

5TH KIIT NATIONAL MOOT COURT COMPETITION, 2017

Before

THE HON'BLE SUPREME COURT OF INDIA

{ Appeal filed under Section 53-T of the Competition Act, 2002 }



Civil Appeal No. _____ / 2017

VIKING.....APPELLANT

v.

ZORO.....RESPONDENT NO. 1

COMPETITION COMMISSION OF INDIA.....RESPONDENT NO. 2

COMPETITION APPELLATE TRIBUNAL.....RESPONDENT NO. 3

MEMORANDUM *for* APPELLANT

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LIST OF ABBREVIATIONS

¶	Paragraph
§	Section
CCI	Competition Commission of India
AIR	All India Reporter
Anr.	Another
Antitrust LJ	Antitrust Law Journal
AP	Andhra Pradesh
CompLR	Competition Law Review
COMPAT	Competition Appellate Tribunal
GLR	Gujarat Law Reporter
HC	High Court
Hon'ble	Honourable
ILR	Indian Law Reports
M	Mars
Ors.	Others
ITR	Income Tax Reports
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reports
V	Viking
Z	Zoro

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STATEMENT OF JURISDICTION

The Appellant, Viking (“V”) has approached this Honourable Court under Section 53-T of the Competition Act, 2002 against the order passed by the Competition Appellate Tribunal.

STATEMENT OF FACTS

INDIA

India is the relevant geographic market in the present case. Viking, Mars and other players exist in the credit card market in India.

VIKING (“V”)

V is the one of the competitors in the credit card market with 40 percent market share. It has independently entered into contracts with different member banks, prohibiting them to issue any other competitor’s credit cards.

MARS (“M”)

M is another competitor in the credit card market with 30 percent market share. It has also entered into exclusive contracts with different member banks.

ZORO (“Z”)

Z entered into the credit card business in 2015. It rapidly acquired a market share of 7% merely within 2 years of its entry in the market. Z alleges anti-competitive behaviour on the part of V & M. However, Z has (only predicted and) not been able to point out any harm caused to it due to either V’s or M’s conduct.

MATTER BEFORE THE CCI

Z filed a complaint with the CCI alleging anti-competitive conduct by V and M on their individual part, by entering into exclusionary contracts and abusing their alleged dominant position. Z also filed an application for interim relief to restrain V & M from entering into or acting upon the said exclusionary contracts. However, the CCI found fierce competition between V & M and rejected the complaint citing that there cannot be more than one dominant entity in one market.

APPEAL TO COMPAT

Z, then, filed an appeal before the COMPAT and the appellate tribunal went beyond the scope of the Act to hold both V & M dominant in the market. COMPAT further, by itself, ordered DG to investigate the matter and also granted interim relief to Z by restraining V & M to enter or act upon such exclusionary contracts.

APPEAL TO SUPREME COURT

Aggrieved by the order of COMPAT, V has approached the apex Court questioning the prima facie view of the appellate tribunal and submitting that the case was not fit for grant of interim relief. V also submits that there cannot be more than one dominant enterprise in one market.

ISSUES RAISED

FOLLOWING ARE THE ISSUES RAISED BEFORE THE HONOURABLE SUPREME COURT-

- I. WHAT IS A “PRIMA FACIE” VIEW AND WHETHER IN THE PRESENT CASE THE 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. DETERMINATION OF “PRIMA FACIE” VIEW AND THAT COMPAT WAS NOT JUSTIFIED IN DIRECTING INVESTIGATION.

- COMPAT cannot order DG to investigate
 - Direction to DG is not an ancillary or incidental function of COMPAT
 - COMPAT judgement suffers from Jurisdictional error

II. THAT THIS WAS NOT A FIT CASE FOR GRANT OF INTERIM RELIEF BY COMPAT.

- No prima facie case exists
- No irreparable injury has been caused
 - Damages are quantifiable
- Absence of satisfactory reason
- Balance of convenience is in favour of the appellant

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

- Statute in force has no provision
 - Purposive interpretation must not be made
- V has not violated section 4 of the Competition Act
 - The relevant market in the present case is “Market for general purpose credit cards in India”
 - V is not dominant in the relevant market
 - V has not violated the alleged dominant position

BODY OF ARGUMENTS**I. DETERMINATION OF “PRIMA FACIE” VIEW AND THAT COMPAT WAS NOT JUSTIFIED IN DIRECTING INVESTIGATION.**

¶(1.) It is humbly submitted before the Hon’ble Court that under Section 26(1) of the Competition Act, 2002 it has been stated that the Commission directs inquiry only if it is opinion that there exists a prima facie case.¹ The expression “opinion” means something more than a mere retailing of gossip or hearsay; it means a judgement or belief.² It has been held that it is a subjective satisfaction of Commission which is arrived at in an objective way, i.e. there should be some material on basis of which such opinion could reasonably be formed.³

¶(2.) It is respectfully submitted that in the present case the Commission could not form the prima facie view that Viking (“V”) and Mars (“M”) abused their position in the market. It is further stated that the COMPAT did not made prima facie view before directing the DG to investigate the position of Viking and Mars. The market report on whose finding COMPAT made their reliance only revealed that Viking (“V”) and Mars (“M”) had 40% and 30% share respectively. It has been stated by various Tribunal and Courts in India that Market Reports are not the solely criteria to conclude whether an enterprise is dominant or not.

