COMPETITION COMMISSION OF INDIA

Dated: May 23,2011

Case No. 17 of 2010

Shri Pravahan Mohanty — Informant
C/o Shri Samreshwar Mohanti, Bakhrabad
P.S. Purighat, Cuttack

Vs.

(i) HDFC Bank Ltd, Chennai — Opposite Parties
(ii) Card Services Division, Chennai

O R D E R

Per R. Prasad, Member (dissenting):

Order under Section 27 of the Competition Act.

Shri Pravahan Mohanty filed an information on 16.04.2010 against HDFC Bank Ltd. HDFC Bank Ltd. is a banking company subject to the regulations framed by the Reserve Bank of India under the Banking Regulation Act. It has a nation-wide network of 1725 branches and 3898 ATMs in 771 Indian towns and cities. The bank started the credit card business in the year 2001. According to the information the total number of credit cards issued by the HDFC Bank is 13 million and there are over 70,000 point-of-sale terminals in different merchant establishments. The informant is also a credit card holder of HDFC Bank issued to him on 24.11.2006. The informant has alleged that in order to expand the credit card business in competition with other banks, the respondent bank resorted to unethical, illegal and unfair trade practices and the informant is one of the victims of the bank. It has also alleged that the said bank is in a dominant position as it was the second largest private sector bank in India. It has also alleged that the respondent had abused its dominant position. In the credit card business, it is not necessary for a person to become an account-holder of the bank, though credit is given on the strength of the credit cards. For this purpose the banks charge an

entrance fee, an annual membership fee. It was also alleged that the credit given through the bank cards lead to increased inflation. The informant was working with M/s Ernst and Young at Gurgaon. He was approached by an agent of the informant with a request that he should subscribe to credit card of the HDFC bank. It was explained to him that the process was easy and simple and that it would improve the financial standing of the informant. At the time of this discussion no detail of the conditions likely to be imposed on the informant after the receipt of the credit card was furnished. After the credit card was received by the informant he was asked to sign an agreement form which contained a large number of onerous and complex clauses. The informant has alleged that the said contract was not a valid contract under the provisions of the Contract Act. The informant's main grouse is that the card agreement came with the card for which the informant had applied and that the onerous clauses were not explained to him. The informant's argument was that the most of the credit card holders are victims of such unfair and fraudulent trade practices adopted by the banks. Another issue which was raised that though the credit card operations of the bank are throughout the country, the Cardmember Agreement provides that only courts in Chennai shall have jurisdiction to deal with all disputes between the bank and the Cardmember. It was also alleged that the interest rates applicable to the card holder is not mentioned in the Cardmember agreement. It was stated that after allowing an interest-free period of one month i.e. from the due date of the last statement to the due date of the next statement, the respondent charged an unstated and unstipulated interest on the outstanding balance along with further debits under the head "interest". No detailed working of how the finance charges over and above the interest charged was calculated. It was argued that even after a card holder had rescinded the Agreement and the bank ceased to provide service, interest was being charged. It was argued that this is in violation of sections 39 and 54 read with sections 73 and 75 of the Contract Act 1972. It was argued that the charging of interest after the

termination of the contract and after the service agreement had expired amounts to an abuse of dominant position. The informant referred to Page 29 of the Cardmember Agreement where it is mentioned that interest and any other applicable charges shall continue to accrue on the Card Account until the outstanding balance of such Card Account was reduced to nil and this clause was operative even after the cancellation of the credit card by the bank. Regarding the rate of interest, it was argued that the bank unilaterally charged the rate of interest and even after single default the rate of interest was 30% per annum. It was stated that the charging of such interest rate was violative of the Usurious Loans Act, 1973 and the circulars of the Reserve Bank of India. It was stated the banks allure the customers by asking them to pay off 10% of the amount due and that on the balance of the 90% interest goes on increasing. It was stated that this is a hidden debt-trap and cash-cow of the bank. It was again stated that the interest on the outstanding amount was levied on daily basis and that there was no interest-free period in respect of cash advances. It was stated that in the Cardmember Agreement the term ”current daily percentage rate of interest” is mentioned but no definition have been provided. It was stated that the bank charged compound interest. It was further argued that the service tax was levied even when there was no transaction in the month on the card. It was stated that the service tax fee not paid is added to the due amount and interest is levied for the benefit of the bank and not for the benefit of the State. It was thus alleged that the respondent cheated the Government even in the service tax returns. Another issue raised was in respect of “Lien and Right of Set-Off” mentioned in the Cardmember Agreement. According to this rule any amount standing to the credit of any card holder with the bank could be adjusted against the outstanding amount on the card account. Even any shares in the depository account could be adjusted towards dues of the card account. The informant argued that in view of this item in the Cardmember Agreement the entire amount standing in the credit balance of the saving accounts of the informant was

