R-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 RESPONDENT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

BOOKS

JOURNALS AND PERIODICALS

Economic and Political Weekly, Vol. 33, No. 9 (Feb. 28 - Mar. 6, 1998), pp. M31-M36	
Aditya Bhattacharya, Of Omissions and Commissions, Economic and Political Weekly, Vol. 45, No. 35 (August 28-September 3, 2010),pp. 31-37	11, 12
Sasha-Lee Afrika and Sascha-Dominik Bachmann, *Cartel Regulation in Three Emerging BRICS Economies: Cartel and Competition Policies in South Africa, Brazil, and India—A Comparative Overview*, The International Lawyer, Vol. 45, No. 4 (WINTER 2011), pp. 975-1003	6
Gabriela Mancero-Bucheli, Anti-Competitive Practices by Private Undertakings in Ancom and Mercosur: An Analysis from the Perspective of EC Law, The International and Comparative Law Quarterly, Vol. 47, No. 1 (Jan., 1998), pp. 149-173	8. 10, 11
John Vickers, *Abuse of Market Power*, The Economic Journal, Vol. 115, No. 504, Features (Jun., 2005), pp. F244-F261	9, 10, 11
Richard Brent, The Meaning of 'Complex Monopoly', The Modern Law Review, Vol. 56, No. 6 (Nov., 1993), pp. 812-831	5,6
Albertina Albors-LLorens, *Collective Dominance: A Mechanism for the Control of Oligopolistic Markets?*, The Cambridge Law Journal, Vol. 59, No. 2 (Jul., 2000), pp. 253-257	9

STATEMENT OF JURISDICTION

The Counsel for the Respondent humbly submits this memorandum on behalf of the Respondent 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 honorable bench that a '*prima facie'* view was evident hence the investigation had taken place. Section 26 of the Competition Act, 2002 illustrates the procedure that COMPAT 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. There is requisite power the Appellate Tribunal has been vested with and that the Competition Appellate Tribunal was justified in directing investigation and hence the respondents humbly submit their arguments before the bench.

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

It is submitted by the Respondents that this particular case was a 'fit case' for the COMPAT to grant an interim relief as it is well within the powers of COMPAT to direct an investigation after obtaining a '*prima facie*' view and that the likelihood of damage is enough to grant an interim relief. Moreover, in this particular case it can be understood that there has been an 'error' made by the Commission and that is the reason why the COMPAT was bound to give directions for an investigation

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

It is submitted before the honorable bench that there can be more than one dominant undertaking or enterprise in the same market under the Competition Act, 2002. The purpose of having defined dominance and the abuse of dominance traces back to the very purpose of the Act. The Act aims to establish a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets.The legislature has recognized the need for the existence of more than one dominant undertaking. There are evident dangers that arise from rejecting the presence of more than one dominant undertaking in the market and hence the respondents humbly submit their arguments before this bench.

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 honorable bench that a '*prima facie'* view was evident hence the investigation had taken place (A) and that the Competition Appellate Tribunal was justified in directing investigation (B) and hence the respondents humbly submit their arguments before the bench.

A. A '*prima facie'* view was evident hence the investigation had taken place.

(¶2.) It is humbly submitted before the honorable court 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 healthy competition between the 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 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. …"

[1] The Competition Act, 2002 §26

(¶3.) The moot proposition[2] reveals that when the matter was being heard before the Competition Commission of India, the commission relied on the date 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 "Z". 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 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: "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

[2] Page 1, Moot Proposition, 5th KIIT National Moot Court Competition, 2017.
[3] Martin Burn Ltd. v. R.N. Banerjee, AIR 1958 SC 79.
[4] Sampat B.G. v. State of West Bengal and Ors, (2000) ILLJ 565 Cal.

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."

(¶6.) 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 judgement in *Cholan Roadways Limited v. G. Thirugnanasambanda*[6] to enlighten the reader in matters concerning the interpretation of the phrase '*prima facie*'.

(¶7.) 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.