A. COMPAT CANNOT ORDER DG TO INVESTIGATE

¶(3.) It is humbly submitted before the Hon’ble Court that a power to make an order as the Appellate Tribunal thinks fit necessarily comprises within it a power to make an order which is just and equitable in the circumstance of the case.⁴ The expression “as it thinks fit” defines the jurisdiction of the Appellate Tribunal to deal with and determines matters relating to the case in the light of evidence and consistently with the justice of the case, in a just and equitable manner. The only limitation is that order should be in accordance with the provision of the Act.⁵

1. TRIBUNAL DOES NOT HAVE ANY INHERENT POWER

¶(4.) It is humbly submitted before the Hon’ble Supreme Court that The Tribunal is a

¹ §26, the Competition Act, 2002.

² *Dolgobinda Paricha v. Nimai Charan Misra*, A.I.R 1959 S.C. 914, ¶ 9.

³ *Dr. Jayanti Dharma Teja v. Secretary Government of India*, 1984 148 I.T.R. 316 (AP), ¶ 7.

⁴ *Rakhra Sports (P) Ltd v. Khairati Lal Rakhra*, I.L.R. 1993 Kar. 880.

⁵ D.P. MITTAL, *COMPETITION LAW AND PRACTICE: A COMPREHENSIVE SECTION WISE COMMENTARY ON LAW RELATING TO THE COMPETITION ACT 282* (Taxmann, 3rd ed., 2011) [hereinafter “D.P. MITTAL”].

creature of the statute and its jurisdiction is limited to the specific powers conferred by the statute. It has no inherent jurisdiction and its powers are not plenary and are limited to the express provisions contained in the statute.⁶ While courts are governed by detailed statutory procedural rules, tribunals generally regulate their own procedure applying the provisions of the Code of Civil Procedure only where it is required.⁷

¶(5.) It is respectfully submitted that the Section 53B(3) makes it quite clear that the tribunal has been given power under the statute to pass such other orders and give such directions to give effect to its orders by confirming, modifying, or setting aside the direction appealed against. Thus, the tribunal is required to function within the statutory parameters.

a. Direction to DG is not an ancillary or incidental function of COMPAT

¶(6.) It is humbly submitted before the Hon'ble Supreme Court that a Tribunal should be construed to be endowed with such ancillary and incidental powers as are necessary to discharge its function effectively to do justice between the parties, unless there is any indication in the statute to the contrary.⁸ The Tribunal should be considered as invested with such incidental and ancillary powers unless there is any indication in a statute to the contrary.

¶(7.) It is respectfully submitted that under Section 26(1), the Commission has the power to direct DG for investigation if the Commission is of the opinion that a prima facie is made out of the information.⁹ Further Section 26(3) states that the DG on receipt of information from "Commission" shall submit its report to the Commission.¹⁰ Thus it can be concluded that the power to direct DG for investigation in the matter is vested only with the Commission and COMPAT by directing DG has discharged its function contrary to statute.

b. COMPAT judgement suffers from Jurisdictional error

¶(8.) It is humbly submitted before the Hon'ble Supreme Court that it is a "well-known principle of law that the provisions of an Act of Parliament shall not be evaded by shift or contrivance"¹¹ i.e. what may not be done directly cannot be allowed to be done indirectly; that would be an evasion of the statute.¹² Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative viz. that the thing shall not be done

⁶ Union of India and Another v. Paras Laminates (P) Ltd., A.I.R. 1991 S.C. 696.

⁷ Standard Chartered Bank v. Dharminder Bhoji and Ors., 2013 (101) A.L.R. 465, ¶ 28.

⁸ CIT v. Anjum M H Ghaswala, A.I.R. 2001 S.C. 4318, ¶ 31.

⁹ §26, the Competition Act, 2002.

¹⁰ *Id.*

¹¹ Fox v. Bishop of Chester, (1824) 2 B.C. 635.

¹² Md. Alauddin Khan v. Karam Thamarjit Singh, (2010) 7 S.C.C. 530, ¶ 48.

otherwise.¹³

¶(9.) It is respectfully submitted that Section 26(4) of the Prevention of Money Laundering Act, 2002 is similar to Section 53B (4) of the Competition Act, 2002 and it has been held that it can only pass an order "confirming, modifying or setting aside" the order appealed against.¹⁴ Further it is submitted that to carry out effectually the object of a Statute, it must be construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined."¹⁵

¶(10.) It is contended before the Hon'ble Court that when we apply the Rule of "Expressio unius est exclusion alterius" in the instant case, it can be stated that under Section 26 the power to direct DG for further investigation is vested with Commission. Section 53B(3) of the Competition act,2002 is in pari-materia with Section 26(4) of the Prevention of Money Laundering Act, 2002 and thus the power vested with the COMPAT is to modify, confirm or set aside. However in the present case the COMPAT by ordering DG has gone beyond what was intended by the legislature. Thus it can be concluded that in the absence of any express provision empowering the Appellate Authority it does not have any inherent powers to order DG for investigation, in fact it does not have any inherent powers at all, unlike a Civil Court, under Section 151 CPC. Also it has been precedence that COMPAT referred case back to Commission ordering the Tribunal to direct DG to investigate.

