of interim relief by the COMPAT for the following two arguments: *first*, that the COMPAT has the power to grant interim relief under the Act and *second*, the grant of interim relief is warranted in the present case as a *prima facie* case existed, respondent would suffer irreparable damage if interim relief is not granted and the balance of convenience tilts in the favour of the respondent.

A. That COMPAT was empowered to grant the interim relief

¶ 20 It is submitted that as per sound principles of interpretation of statutes, the provisions of the Act and the rulings of the courts, COMPAT was well within its authority to grant the interim relief in the present case.

¶ 21 The COMPAT is empowered to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under § 33.[27]Further §53B(3) bestows upon the appellate authority to pass orders that '*it thinks fit*' in relation to appeals brought before conferring jurisdiction of the widest amplitude. [28] This Court was also of the view that the appellate authority cannot be treated as powerless in relation to grant of interim reliefs. In fit cases, the said appellate authority can issue interim orders. This power, in my view, is inherent with the appellate authority.[29]

¶ 22 Further, *'Any'* is a word which excludes limitation or qualification. As per Fry L.J it means having an interpretation "as wide as possible"[30] As per Chitty, J, it connotes wide generality.[31]In the interpretation of statutes, the courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect.[32] It is not a sound principle of law to brush aside words in a statute as being inapposite surplus age, if they can have

[27] § 53A, The Competiton Act, No. 12 of 2003.
[28] Shri. Surendra Prasad v. Competition Commission of India &Ors., Unreported Judgments ,2014.
[29]Sanskar Ved Bharti School v. State of M.P. & Ors. Unreported Judgments, 2015.
[30] Duck v. Bates, 53 L.J.Q.B. 344.
[31] Beckett v. Sutton, 51 L.J. Ch. 433.
[32] J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. State of U.P., A.I.R. 1961 S.C. 1170 (India); Shri Mohammad Alikhan v. Commissioner of Wealth Tax, A.I.R. 1997 S.C. 1165 (India); Dilawar Babu Kurane v. State of Maharashtra, A.I.R. 2002 S.C. 564 (India).

appropriate application in circumstances conceivably within the contemplation of the statute.[33] Therefore, use of the word "any" should be construed in aid of interpreting the scope of COMPAT's power.

B. That the grant of interim relief is warranted in the present case.

¶ 23 It is humbly submitted that CCI is duty bound to eliminate practices having adverse effect on competition and promote and sustain competition.[34] On the failure of the CCI to discharge its vital function, COMPAT as an appellate authority, ought to assume the same to act expeditiously and preserve the object of the Act.

¶ 24 It is submitted that since no standards of interim relief are prescribed within the Act, reliance must be placed on traditional rules of procedure in case of injunctions. 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.[35] These standards have been affirmed by this Hon'ble Court in *CCI* v. *SAIL*.[36]

i. <u>There exists a *prima facie* case of anti competitive conduct on part of Viking and Mars.</u>

¶ 25 *Prima facie* case is defined as the establishment of a legally required rebuttable presumption or a party's production of enough evidence to allow the fact trier to infer the fact at issue and rule in the party's favour.[37] In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favour of the plaintiff.[38] In deciding matters for the grant of a temporary injunction, the court is

[33]Aswini Kumar Ghose v. Arabinda Bose, A.I.R. 1952 S.C. 369 (India); Union of India v. Hansoli Devi, A.I.R. 2002 S.C. 3240 (India); State of Orissa v. Joginder Patjoshi, A.I.R. 2004 S.C. 1039 (India).
[34]*Supra* note 27, § 18.
[35]Kalu Haji v. Nabin Chandra Bora, (1985) 1 G.L.R. 281 (India); Bharat Law House v. Wadhwa& Co. Pvt. Ltd., A.I.R. 1988 Del. 68 (India); Bhartiya Sanghatana v. Best Bread Co., (1988) 1 C.C.C. 33 (India).
[36] Competition Commission of India v. Steel Authority of India Ltd., (2010) Comp.L.R. 61 (India).
[37]*Supra* note 2.
[38] Great Western Rly. Co. v. Birmingham & Oxford Junction, (1848) 2 Phill. 597; Robinson v. Pickering, (1881) 16 Ch .D. 636.

not required to go into evidence with a critical attitude for its close scrutiny.[39] Thus, *prima facie* evidence was sufficient for COMPAT to grant an interim relief.