(¶8.) Para 7 of the fact sheet[7] reveals that the Competition Appellate Tribunal could not meet the standard laid down in the Martin Burns case. The Tribunal states:

"… the COMPAT 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…"

(¶9.) This passage illustrates the subtle nuance involved in determining whether a case meets the standard set for '*prima facie*'. The court essentially talks about how a definitive conclusion cannot be drawn based on the data available at hand. And that is where the nuance lies, the tribunal does not have to definitively ascertain anything, it's only object is to determine whether a conclusion favoring the appellants "Z" can be drawn in the absence of data or arguments to the contrary. The tribunals objective was to determine whether the appellants case could stand on its own, which the tribunal believed it could when it stated that 'V' and 'M' lacked commercial justification due to their anti-competitive behavior.

[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.

B. The Competition Appellate Tribunal was justified in directing investigation

(¶10.) It is humble submitted before the honorable bench that para 8 of the fact sheet[8]read as follows: "…The COMPAT accordingly directed the Director General to investigate and present its report to the CCI…."Counsel contends that the Competition Appellate Tribunal was justified in directing the investigation.

(¶11.) In the case of *North East Petroleum Dealers Association v. Competition Commission of India and Ors.*[9], the tribunal state the following:

"In view of the judgment of the Supreme Court in Competition Commission of India v. Steel Authority of India Limited and Another, an order passed by the Commission under Section 26(1) cannot be made subject-matter of appeal under Section 53-B but legality and propriety of an order passed under Section 26(2) can certainly be subjected to judicial scrutiny by the Tribunal. In other words, if in exercise of the appellate power vested in it under Section 53-B the Tribunal is satisfied that the negative opinion formed by the Commission on the issue of existence of a '*prima facie'* case is vitiated by an error of law, then it can set aside the impugned order and direct an investigation under Section 26(1) of the Act."

(¶12.) This quote clearly illustrates the requisite power the Appellate Tribunal has been vested with. The facts, as mentioned in the moot proposition clearly mimic the position of law that the above judgment espouses. In the fact sheet[10], the informant 'Z' only appealed to the Competition Appellate Tribunal when the Competition Commission of India passed an order dismissing the case in consonance with section 26(2). This implies that, in accordance with the precedent laid down in the North-East Petroleum case, the Competition Appellate Tribunal has the power to direct an investigation.

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

(¶13.) It is humble submitted by the Respondents that this particular case was a 'fit case' for the COMPAT to grant an interim relief as it is well within the powers of COMPAT to direct an investigation after obtaining a '*prima facie*' view (A) and that the likelihood of a damage

[8] Page 2, Moot Proposition. 5th KIIT National Moot Court Competition, 2017.
[9] North East Petroleum Dealers Association v. Competition Commission of India and Ors, 2016 Comp LR 71 (CompAT).
[10] Page 1, Moot Proposition, 5th KIIT National Moot Court Competition, 2017.

is enough to grant an interim relief (B) . Also, the existence of more than one dominant undertaking is warranted by a need for the same (C)

A. It is well within the powers of COMPAT to direct an investigation after obtaining a '*prima facie*' view

(¶14.) It is humbly submitted before the honorable bench that it is well within the power of COMPAT to direct an investigation after obtaining a '*prima facie'* view. In the case of *North East Petroleum Dealers Association*[11] it was held that:

"An order passed by commission under section 53 B but legality and propriety of an order passed under Section 26(2) can certainly be subjected to judicial scrutiny by the Tribunal. IN other words, if in exercise of the appellate power vested in it under section 53-B of the tribunal is satisfied that the negative opinion formed by the Commission on the issue of existence of a '*prima facie'* case is vitiated by an error of law, then it can be set aside and direct an investigation under Section 26 (1) of the Act."

(¶15.) Hence, in this particular case it can be understood that there has been an 'error' by the Commission is the reason why the COMPAT was bound to give directions for an investigation.