II. THAT THIS WAS NOT A FIT CASE FOR GRANT OF INTERIM RELIEF BY COMPAT

¶(11.) It is submitted that the COMPAT erred while granting the interim relief to the respondent ("Z") in the present case since, there is absence of any prima-facie case (1). *In Arguendo*, mere existence of a prima-facie case in the present matter, cannot allow an interim relief as no irreparable injury has been caused to the defendant (2) and further, the balance of convenience is in favour of the appellant (3). If a party fails to make out any of the three ingredients, he would not be entitled to interim relief and the court will be justified in declining.¹⁶

¹³ GVK Industries Ltd. and v. Income Tax Officer & Anr., (2015) 11 S.C.C. 734.

¹⁴ Gautam Khaitan v. The Deputy Director, Directorate of Enforcement, Delhi, MANU/ML/0007/2017.

¹⁵ PETER S. LANGAN & PETER B. MAXWELL, MAXWELL ON INTERPRETATION OF STATUTES, 3501 (Sweet & Maxwell, 12th ed. 1969).

¹⁶ Hazrat Surat Shah Urdu Education Society v. Abdul Saheb, 1988 (14) A.L.R. 776, ¶ 4.

A. NO PRIMA FACIE CASE EXISTS

¶(12.) It is humbly submitted before the Hon'ble Supreme Court that it has been held in a series of judgements, that establishment of prima facie case for trial is a necessary element, in the plea for grant of interim relief.¹⁷ The finding on the existence of prima facie case is on facts, however, while arriving at such a finding, the court must consider that even the grounds for injunction exist and not mere qualification of case for trial.¹⁸ The appellant humbly submit that, it is well settled that in order to obtain an interim relief or an order of injunction, the party who seeks to obtain such order of injunction has to prove that it has made out a prima facie case to go for trial. Where the party seeking relief fails to prove prima facie case to go for trial,¹⁹ the question of considering irreparable injury and the balance of convenience would not be material at all.²⁰

¶(13.) It is submitted that in the present case, the respondent has not made any definitive finding on prima facie case to become eligible for any interim relief. Even the COMPAT considered a mere possibility of anti-competitive conduct and did not construct a firm opinion on the violation. It has been held that various factors is to be taken into account for determination of dominance as listed under S. 19(4) of the Act and thus market share, though a major factor, is not the sole yardstick in determination of dominance. Thus it can be concluded that market shares of an entity is 'only one of the factors that decides whether an enterprise is dominant or not, but that factor alone cannot be decisive proof of dominance' and thus COMPAT did not consider this while granting an interim relief to the respondent.

B. NO IRREPARABLE INJURY HAS BEEN CAUSED

¶(14.) It has been held by the Hon'ble Orissa High Court that "Irreparable injury" means such injury which cannot be adequately remedied by damages.²¹ The existence of irreparable loss is considered a necessary element for grant of an interim relief.²² This Hon'ble Court has held that even where prima facie case is in favour of the party seeking interim relief, the Court may still refuse the temporary relief if the injury was not irreparable.²³

¶(15.) It is submitted that irreparable loss to the informant/respondent ("Z") is not satisfied

¹⁷ Babul Products Private Ltd. v. Zen Products (2005) 3 G.L.R. 2309, ¶ 17.

¹⁸ M. Gurudas & Ors. v. Rasaranjan & Ors., (2006) 8 S.C.C. 367, ¶ 19 [hereinafter "Gurudas"].

¹⁹ Zenit Mataplast Pvt Ltd v. State of Maharashtra & Ors., (2009) 10 S.C.C. 388, ¶ 31.

²⁰ Kashi Math Samsthan v. Shrimad Sudhindra ThirthaSwamy & Anr. (2010) 1 S.C.C. 689, ¶ 16.

²¹ Orissa State Commercial Transport Corporation Ltd v. Sri Satyanarayan Singh and Anr., 40 (1974) C.L.T. 336, ¶ 11.

²² Fast Track Call Cab (P) Ltd. v. Competition Commission of India, 2016 Comp.L.R.381 (Comp.A.T.), ¶ 5.