¶ 26 Analysis of the appreciable adverse effect on competition of the vertical agreements[40] entails balancing the anti-competitive and pro-competitive factors mentioned under § 19(3) of the Act. This was further reflected in the decision of General Court of the European Union, where it held that "weighing up the advantages expected from the implementation of the agreement and the disadvantages which the agreement entails for the final consumer owing to its impact on competition, is to be done as a balancing exercise carried out in the light of the general interest appraised at Community level."[41]

¶ 27 Under the Sherman Act[42], all that is necessary to see is that it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have influence, direct and direct, actual or potential on competition.[43] In *Mahindra and Mahindra Ltd* v. *UOI*[44] it was observed that it is where a trade practice has the effect, actual or probable, or restricting, lessening or destroying competition that is liable to be regarded as restrictive trade practice.

¶ 28 Thus in light of the various judgments, the following are the adverse effects of the exclusionary contracts entered into by the appellants:

- Foreclosing market access and creation of entry barriers.: Exclusionary behaviour entails denying rivals access to some resource or set of consumers in order to raise the rival's costs and weaken their ability compete.[45]When there are substantial economies of scale and scope in distribution, signing exclusive contracts with particular distributors raises the distribution costs of other suppliers and reduces the

[39] Jai Chand Soni & Ors. v. State of Rajasthan & Ors., (2002) 2 W.L.C. 555.

[40] Business Electronics Corp. v. Sharp Electronic Corp., 485 U.S. 717; National Society of Professional Engineers v. United States-, 435 U.S. 679.

[41]Glaxo Smith Kline Services Unlimited v. Commission, (2006) C.M.L.R. 1623.

[42] Sherman Anti-Trust Act, 1890.

[43]Summit Health Ltd et al v. Pinhas, 500 U.S. 322 (1991).

[44]Mahindra & Mahindra Ltd. v. Union of India, (1979) 2 S.C.R. 1038.

[45] Richard J. Gilbert & Michael L. Katz, *Economist's Guide to U.S. v. Microsoft, in* THE J. OF ECON. PERSP., 25-44 (2nd ed., 15 vol., Spring, 2001).

possibilities to reach the market for new suppliers.[46]It is pertinent to reiterate here that V and M collectively hold 70% of the market share and exclusionary contracts entered into by them are denying market access to smaller players.

- Driving Competitors out of the market: Exclusive dealing imposed by dominant manufacturer eliminates its rivals from the market exclusive dealing both reduces actual competition and restricts consumer choice set.[47] Exclusionary contracts in the instant matter have severely impacted the smaller player and thus they are slowly being driven out of the market by the appellants.
- There is no accrual of benefits to consumers: If a large number of buyers accept inducements to deal exclusively with a single supplier, the overall effect can be to reduce competition to the detriment of consumers. This analysis applies with even greater force when a seller with market power can strategically price discriminate and bargain sequentially with buyers.[48]

¶ 29 Further, the exclusionary contracts are harmful to the rivals in a way that also harms consumers.[49] The nature of exclusive arrangement is such that it is a "prohibition" imposed by the appellants on the issuing banks rather than a bid put up by the customer bank to ensure the best possible deal. Thus, it essentially constrains rivals' ability to constrain the appellants' power.

¶ 30 As has been held in the *Visa case*[50], in contrast, the only route to debit or other bank account based card functionality was through banks; banks designed and established the features of the products that were sold; and banks provided customer relationships that could not be utilized as effectively through other means. Thus exclusionary contracts especially in this sector cause a more direct harm to the consumers.

ii. That the Respondent would suffer Irreparable and irretrievable damage in the absence of Interim Relief

[46] Steven C. Salop & David Scheffman, *Rising Rivals' Costs, in* AM. ECON. REV., 267-71 (2nd ed., 73 vol., 1983); Thomas G. Krattenmaker& Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price, in* YALE L.J., 209 (96 vol., 1986).

[47] G. Frank Mathewson & Ralph A. Winter, *The Competitive Effects of Vertical Agreements: Comment, in* The Am. Econ. Rev., 1057-1062 (77 vol., 5th ed., 1987).