B. The likelihood of damage is enough to grant an interim relief

(¶16.) In *Karunanidhi v. R Renganathan Chettiar*[12] it was held "the making our '*prima facie'* case does not mean that the court should examine the merits of the case closely and then come to a conclusion that the applicant has a case in which he is likely to succeed, as that would be prejudging the merits of the suits. All that the Court has to see that on the face of it the person applying for injunction has a case for which he needs consideration and which is not bound to fail by virtue of some apparent defects. There must be a probability that the petitioner has an ultimate chance of success"

(¶17.) In this particular case, it is quite evident that there was a probability of damage caused to the petitioner. Hence the court is not bound to see the merits of the case, but only the 'likelihood' of a damage being caused and the possibility of that itself is enough for them to pass an interim relief to Z. V& M do not have any commercial justification to have separate contract with the member banks, hence it was the responsibility of the COMPAT to ensure that this does not cause harm to Z who is an active member in the market.

[11] North East Petroleum Dealers Association v. Competition Commission of India and Ors, 2016 Comp LR 71 (CompAT).
[12] Karunanidhi v. R Renganathan Chettiar, AIR 1973 Mad 443.

(¶18.) In the case of *Kanshi Ram v. Bansilya*[13] it was observed that:

"The merits of the case must be closely examined by conducting an in-depth investigation in order to decide whether the petitioner has ultimate chances of success. An entry into some degree of the merits of the case would be necessary, in considering whether there is a *prima facie* case" Applying the principles of this case to the current factual scenario, it is clear that there was a requirement of an in depth investigation in order to understand the importance of the degree of merits in this case. Hence, this case was definitely a 'fit case' in order for COMPAT to provide an interim relief

(¶19.) Moreover, in *Tavener Rutledge Ltd. v. Specters Ltd.*[14] It was held that "The granting of an interim injunction the Court is to be generally guided by the balance of convenience to the parties concerned and the extent of the damage that is likely to be causing to them". Hence, it is assumed that COMPAT had decided that this case had passed the test of balance of convenience and hence needed to be given an interim injunction.

(¶20.) *Pickwik internal inc. Ltd. v. Multiple Sound Distribution ltd*.[15]It was held that "The remedy of an interlocutory injunction is to be kept flexible and discretionary rather than being the subject of strict rules. The basis of fairness justice and common sense in relation to all relevant law and facts" Hence, it is impossible for any court to follow strict rules and procedures to pass an interim relief. The Court had found an imminent necessity in this particular case and had hence passed the interim relief to the parties.

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

(¶21.) It is humbly submitted before the honourable bench that there can be more than one dominant undertaking or enterprise in the same market under the Competition Act, 2002 (A). The legislature has recognized the need for the existence of more than one dominant undertaking. (B) There are evident dangers that arise from rejecting the presence of more than one dominant undertaking in the market (C) and hence the respondents humbly submit their arguments before this bench.

[13] Kanshi Ram v. Bansilya, AIR 1977 HP 61.
[14] Tavener Rutledge Ltd. V. Specters Ltd., (1959) RPC 83, 355.
[15] Pickwik internal inc. Ltd. V Multiple Sound Distribution Ltd., (1972) RPC 786.

A. Existence of more than one dominant undertaking is not barred under the Competition Act, 2002

(¶22.) According to Section 4 of the Competition Act, 2002[16], dominance and abuse of dominance are defined as under:

"(*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.

Explanation.—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (*i*) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (*ii*) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(*b*) limits or restricts—

(*i*) production of goods or provision of services or market therefore; or

(*ii*) technical or scientific development relating to goods or services to the prejudice of consumers; or

(*c*) indulges in practice or practices resulting in denial of market access 3[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—

[16] The Competition Act, 2002, § 4

(*i*) operate independently of competitive forces prevailing in the relevant market; or

(*ii*) affect its competitors or consumers or the relevant market in its favor;

(*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." [17]

(¶23.) The purpose of having defined dominance and the abuse of dominance traces back to the very purpose of the Act. The Act aims at providing for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.