²³ Best Sellers Retail India Pvt. Ltd. v. Aditya Nirla Nuvo Ltd., (2012) 6 S.C.C. 792, ¶ 29.

in the case at hand, since Z's contention are merely relied on speculation of forced exit from the market without any definite finding. The market report on which the respondent ("Z") has placed its primary reliance merely states the market share of V and M and nowhere does it mentions the harm or loss caused to Z, due to V's conduct. Even if a prima-facie case is made out irreparable injury and balance of convenience is necessary to exist before an interim relief can be granted.²⁴

I. DAMAGES ARE QUANTIFIABLE

¶(16.) It has been held by the competition appellate tribunal that where the damages are quantifiable, the damage is not considered to be irreparable even when it is difficult to calculate the compensation at a later stage.²⁵ In the instant case, the respondent ("Z") has not been able to prove any damage or loss occurred to it resulting from the appellant's actions. Further, assuming but not conceding to the fact that if appellant's ("V") actions caused any injury to the respondent, the same can be constructed in quantifiable terms when discovered.

¶(17.) Further, even the High Courts have opined and expressed that where the damages are quantifiable, the remedy of interim relief is not available.²⁶ In view of the contentions above, it is humbly submitted that the element of unquantifiable damages is not satisfied in the present case and thus, interim relief should not be granted.

C. ABSENCE OF SATISFACTORY REASON

¶(18.) This Court has also held that the power to issue interim orders should be exercised by the Commission sparingly and under compelling and exceptional circumstances.²⁷ Moreover, the record of satisfaction for such order should be of higher degree than formation of prima facie view under section 26.²⁸ It is brought to the notice of the Hon'ble Court that even the COMPAT considered a mere possibility of V's anti-competitive conduct, which Z further failed to make out. Further, it is a settled proposition in competition law jurisprudence that market share is not the only criteria to determine dominance position of an enterprise (which is elaborated later in this appeal).

²⁴ Anand Biscuit Co. v. Anand Food Products, 1989 (15) A.L.R. 532, ¶ 22.

²⁵ CCI v. ANI Technologies Pvt. Ltd., Appeal No. 4 of 2016 (Comp.A.T.), ¶ 5.

²⁶ M.S.M. Discovery Private Ltd. v. Viacom 18 Media & Ors., 2010 S.C.C. Online Del 2701, ¶ 32.

²⁷ Competition Commission of India v. Steel Authority of India Ltd. and Anr., (2010) 10 S.C.C. 744, ¶ 23 [hereinafter "Steel Authority"].

²⁸ *Id.*

D. BALANCE OF CONVENIENCE IS IN FAVOUR OF THE APPELLANT

¶(19.) It is humbly submitted before the Hon'ble Court that Balance of convenience means that comparative mischief²⁹ or inconvenience³⁰ which is likely to issue from withholding the injunction will be greater than that which is likely to arise from granting it.³¹ Further it has been held that while applying this principle, the Court has to weigh the amount of substantial mischief that is likely to be done to the applicant if the injunction is refused³² and compare it with that which is likely to be caused to the other side if the injunction is granted.³³

¶(20.) This Court has taken a categorical view that the court must weigh one need against another and ascertain where the 'balance of convenience' lies.³⁴ The court has also recognized that the requirement of protection flowing from interim relief has to be weighed against the parallel need of injured party.³⁵ In a series of judgements has been held that existence of prima facie case alone is insufficient for grant of an interim relief.³⁶ While considering the grant of interim relief, the court would consider and pass an order giving due regard to the existence of prima facie case, balance of convenience and existence of irreparable injury.³⁷

¶(21.) It is submitted that, in the present case the balance of convenience lies in the favour of appellant since, there is mere speculation of violation by the respondent and the same has not been supported with any definite finding. The appellant is a relatively new entrant in the market and has gained 7% market share in two years of its existence. This does not leads to any conclusion that appellant's ("V") alleged misconduct led to loss for the defendant ("Z"). Therefore, it is humbly submitted that the defendant ("Z") is not entitled to any interim relief.

**III. THERE CANNOT BE MORE THAN ONE DOMINANT ENTERPRISE
IN A SINGLE MARKET****A. STATUTE IN FORCE HAS NO PROVISION**

¶(22.) It is submitted that the present law in force i.e. the good law provides for assessment

²⁹ Ram Narain Agarwal & Anr v. D.D.A., A.I.R. 2000 Del. 206.

³⁰ Geetanjali Nursing Home (P) Ltd. v. Dr. Dileep Makhija, A.I.R. 2004 Del. 53.

³¹ Brajendra Nath Ghosh v. Smt Kashi Bai, A.I.R. 1946 Pat. 177.

³² Anwar Elahi v. Vinod Misra and Anr., 60 (1995) D.L.T.752.

³³ Narendra Singh Rajawat and Ors. etc. v. Thakur Mohan Singh Kanota and Ors. etc., A.I.R. 2002 Raj. 218.

³⁴ Wander Ltd. v. Antox Pvt. Ltd., 1990 Supp. S.C.C. 727, ¶ 9.

³⁵ Gujarat Bottling Co. Ltd. v. Coca Cola Co., A.I.R. 1995 S.C. 2372, ¶ 50.

³⁶ Seema Arshad Zaheer & Ors. v. Municipal Corporation of Greater Mumbai, (2006) 5 S.C.C. 282, ¶ 30.