[48] *Supra* note 45.

[49] Jonathan M. Jacobson, *Exclusive Dealing, Foreclosure & Consumer Harm, in* ANTITRUST LAW J., 311-369 (70 vol., 2nd ed., ,2002).

[50] United States v. Visa USA, 163 F. Supp. 2d 322 (S.D.N.Y 2001).

¶ 31 *'Irreparable injury rule'* is defined as the principle that equitable relief (such as an injunction) is available only when no adequate legal remedy (such as monetary damages) exists.[51] The object of passing interlocutory order is to see that the relief which might be granted, finally may not be rendered infructuous and the interest of both the parties during pendency of the suit are not jeopardized and irretrievable.[52] The object is to preserve the subject matter until the case can be tried.[53]

¶ 32 This Hon'ble Court has held that "the object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial."[54] In *Burn Standard Co. Ltd. &Ors. Vs. Dinabandhu Majumdar & Anr.*[55], this Hon'ble Court defined irreparable loss as a loss that could not be compensated for by granting monetary benefits for at a later stage. The Court held that in such cases interim relief sought was fair and should be granted.

¶ 33 It is humbly submitted by the respondents that in the present matter, in the absence of an interim relief, smaller players in the market would have no chance of survival and would be wiped out of the market being compelled to exit. This consequence would render futile, any favourable decision by the Commission at a later date, as there is no way to ascertain the damage caused.

iii. <u>That the Balance of convenience tilts in favour of the respondents</u>

¶ 34 *'Balance of convenience*' is defined as a balancing 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.[56] It is submitted by the respondents that no harm would be caused to the appellants in case the interim relief is granted, since it would merely put

[51] *Supra* note 2 at 958.
[52] Dover Park Builders Pvt. Ltd. v. MadhuriJalan, A.I.R. 2003 Cal. 55 (India).
[53] HALSBURY'S LAWS OF ENGLAND, 904 (24 vol., 4th ed., 2004).
[54] Gujarat Bottling Co. Ltd. &Ors. v. Coca Cola Co. &Ors., (1995) 5 S.C.C. 545 (India).
[55] Burn Standard Co. Ltd. &Ors. v. Dinabandhu Majumdar & Anr., (1995) 4 S.C.C. 172 (India).
[56] *Supra* note 2 at 170.

the appellants in the same position as other players in the market, only with the larger market share that they possess. On the other hand, irreparable harm would be caused to the respondents in case no relief is granted. Further, no loss to public interest would be caused as credit cards are a relatively homogeneous good and most relevant business decisions affecting consumers are made at the level of the issuing bank.[57]

¶ 35 Undertakings under investigation often continue implementing the practices under investigation throughout the proceedings consistent with their defence that those practices are lawful and efficient and the pursuit of the impugned practice over the course of a multi-year investigation may very well prove successful in eliminating competition and in erecting barriers to entry, in particular in markets characterized by scale or network effects. [58] Hence, all the criteria have been met in the instant matter and so, it is a fit case to grant interim relief.

¶ 36 It has been held that the Commission should use the available tools such as grant of interim relief to eliminate the negative effects of the extended duration of competition law proceedings.[59] Failure to consider the adoption of interim measures for reasons unrelated to the specific circumstances of the case may have very negative consequences for all the stakeholders, and the Commission itself, whose final decision may not eliminate the harm to competition caused by the impugned practice in the course of the investigation.[60]

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

¶ 37 It is humbly submitted that more than one dominant undertaking/ enterprise can exist in the same relevant market. Reliance is placed on § 4, Competition Act to establish the above besides landmark rulings of the European Courts and their Competition legislation & regulations given that it is a developed jurisdiction in Competition Law and the Indian Competition Act has been substantially derived from it.

---

[57] Lawrence M. Ausubel, *The Failure of Competition in the Credit Card Market, in* THE AM. ECON. REV., 50-81 (81 Vol., 1st, ed., 1991).

[58] Jean-Yves Art, *Interim relief in EU competition law: A matter of relevance,* Art. No. 80361, CONCURRENCES REV., (2016), *available at* www.concurrences.com.