(¶24.) The Act is not intended to prohibit competition in the market. It merely acknowledges the fact that competition is subject to harm, especially from dominant entities which can independently control the market make-up and therein resort to practices that cause a significant adverse impact on the consumer as well as other players in the market as a whole. Thus, it becomes imperative that due caution and clarity exercised in efficiently upholding the purpose and spirit of the Act, a task which involves the strategic management of all players in the market, especially dominant undertakings, which possess the strength to influence market structures and create ripples in relevant markets thereby overthrowing any semblance of a balance in market competition. The prohibition of an 'Abuse of Dominant Position', enshrined in Section 4 of the Competition Act, 2002, forms one of the three pillars of competition regulation in India. Recognising the immense power that an enterprise may possibly hold, the provision prohibits certain classes of abusive behaviour by any entity which is dominant in a market. Such abuses range from coercing consumers to accept exploitative conditions to ensuring that a market is not hospitable to competitors of the dominant firm.[18]

(¶25.) Thus where a single dominant entity in itself has presumed as being potentially damaging to the market, it becomes inevitable that one must be vary of the presence of more

[17] The Competition Act, 2002, § 4
[18] VINOD DHALL, COMPETITION LAW TODAY (Oxford University Press 3rd edition 3007).

than one dominant enterprise in the market. Such a scenario where more than one independent dominant undertaking comes into existence and thereby persists to influence the market is known as collective dominance.

(¶26.) On a perusal of the provisions of the Competition Act there is a clear insistence on the existence of more than one dominant player who enter into anti-competitive agreements and exhibit parallel behavior which may influence the market by virtue of their dominant hold over the market. The same would not have been addressed if all that the act dealt with was a monopoly, but it focuses on anti-competitive practices through agreements between powerful players with the same market because it acknowledges the possibility of their existing in the market, more than one dominant undertaking with the strength to affect the consumers in the market and operate independently of the competitive forces in the market by forming their own collusive rules and/or practices that provide them with further control over the market functioning.

B. The Legislature has recognized the need for the existence of more than one dominant undertaking

(¶27.) It is humble submitted before the honourable bench that in line with the international trend and to cope up with the changing realities India, consequently, proposed to enact the 2012 Amendment, thereby providing recognition to collective dominance.

(¶28.) On 7 December 2012, the Central Government introduced the Competition (Amendment) Bill, 2012 in the Lower House (Lok Sabha). The proposed amendments to the Act, moved by the Ministry of Corporate Affairs, were aimed at fine tuning the provisions to meet present day competition needs, given CCI's experience over the last few years.

(¶29.) The proposed amendment in section 4 sought to provide for the recognition of the potential existence and consequent scope of regulating 'collective dominance' and proposed that Section 4(1) be amended with the inclusion of the words "joint or singly". Accordingly, the proposed revision of the wordage of Section 4(1) would be:

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

(¶30.) With the addition of these words it is sought to prevent the mischief which had hitherto went unnoticed. This checks in for bringing in keeping a check against "Collective Dominance" which may be exercised by the major players of the industry in collusion with each other irrespective of whether they have any kind of stake in any other of those enterprises.

(¶31.) There is nothing in the definition of enterprise under Section 2(h) or in the provisions of Section 4 to suggest that two or more independent entities can be clubbed together to constitute collective dominance but neither does it bar the possibility of existence of the presence of more than one dominant undertaking in the same market. The explanatory statement provided to the Parliamentary Standing Committee on Home Affairs on the Competition Bill states that "the clause prohibits abuse of dominant position by any enterprise".

(¶32.) It is important to note that in the *DTH case*[19]in 2011, the dissenting member had opined that an 'enterprise' has been defined in Section 2(h) of Act as including a 'person'. A 'Person' has been defined under Section2(l) as including 'as association persons … whether incorporated or not …' and thus, the respondents in that case would together constitute an 'unincorporated association of persons', thereby making them an "enterprise" for the purposes of Section 4(1) of the Act.