³⁷ Gurudas, *supra* note 18.

of dominance by “an” enterprise and not by several enterprises either singly or jointly.³⁸ Further, it is a general principle of law that the law for the time being in force should be applied and it has an overriding effect on the law which may be enacted in future during the life of the Act.³⁹

I. PURPOSIVE INTERPRETATION MUST NOT BE MADE

¶(23.) It is a settled principle of law that the first rule of interpretation is the literary construction and the Court at the outset should see to what the provision says.⁴⁰ This hon’ble Court has held that other rules of interpretation should only be resorted to when plain words of statute are ambiguous or lead to no intelligible result.⁴¹ When the words of statute are unambiguous, recourse to other principles of interpretation, other than literal rule, should not be taken.⁴² Moreover, the language employed in a statute determines the legislative intent of the act.⁴³ Therefore, it is humbly submitted that there cannot be more than one dominant enterprise in a market.

B. V HAS NOT VIOLATED SECTION 4 OF THE COMPETITION ACT

¶(24.) It is submitted before the Hon’ble Court that V has not violated section 4 of the Competition Act, 2002, which deals with the abuse of dominant position by an enterprise. According to §. 4(1) of the Act no enterprise or group shall abuse its dominant position.⁴⁴

¶(25.) V has not abused the alleged dominant position under §. 4 of the Act since, the relevant market is “Market for general purpose credit cards in India” [1], V is not dominant in the relevant market [2] and V has not violated the alleged dominant position [3].

I. THE RELEVANT MARKET IS “MARKET FOR GENERAL PURPOSE CREDIT CARDS IN INDIA”

¶(26.) It is essential to ascertain⁴⁵ the ‘relevant market’⁴⁶ in order to establish abuse of dominant position.⁴⁷ The commission must consider⁴⁸ the relevant geographic market⁴⁹ and

³⁸ §4 (2), the Competition Act, 2002.

³⁹ Yakub Abdul Razak Memon v. State of Maharashtra, (2013) 13 S.C.C. 1, ¶ 1554.

⁴⁰ Hiralal Ratanlal v. S.T.O., A.I.R. 1973 S.C. 1034, ¶ 22.

⁴¹ Raghunath Rai Bajera & Anr. v. Punjab National Bank & Ors., (2007) 2 S.C.C. 230, ¶ 40.

⁴² Swedish Match A.B. v. S.E.B.I., A.I.R. 2004 S.C. 4219, ¶ 52.

⁴³ Prakash Nath Khanna v. C.I.T., (2004) 9 S.C.C. 686, ¶ 13.

⁴⁴ §4(1), the Competition Act, 2002.

⁴⁵ § 4 (2) Explanation 2, the Competition Act, 2002.

⁴⁶ Shri M. M. Mittal v. M/s Paliwal Developers Ltd., 2016 S.C.C. Online CCI 61, ¶ 4.

⁴⁷ Prints India v. Springer India Pvt. Ltd., (2012) 109 C.L.A. 411 (C.C.I.), ¶ 12 [hereinafter “Prints India”].

⁴⁸ Shri Sonam Sharma v. Apple Inc. USA, (2013) Comp. L.R. 346 (C.C.I.), ¶ 19 [hereinafter “Sonam Sharma”].

⁴⁹ Meru Travel Solutions Pvt. Ltd. v. Uber India Systems Pvt. Ltd. & Ors., (2016) Comp. L.R. 209, (C.C.I.), ¶ 18 [hereinafter “Meru Travel”]; United States v. Marine Bancorporation, (1974) 418 U.S. 602.

relevant product market for determining the relevant market⁵⁰.

¶(27.) In the present case, the relevant geographic market is India (a) and the relevant product market is the market for general purpose credit cards (b).

a. The relevant geographic market is India

¶(28.) The relevant geographic market comprises the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous⁵¹ and can be distinguished from the conditions prevailing in the neighbouring areas.⁵² §. 2 (s) read harmoniously with §. 19 (6) of the Act defines relevant geographic market. In the present case, the relevant geographic market must be India as the dominant position of the enterprise has to be viewed in relation to India.

¶(29.) The Hon'ble Court should pay due regard to the factors such as regulatory trade barriers,⁵³ local specification requirements,⁵⁴ & consumer preference,⁵⁵ inter alia, while identifying the relevant geographic market.

¶(30.) There regulatory barriers to enter and operate as a credit card service provider, and the conditions for operation are similar throughout India for all the service providers.

b. The relevant product market is the "Market for general purpose credit cards"

¶(31.) The underlying principles of market definition provides that all those products or services⁵⁶ which are regarded as interchangeable or substitutable from the consumer's perspective⁵⁷ would form the relevant product market⁵⁸ and the relevant market cannot be segmented variant wise⁵⁹ unless such variant have such distinct characteristics to be viewed as a separate market in terms of substitutability or interchangeability.⁶⁰

¶(32.) The commission has observed substitutability on the part of consumer as the decisive factor while determining relevant product market.⁶¹ It is also observed that identical nature of

⁵⁰ Steel Authority, *supra* note 27.

⁵¹ ARIEL EZRACHI, EU COMPETITION LAW: AN ANALYTICAL GUIDE TO THE LEADING CASES 54 (Oxford and Portland, 4th ed., 2014) [hereinafter "ARIEL EZRACHI"].