[59] La Cinq SA v. Commission of European Communities, (1992) E.C.R. II-1.

[60] *Supra* note 58.

A. That the Act itself encompasses the concept of existence of more than one dominant entity in the same market.

¶ 38 A bare perusal of § 4(1) of the Act throws light on the concept of 'collective dominance' where it states that "*No enterprise or group shall abuse its dominant position.* Emphasis is added on the words "no enterprise" which do not anywhere explicitly establish that there must be only one dominant undertaking in the market. It is reasonable to infer that it proscribes any number of enterprises from abusing its dominance. Hence, there is no restriction on existence of more than one dominant enterprise in the market.

¶ 39 The Section aims to ensure that no enterprise abuses its dominant position by any means as prescribed within the provision itself, however, there is no inkling of any bracket on the number of dominant entities that may exist in the same relevant market. The CCI has also discussed the possibility of existence of more than one entity acquiring a position of dominance in the market when it held that '*the concept of dominance does centre on the fact of considerable market power that can be exercised only by a single enterprise or a small set of market players.*[61]'

¶ 40 In application of rules of interpretation, if there is ambiguity and the provision is susceptible to two meanings, the court should interpret it in the manner which will best serve the object sought to be achieved.[62] Further, it has been held that the statutes should be construed not as theorems of Euclid but with some imagination of the purposes which lie behind them and to be too literal in the meaning of words is to see the skin and miss the soul.[63] On the same lines, it has been correctly held that in order to understand the true nature and scope of an Act, it is necessary to ascertain the evil which were intended to be redressed.[64] The fact that incidents unthought of at the time the legislation is passed are not, for that reason, to be excluded if they come within the natural meaning of the Act construed with reference to its purpose.[65]

[61] Consumer Online Foundation v. Tata Sky & Ors., Unreported Judgments 2011 (India).
[62] Rakesh Wadhwan & Ors. v. Jagdamba Industrial Corporation, (2002) 5 S.C.C. 440 (India).
[63]Tata Engineering & Locomotive Co. Ltd. v. State of Bihar &Anr., (2002) 5 S.C.C. 346 (India).
[64]Sundararamier & Co. v. State of Andhra Pradesh, A.I.R. 1958 S.C. 468, 484 (India).
[65]Federated Municipal & Shire Council Employees' Union of Australia v. Melbourne Corp.(1919) 26 CLR 508,551.

¶ 41 To substantiate further, § 13(2) of The General Clauses Act, 1897 states that in all Act and Regulations, that unless the context specifies '*singular shall include the plural and vice versa.*' The provision expressly states that any words in the act in singular will be understood and construed to include the plural which in the simplest words means and re-affirms the claim that under § 4, the term 'enterprise' shall also include 'enterprises'. In various cases, the singular terms such as person[66], state[67] and association[68] have been held to include their plural meanings as well.

¶ 42 Further, the rule of singularity and plurality must not cause the section to be repugnant or absurd.[69] In the present matter, a reading of plural form of *'enterprise'* does not make the section absurd or repugnant, thus implying that '*enterprises*' are squarely covered within § 4(1) when read with § 13(2) General Clauses Act. A similar stance was taken while holding that § 13(2) could be applied in the dispute and that the explanation to the Section still holds good when read with the plural.[70]

¶ 43 The Privy Council laid down in that the mere fact that a statutory provision suggests an emphasis on singularity as opposed to plurality is not enough to exclude the application of the rule that words in the singular shall include the plural.[71] Thus, it is vehemently asserted that a mere perusal of the Competition Act read with General Clauses Act, 1897 establishes that there can be more than one dominant undertaking/enterprise(s) in the same market.

B. That the concept of collective dominance conveys the existence of more than one undertakings being dominant in the market.

¶ 44 It is humbly submitted that the arguments mentioned above successfully establishes that § 4 of the Act embraces a situation wherein more than one undertaking~~s~~ can be dominant in one single market. In addition to it, it is submitted that Article 102 of

[66]Nathu v. State, A.I.R. 1958 All. 467 (India).
[67]S. Sher Singh s/o S. Hukam Singh v. Raghu Pati Kapur and Anr., A.I.R. 1968 P&H 217 (India).
[68] In re: Phool Din &Ors., A.I.R. 1952 All. 491(India).
[69]C.S. Balarama Iyer&Anr. v. Krishna Kunchandi, A.I.R. 1968 Ker. 240.
[70]Atma Singh v. The Chief Settlement Commissioner & Ors., A.I.R. 1964 P&H 87.
[71] Blue Metal Industries v. R.W. Diley, (1969) 3 All E.R. 437 (P.C.).