(¶33.) Thus, it seems that even without the clarification as proffered in the Bill, there may have been an interpretation of the various provisions of the Act which would have covered the element of "collective dominance" under Section 4(1) of the Act. By inserting the wording "jointly or singly," the amendment merely sought to explicitly bring the group of independent and unrelated enterprises holding a dominant position within the scope of Section 4 , thereby making evident the legislature's acknowledgment of the possibility of the existence of several dominant entities in the same market and the need to clarify its position and importance of the regulation of the same in preventing the potential adverse effects of the multiplicity of such undertakings.

(¶34.) This amendment to Section 4(1) would have also strengthened the position of the CCI as in principle (if the CCI had the explicit sanction of law to find a collective dominant position where no single dominance exists, it could find an infringement of competition law even where the evidence is not strong enough to support the finding of an anti-competitive agreement between the parties)and also would have codified the concept in line with the position under Article 82 of the EC Treaty (Now Article 102 of the TFEU). The Competition Laws of India, the Competition Act, 2002, is largely modelled on the EU Law and influenced by similar regulation in the US[20].

[19] Consumer Online Foundation v. Tata Sky Ltd & Ors, Case No. 2/2009, Order dated 24.03.2011.
[20] SUZANNE RAB, INDIAN COMPETITION LAW- AN INTERNATIONAL PERSPECTIVE, (CCH Publications 2012).

(¶35.) The Treaty on the Functioning of the EU has been cognizant of the presence of more than one dominant undertaking/enterprise in the same market and has made explicit reference to the same in Article 102 which prohibits the abuse of a dominant position "by one or more undertakings" in the market. The opening words of Article 82 of EC Treaty (Now Article 102 of the TFEU)and Section 4 of the Act, as it presently stands, are divergent, so far as, Article 82 begins with the phrase "*any abuse by one or more undertakings of a dominant position*" and it was this phrase "one or more undertakings" which was used by Court of First Instance in the *Italian Flat Glass case*[21]to hold that "there is nothing in principle to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market." This marked the birth of the concept of "collective dominance" in Europe. The proposed amendment to Section 4(1) of the Act is more in the nature of a clarification, since the intent of the Act has always been to encapsulate abuse of dominance either by an undertaking in its individual capacity, or by two or more undertakings collectively. This is in line with internationally accepted and administered principles in both the EU and the US, which have well-settled jurisprudence on the abuse of dominance process and analysis.[22]

(¶36.) To establish a collectively dominant position under EU law, it is necessary to assess any "economic links" between competitors, particularly structural links, on a case-by-case basis to ascertain whether anticompetitive parallel behaviour is likely. However, there is no need to find an agreement between the parties as is required under Article 101 TFEU (equivalent to India's 3 of Competition Law Act, 2002), which significantly reduces the burden of those aggrieved by multiple dominant players in the market, thereby making the process of securing relief much more fairer and in keeping with consumer interests.

(¶37.) Similarly, US antitrust legislation in Section 2 of the Sherman Act also provides that: "Every person, who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony", therein signifying its

[21] Judgment of the Court of First Instance (First Chamber) of 10 March 1992. – Società Italiana VetroSpA, Fabbrica PisanaSpA and PPG Vernante PennitaliaSpA v Commission of the European Communities – EUR-Lex-61989A0068.

[22] Freny Patel, *Addition of concept of "collective dominance" to Indian Competition Act will strengthen country's antitrust regulator*, http://www.ft.com/cms/s/2/025fdfac-6b22-11e2-8017-00144feab49a.html?ft_site=falcon&desktop=true#axzz4nGRfJUFb (last visited on 15th June 2017).

acquiescence of the presence of potentially dangerous dominant players in the same relevant market.

(¶38.) In fact, one cannot ignore the coincidence that at the time when the Competition Bill was drafted, US anti-trust authorities had successfully argued that two or more players can be dominant in a market, in a case where two dominant players in the credit card market had abused their dominance. While adopting best practices of advanced jurisdictions, the Indian law must have taken into account such conduct and therefore, provided adequate mechanism in the statute to deal with similar situations.