⁵² Shri Avtar Singh v. M/s Ansal Township & Land Development Ltd., 2014 Comp. L.R. 154 (C.C.I.), ¶ 8.

⁵³ §19(6) (a), the Competition Act, 2002.

⁵⁴ §19(6) (b), the Competition Act, 2002.

⁵⁵ §19(6) (g), the Competition Act, 2002.

⁵⁶ RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 38 (Oxford University Press, 7th ed., 2012).

⁵⁷ D.P. MITTAL, *supra* note 5.

⁵⁸ §19 (5), The Competition Act, 2002.

⁵⁹ Global Tax Free Traders v. William Grant & Sons Limited & Ors., (2015) Comp. L.R. 503 (Comp.A.T.), ¶ 21.

⁶⁰ Sonam Sharma, *supra* note 48.

⁶¹ Meru Travel, *supra* note 49.

goods is not necessary to establish substitutability of a product in the relevant market⁶² if they serve the same purpose differently.⁶³

¶(33.) The assessment of relevant market⁶⁴ is necessary for analysing dominance.⁶⁵ The relevant product market may be established by all or any factors listed under §. 19 (7). It has been held that other forms of payment such as cash, cheque and proprietary cards are not considered reasonable substitutes by most consumers.⁶⁶

2. V IS NOT DOMINANT IN THE RELEVANT MARKET

¶(34.) It is submitted that V is not in a dominant position in this market because: V does not operate independently of the competitive forces prevailing in the relevant market (a), and, V is not affecting its competitors, consumers or the relevant market to their disadvantage, in its favour (b).

¶(35.) The determination of dominance in relevant market is pre-requisite to enquire into.⁶⁷ The factors which CCB should consider⁶⁸ to determine the dominant position of an enterprise is enumerated under §. 19 (4) of the Act.⁶⁹

a. V does not operate independently of the competitive forces prevailing in the relevant market

¶(36.) It is submitted that in the present case V is not operating independently, that is, without the influence of market forces and its competitors. In order to determine that an enterprise does not operate independently of the competitive forces in relevant market,⁷⁰ the following factors enlisted under §. 19(4) of the Act should be considered which include market share of the enterprise [i], size and resource of enterprise [ii], size and resource of competitors [iii] & existence of monopoly [iv].

i. Market share of the enterprise

¶(37.) The position of economic strength can be understood to be one of substantial market

⁶² MAHER M. DABBAH, EC AND UK COMPETITION LAW: COMMENTARY, CASES AND MATERIALS, (Cambridge University Press, 1st ed., 2004).

⁶³ Arshiya Rail Infrastructure Ltd. v. Ministry of Railways, (2012) Comp. L.R. 937 (C.C.I.), ¶ 14.17 [hereinafter “Arshiya Rail”].

⁶⁴ §4(2), The Competition Act, 2002.

⁶⁵ Prints India, *supra* note 47.

⁶⁶ U.S. v. Visa Inc., 344 F.3d 229 (2nd Cir. 2003), pp. 239.

⁶⁷ §19(5), the Competition Act, 2002.

⁶⁸ Arshiya Rail, *supra* note 63.

⁶⁹ §19(4), the Competition Act, 2002.

⁷⁰ ARIEL EZRACHI, *supra* note 51.

power.⁷¹ Market share less than 50% would lead to a presumption that dominance is unlikely to be present, in the absence of exceptional circumstances.⁷² V is not in a dominant position in the relevant market as it possessed only 40% of the market share.

¶(38.) The Competition Commission of India (hereinafter CCI) has observed that “market share, though important, is not the only criteria on the basis of which dominance of an enterprise can be determined and factors such as substantial competitive advantage in terms of financial strength, technical capabilities brand value, historical legacy etc. which would affect its competitors in a manner wherein they would be unable to do or would find it extremely difficult to do so on a sustained basis are also to be considered.”⁷³ Additionally, The European Court of Justice has also opined that “holding 40-45 percentage of market share in relevant market does not conclude the fact that it controls the market per-se”.⁷⁴

¶(39.) Thus, V holding highest market share in the market for general purpose credit cards, certainly cannot be the only factor determining the dominant position of an enterprise.

ii. Size and resources of the enterprise

¶(40.) Despite having high market share, other competitors like M existed in the relevant market which could not have been possible without large scale operations with huge size and resources of each of the competitors. Even a new entrant like Z was able to acquire a market share of 7 percent in merely 2 years of its entrance.

iii. Size and importance of the enterprise

¶(41.) In accordance with §. 19 (4) (c) of the Act, it is contended in the present matter that V’s competitors are preferred by various consumers of general purpose credit cards. This means that V does not possess complete autonomy to turn market in its favour and exclude its competitors’ behaviour.

iv. V does not exercises monopoly over the product market

¶(42.) CCI has stated that independence in the context of dominance does not mean absence of any other player in a relevant market.⁷⁵ Under §. 19 (4) (g), dominant position of an enterprise can be ascertained if it enjoys monopoly. In the present case, such monopoly is

⁷¹ Treaty on functioning of European Union art. 102, Dec. 13 2007, 2008/C 115/01.