Treaty on the Functioning of the European Union (TFEU)[72] encompasses abuse of dominant position by 'one or more undertakings'. The provision recognizes a situation of abuse of dominance by more than one undertaking under the term 'collective dominance'.[73]

¶ 45 The Court of Justice of the European Union defined collective dominance as "*a dominant position held by two or more economic entities legally independent of each other provided that from an economic point of view 'they present themselves or act together on a particular market as a collective entity'*.[74] A reference in Article 102 of TFEU to one or more undertakings indicates that it has a wide meaning, so that *legally and economically independent firms might be considered to hold a 'collective dominant position'*.[75]For independent entities to be collectively dominant in the market they can either have economic linkage through agreements, licences or technological lead etc.[76] or have parallelism of interest[77] where there is a kind of interdependence which often comes about in oligopolistic markets.[78]

¶ 46 Therefore, for two entities to be dominant in the same market there is no legal requirement of an agreement or other links in law. It is possible that firms could be held to be collectively dominant where the oligopolistic nature of the market is such that they behave in a parallel manner, thereby appearing to the market as a collective entity.[79]

¶ 47 The 'Game Theory' suggests that a strategic interaction of the firms in an oligopolistic market[80] is such that competitors are acutely aware of each other's

[72]Art. 102 of the Treaty for Functioning of European Union.
[73]OFFICIAL JOURNAL OF THE EUROPEAN UNION, COMMUNICATION FROM THE COMMISSION — GUIDANCE ON THE COMMISSION'S ENFORCEMENT PRIORITIES IN APPLYING ARTICLE 82 OF THE EC TREATY TO ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS, (2009), *available at* http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC0224(01).
[74]Compagnie Maritime Belge Transports v. Commission ,(2000) E.C.R. I- 1365.
[75]RICHARD WHISH & DAVID BAILEY, COMPETITION LAW, 573 (2011).
[76]SocietàItalianoVetroSpA v. Commission,(1992) E.C.R. II- 1403.;Almelo v. NV EnergiebedrijfIjsselmij,(1994) E.C.R. I- 1477.
[77] *Supra* note 75.
[78] Notice on Access Agreements in the Telecommunications Sector, (1998) O.J.(C 265) 2, *available at* http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31998Y0822(01).
[79]France v. Commission, (1998) E.C.R. I- 1375.
[80]JONES, ALISON & BRENDA SUFRIN, EU COMPETITION LAW: TEXT, CASES AND MATERIALS 860 (2008).

presence and are bound to match one another's marketing strategy.[81] Further, the concept of 'Prisoner's Dilemma', recognises that firms take into account the likely actions (and reactions) of competitors when deciding how to behave[82] and hence tacitly coordinate in order to establish collective dominance in the market.[83]

¶ 48 Therefore, it is reasonably inferred that the concept of 'collective dominance' includes dominance of legally independent entities by the way of tacit coordination and governs the behaviour of firms which might be individually dominant in the same market. To substantiate this averment, similar market conditions existed and the U.S. Court of Appeals Second Circuit held Visa and Mastercard as, jointly and separately, dominant in the same relevant market.[84]

¶ 49 Consequently, it can reasonably be stated that under § 4 of the Act, more than one dominant undertakings can exist in the same relevant market and hence the Competition Act, 2002 recognizes the said concept.

[81] *Supra* note 75 at 561.
[82] Mario Franzosi, *Oligopoly and the Prisoner's Dilemma: Concerted Practices and "As If" Behaviour* , 9 in EUR. COMPETITION LAW REV., 385, (1988).
[83] *Supra* note 75 at 578.
[84] U.S. v. Visa U.S.A., Inc., 344 F.3d 229 (2003).

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

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

3. Uphold 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 can be more than one dominant undertakings in the same market;

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

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

All of which is most humbly prayed

Counsel for the Respondent