(¶39.) There is no constraint in law or otherwise that pre vents CCI from taking action against enterprises which engage in anti-competitive conduct in concentrated markets. Economic laws such as competition law must keep pace with changing economic and business realities. Therefore, the legislature armed CCI with enough powers to prohibit anti-competitive conduct by players in the market. All that CCI needs to do now is to re visit its thoughts on the issue, while keeping in view the fundamental objective of competition law to pro mote competition and the legislative intent that two wrongs cannot make a right.[23]

(¶40.) The mere lack of an explicit pronouncement of the existence of more than one dominant undertaking thereby does not mean the absence of its possibility in the market but merely signifies the legislature's intent to simplify procedural ambiguities that may arise out of it.

C. The existence of more than one dominant undertaking is warranted by a need for the same

(¶41.) Collective dominance can be described as a position of two or more independent entities that together hold a position of joint dominance where they act or present themselves as one unit. The market on which it is most likely for firms to achieve such position is on oligopolistic markets.[24] The concept of collective dominance envisages extending abuse of dominance provisions to encompass those situations where independent companies, in acting together, create situations of dominance. Thereby, when several independent companies maintain economic ties of such nature that they are able to adopt similar practices in a market

[23] Akash Gupta and Shweta Dubey, *Nurturing competition in India*, https://www.pressreader.com/india/business standard/20170219/281788513822477 2/3 (last seen on 14th July 2017).

[24] Karolina Rydman, *Collective Dominance- how is it interpreted and how does it correlate with tacit coordination*, Stockholm University (24th November 2015) http://fr.slideshare.net/karolinarydman/collective-dominance-karolina-rydman-13171127.

which render them immune to the competitive forces therein, even if they would be able to do so individually, they are considered jointly dominant in that market.

(¶42.) The abuse of dominance has perennially hinged on unwelcome practices that it puts forth in markets. Extending abuse of dominance provisions to encompass those situations where independent companies, in acting together, create situations of dominance or jointly evolve as independent dominant entities should logically serve to remedy this defect. Thereby, when several independent companies maintain economic ties of such a nature that they are able to adopt similar practices or possess the potency to transform dominant undertakings in a market which render them immune to the competitive forces therein, even if they would be unable to do so individually, they are considered jointly dominant in that market. This would make it possible to punish, for instance, the hidden charges placed by most telecom operators today – none of whom dominate the market by themselves. With its focus on the behavioural element of abuse rather than on concentration *per se*, importation of this concept theoretically serves to sidestep the express necessity of agreements in anti-competitive agreement provisions and therein provide due consideration to the existence of the possibility of more than one dominant undertaking, a move that would only seek to further the purpose of fairness in competition and consumerism in the market. [25]

D. There are evident dangers that arise from rejecting the presence of more than one dominant undertaking in the market

(¶43.) Competition has been a key driver for investment and innovation. Hence any pitfalls in a competitive market due to unbecoming conduct sought to transcend competition on the market shall be fatal for all the players in the market as well as antithetic to consumer welfare.

(¶44.) There are substantial dangers in ignoring the existence of more than one dominant undertaking. These dangers include the inability to regulate and control various anti-competitive practices entered into by the dominant undertakings who in finding gains in isolation, would now want to amalgamate their dominant positions in the quest for greater strength in market manipulation thereby resulting in the offending of the most fundamental tenants of competition in the market structure. Such practices evolve into much greater threats such as entering into anti-competitive agreements resulting in predatory pricing or the

[25] Shroff Cyril and Nisha Oberoi, *India: Abuse of Dominance*, http://globalcompetitionreview.com/reviews/60/sections/206/chapters/2342/india-abuse-dominance/ (last visited on: visited on 6/3/2014 at 6:09PM).

formation of cartels, situations which could have been nipped in the bud had it been accepted that multiple undertaking could assume dominance and the same could have been monitored closely.[26]

(¶45.) Enterprises possessing significant strength in the market thereby have the ability to be engaged in cartelization thereby limiting and restricting production and supply and collusive price fixing through price parallelism. These activities have triggered an appreciable adverse effect on the competition in the market and affected consumer interests at large of not regulated and monitored closely.