⁷² A.K.Z.O. Chemie B.V. v. Commission, (1991) E.C.R. I-3359 (E.C.J.), ¶ 60; See also EU Guidelines On Antitrust Procedures in Abuse of Dominance (2009), available at: http://ec.europa.eu/competition/antitrust/procedures_102_en.html. (last accessed on 19 July. 2017 at 07:00 P.M.).

⁷³ M.C.X. Stock Exchange Ltd. v. N.S.E. India Ltd., (2011) Comp. L.R. 129 (C.C.I.), ¶ 21.28.

⁷⁴ United Brands v. European Commission (1978) E.C.R. 207 (E.C.J.), ¶ 108-09 [hereinafter “United Brands”].

⁷⁵ Kapoor Glass Pvt. Ltd. v. Schott Glass India Pvt. Ltd., (2012) 111 C.L.A. 137 (C.C.I), ¶ 9.2.2.

absent as V does not enjoy any monopolistic advantage over its competitors.

b. V is not affecting its competitors, consumers or the relevant market to their disadvantage, in its favour

¶(43.) In order to determine that an enterprise is not affecting its competitors, consumers or the relevant market in its favour, the following factors enlisted under §. 19(4) of the Act should be considered which include dependence of consumers and barriers to entry [i] existence of multiple competitors [ii].

i. No dependence of consumers and barriers to entry

¶(44.) The strength of an enterprise to create barriers on potential entrants in the market proves its dominant position according to §. 19 (4) (f).⁷⁶ An enterprise should have the ability to engage in conduct that excludes competition or prevents the entry of newcomers into the relevant market and should be able to influence the relevant market in its favour.⁷⁷ However, in the present case the market is competitive with M, Z and other enterprises competing with V. §. 19 (4) (f) provides for dependence of consumers on an enterprise to ascertain whether it enjoys a dominant position. V does not enjoy such position since there are other competitive players existing in the market.

ii. Existence of multiple competitors

¶(45.) There are numerous prominent competitors in the market along with V. The consumers have various choices available as per their preference which reduces V's chances of holding a dominant position in the market.

3. V HAS NOT VIOLATED THE ALLEGED DOMINANT POSITION

¶(46.) The Competition law allows an enterprise to be in a dominant position⁷⁸ since dominance *per-se* is not illicit, but bars it from abusing the same.⁷⁹

¶(47.) Assuming, but not conceding, that V is in a dominant position in the relevant market, V has not abused its alleged dominant position because its conduct is reflective of general market practice (a), and V has objective justification for entering into exclusive business agreement with member banks.

⁷⁶ LENNART RITTER & W. DAVID BRAUN, EUROPEAN COMPETITION LAW: A PRACTITIONERS GUIDE (Kluwer Law International, 3rd ed., 2005).

⁷⁷ §19(4) (h), the Competition Act, 2002.

⁷⁸ §4, the Competition Act, 2002.

⁷⁹ M/s Jupiter Gaming Solutions Private Ltd. v. Secretary, Finance, Government of Goa, (2012) Comp. L.R. 56 (C.C.I.), ¶ 80.

a. General Market Practice

¶(48.) It is illustrated in the facts that M who was a competitor to V also entered into such contracts with different member banks, whereas the conduct of other competitors is silent in this regard. This conduct can also be reasoned with the illustration of considering two banks (State Bank of India and Industrial Credit Investment Corporation of India) in India. While ICICI issues⁸⁰ Visa, Mastercard and American Express, at the same time, SBI issues⁸¹ only Visa and Mastercard.

b. V's has objective justification for entering into contracts with different member banks.

¶(49.) It is submitted that V has not abused its alleged dominant position. As a general rule, no enterprise will be in abuse of dominant position if it can provide for an objective justification of its conduct.⁸² The exact definition of objective justification is unclear,⁸³ factors that can be considered as objective justifications includes legitimate business behaviour, and efficiency considerations.⁸⁴

¶(50.) Under the EU jurisdiction, the position relating to exclusionary conduct is settled and, if the enterprise can provide an objective justification or it can demonstrate that its conduct produces efficiencies which outweigh the negative effect on competition, then it would not be termed as abuse of dominant position.⁸⁵

i. Meeting the competition

¶(51.) The Courts have considered that an enterprise defending its own economic and

⁸⁰ List of ICICI credit cards, available at: <https://www.icicibank.com/card/credit-cards/credit-card.page> (last accessed on 19 July 2017 at 8:00 P.M.).

⁸¹ List of SBI credit cards, available at: <https://www.sbicard.com/en/personal/credit-cards>. (last accessed on 19 July 2017 at 8:00 P.M.).

⁸² Paul John Loewenthal, *The Defence of "Objective Justification" in the Application of Article 82 EC*, 28 WORLD COMPETITION LAW AND ECONOMICS REVIEW 455 (2005).

⁸³ Tjarda van der Vijver, *Objective Justification and Article 102 TFEU*, 35 WORLD COMPETITION LAW AND ECONOMICS REVIEW 55 (2012).

⁸⁴ Emanuela Arezzo, *Intellectual Property Rights at the Crossroad between Monopolization and Abuse of Dominant Position: American and European Approaches Compared*, 24 J. Marshall J. Comp. & Info. 455 (2005).

⁸⁵ Sirena S.R.L. v. Eda S.R.L. & Ors., [1971] E.C.R. 69, ¶ 17; Deutsche Grammophon Gesellschaft MBH v. Metro-SB-Großmärkte GmbH & Co. KG [1971] E.C.R. 487, ¶ 19; United Brands, supra note 72; Benzine en Petroleum Handelsmaatschappij BV & Ors. v. Commission [1978] E.C.R. 1513, ¶ 32-34; Ministère public v. Jean-Louis Tournier, [1989] E.C.R. 2521, ¶ 46; Centre belge d'études de marché - Télémarketing (CBEM) v. SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB), [1986] E.C.R. 3261, ¶ 27; P Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission (Magill), [1995] E.C.R. 743, ¶ 55; Hilti AG v. Commission, [1991] E.C.R. II-1439, ¶ 102-119; Tetra Pak International SA v. Commission (Tetra Pak II), Case T-83/91, ¶ 115; Portuguese Republic I v. Commission, [2001] E.C.R. 2613, ¶ 53.

commercial interest to respond to the conduct of other competitors is a legitimate claim.⁸⁶ It can be reasonably implied from the facts that while the market practice in the present case was to enter into agreements with different banks and then compete within the market. Therefore, V was not abusing its dominant position in the market but was only trying to sustain and remain in competition.

ii. No harm has been caused to the consumers

¶(52.) The Raghvan committee's report on competition law policy⁸⁷ and various case laws⁸⁸ emanates the objective of promoting consumer welfare. It should be considered that in the present case, even after a price hike, if the consumers prefer a certain brand over other available choices having same end-use, then a prudent inference can be drawn that serving consumer interest and welfare was not extinguished.

¶(53.) Thus, it is contended that in the present case V cannot be said to have abused its alleged dominant position as it entered into the contracts with different banks as a business policy decision and did not cause any harm to the consumers.

iii. V's conduct was necessary to ensure efficiency

¶(54.) A dominant enterprise can justify its conduct if it is able to show that the efficiencies generated by the conduct are likely to enhance the ability and incentive of the enterprise to act for the benefit of the consumers in a pro-competitive manner.⁸⁹ By engaging into market practice of entering into agreements with banks, V like other competitors was attempting to serve its consumers efficiently. By knowing its member banks and that no other enterprise in intervening with its transactions, V could have known the market and consumer patterns clearly for serving them better.

¶(55.) Therefore, it is submitted that V's conduct was not intended to drive out the competitive rivals but only to ensure efficiency for the benefit of consumers.

iv. Principle of proportionality

¶(56.) The assessment of exclusionary conduct should be made on principle of

⁸⁶ United Brands, *supra* note 72.

⁸⁷ S.V.S. Raghavan Committee Report on High Level Committee on Competition Policy & Law 23 (2007) available at: http://www.competitioncommission.gov.in/Act/Report_of_High_Level_Committee_on_Competition_Policy_Law_SVS_Raghavan_Committee29102007.pdf (last accessed on 20th July, 2017 at 03:30PM).

⁸⁸ Explosive Manufacturers Welfare Association v. Coal India Limited and its Officers, (2012) Comp. L.R. 525 (C.C.I.), ¶ 21.

⁸⁹ Irish Sugar plc v. Commission, [1999] E.C.R. II-2969, ¶ 189.

proportionality.⁹⁰ The exclusionary effect arising from a conduct which might be disadvantageous for competition, may be counterbalanced or even outweighed by advantages in terms of efficiency which also help the consumers.⁹¹

¶(57.) It is submitted that V's alleged dominant conduct can be completely justified on the basis of principle of proportionality since, there was no harm caused to the consumers and it would not be unreasonable to assume that efficiency would have increased. Therefore, V has not abused its alleged dominant position.

⁹⁰ Masterfoods Ltd. v. H.B. Ice Cream Ltd., [2000] ECR I-11369, ¶ 101.

⁹¹ British Airways v. Commission, 2007 E.C.R. I-2331 ¶ 86.

PRAYER FOR RELIEF

Wherefore, in the light of the facts stated, arguments advanced and authorities cited it is most humbly prayed and implored before the Hon'ble Supreme Court, that it may be graciously pleased to adjudge and declare that:

1. COMPAT was not justified in directing DG to investigate the matter.
2. The interim order passed by COMPAT in favour of Respondent is not sustainable.
3. There can not be more than one dominant undertaking/enterprise in the same market.

Any other order as the Hon'ble Court deems fit in the interests of equity, justice and good conscience.

All of which is humbly prayed

Place: New Delhi

Dated: 08.09.2017

(S/d)

Counsels for the Respondent