(¶46.) Thus in a system where the law refuses to acknowledge the presence of more than one dominant undertaking in a market characterized by several players where no single firm or group was in a dominant position, it gives rise to the dangers of toppling the existing conditions of productive competition, which shall ultimately lead to gross harms to the consumers.

(¶47.) At present, CCI interferes with the stand alone conduct of an enterprise only if it is a dominant player. Determining who a dominant player is, becomes difficult in concentrated markets where there is more than one strong player. The easiest answer would be that no enterprise is dominant in such markets. Therefore, CCI cannot intervene even if players en gage in anticompetitive activities. However, this response would have consequences for a large number of fringe players or potential/new entrants, which suffer the onslaught of anti-competitive practices adopted by one or more players in such markets. Traditionally, these provisions were understood to have the mandate of controlling collusive behaviour, while abuse of dominance provisions were understood to be restricted to monopolistic practices by single entities. Unfortunately, this understanding has severely curbed the ability of enforcement authorities to check a monopoly-like contortion of the market.[27]Thus the CCI should give serious thought to the issue of collective dominance; else collective action by a group of enterprises having no structural links could escape action by the CCI.[28]

(¶48.) Another important looming threat is that of 'tacit coordination'. Tacit coordination is a way for the entities, holding a collective dominant position, to coordinate their behaviour.

[26] Ripal Gupta, *Need Of Collective Dominance Under Indian Competition Act 2002,* Journal of Legal Studies and Research (Vol 2 Issue 3, ISSN 2455-2437, 2014).
[27] Akash Gupta &ShwetaDubey, *Nurturing competition in India*, https://www.pressreader.com/india/business standard/20170219/281788513822477 2/3 (last seen on 14th July 2017).
[28] Press Release, Indian Competition Law – The Enforcement Of Abuse Of Dominance Provisions, https://indialawnews.org/2012/12/01/indian-competition-law-the-enforcement-of-abuse-of-dominance-provisions/ (2012).

They can also coordinate their behaviour explicitly but they tend to avoid this since it is easier to detect. Therefore, it is of significant importance to investigate into such position and behaviour and examine the multiple dominant undertakings in the relevant market. The danger of failing to acknowledge the multiplicity of dominant players is that it is not only a creation or strengthening of dominance of the merging firms that might significantly impede effective competition but a prospective merger of firms not already holding dominant positions can also create or strengthen a collective dominant position in the relevant market since it can increase the likelihood of coordination of behaviour of the firms on the relevant market.[29]

(¶49.) Thus the status quo is such that that the law will protect you against one bully, but if there is more than one bully in the market, you are on your own. Such an understanding of the law appears to be contrary to the fundamental objectives of competition law. CCI is required to promote and sustain competition and eliminate practices that have an adverse effect on competition. Though the phrase "promote and sustain competition" has not been explained in Indian law, one presumes that it would entail protection of equally efficient players.[30]

(¶50.) While it is true that the presence of one or more competitors would generally keep other competitors in line, con duct such as predatory pricing challenges this presumption. In such a case all the other players shall typically follow suit or risk extinction.

(¶51.) Hence, whether one player does harm or two should actually not be the criterion for a regulator to act; the real test is whether there has been any adverse effect on competition as a result of anti-competitive conduct on the part of one or more enterprise, thereby taking into account the relevance in the existence of more than one dominant undertaking and its contribution as well as behaviour in the market.

[29] Mark R. Joelson, *An International Antitrust Primer*, Kluwer Law International, 3rd Edition, Page 396-397.
[30] *Supra* at note 22.

PRAYER

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

1. That, the appeal shall be dismissed.
2. That, the order of the COMPAT is upheld and must therein be executed accordingly.
3. That, there can be more than one dominant undertaking in the same market and the same must be explicitly dealt with and adequate laws must be enforced by the Legislature for the regulation of the same.
4. That, the appellant shall refrain from abusing their dominant position in collusion with fellow dominant undertakings and therein be restricted from performing anti-competitive practices.

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 Respondent shall duty bound forever pray.

Sd/-

(Counsel *for* Respondent)