adjusted by the bank against the outstanding dues against the card without giving any proper notice. Another issue raised was that the respondent could appoint third party representatives to collect amounts due to the respondent and that the respondent claimed that it was not responsible for any wrongful act of such representatives. Further the amounts paid by the respondent to the third parties were made recoverable from the card member. The informant further stated that these third parties have threatened him and his family on various occasions on phone. It was stated that the use of the third party was unfair and illegal and that the respondent cannot claim immunity from its actions. It has also been stated that respondent did not disclose its address of the registered office or that of the card division and that there was no provision of grievance redressal mechanism. Thus, no intimation of any change of address could be sent to the respondent. The informant then argued against another stipulation in the Cardmember Agreement according to which any amount outstanding against the informant could be sold to a third party and any cost incurred in this respect could be recovered from the cardholder. There is also a stipulation in the agreement that even a disputed amount on the card has to be paid by the cardholder. The informant has also objected to another item in the Cardmember Agreement on the basis of which the card members' personal information could be given to a third party. It was argued that this violated the personal privacy of the informant. The informant then referred to page 44 of the Cardmember Agreement wherein under the head "Changes to Cardmember Agreement" the respondent bank reserved the right to unilaterally vary any of the terms and conditions of the Agreement from time to time without prior notice to the Cardmember. The interest rate could be changed without the knowledge or consent of the Cardmember. It was argued that this strikes at the root of the doctrine of mutuality in law of contract and therefore it was unfair and illegal. It was further stated that informant was willing to pay all the legal dues but was unwilling to pay any amount due to illegal foisting of illegal

dues on the informant. The informant has sought the following relief from the Commission:-

(i) Direct the respondent to cease and desist from carrying on credit card business on the basis of the aforesaid Cardmember Agreement and to discontinue such abuse of their dominant position.

(ii) Direct the respondent not to enforce the aforesaid Cardmember Agreement and not to realize any "dues" thereunder as against the informant beyond what is payable in respect of purchases from commercial establishments, having regard to S.65 of the Contract Act, 1872 and to refund any excess amount collected from the informant.

(iii) Impose such penalty on the respondent as may be deemed fit and proper.

(iv) Pass such other order or issue such direction as the Commission may deem fit.

Interim Reliefs under S.33 of the Competition Act, 2002

(A) Direct the respondent not to take away and appropriate, without specific instruction from the informant, any sum deposited by or for the informant in any account (saving, current or fixed) held by the informant in any branch of the respondent.

(B) Direct the respondent not to take any coercive steps for realization of the alleged dues under the aforesaid Cardmember Agreement.

(C) Direct the respondent to retransfer/redeposit the sum of Rs.64,002/- to the Informant's Saving Account No. 00901140185423.

2. The Commission took cognisance of the information submitted in May-June 2010 and came to the conclusion that there existed a prima facie case under the Competition Act. The Commission therefore referred the case for investigation by the Director General.

3. On receipt of the directions of the Commission, the Additional Director General issued a showcause notice to HDFC Bank. The bank replied that the informer had given the information to the Commission to harass the bank. It was argued that the informant had acted in this manner mainly to get his outstanding amount pending with the bank to be written off/settled. According to the bank, the credit card was taken by the informant on 24.11.2006. The bank had recovered a sum of Rs. 1,55,636/- and a further amount of Rs. 44,043/- was still recoverable from the informant. It has been argued on behalf of the bank that as the amount outstanding against the informer (I.P.) was not paid inspite of various reminders, the bank had no option but to make the recovery out of the account of the I.P. maintained with the bank. No explanation has been given as to why no notice was given by the bank before exercising the Bankers' General Lien. It was further stated that the I.P. was an industry analyst with E&Y and was aware of the Cardmember Agreement before taking the credit card. It has also been stated that cards of various banks are available in the market and the IP had to make a choice of cards and that the IP made a choice and selected the card of the bank. It was stressed that the functioning of the bank was transparent and the 'Most Important Terms and Conditions' (MITC) were explained at the time of sourcing the card, at the time of the issue of the cards and every month on the reverse of the account statement and on the website. It was stated that all the guidelines laid down by the RBI had been followed and that no illegality or impropriety had been indulged in by the bank.

4. It was further argued that the story of the Abuse of Dominant Position has been concocted by the I.P. and that the bank did not enjoy a

dominant position. It was further argued that the issue of MITC had come up before the MRTP in case no. UTPE 34 of 2005 – DGIR vs. HDFC Bank and that the bank had taken a large number of consumer friendly steps and for this reason the MRTP Commission had dismissed the petition. It was also stated that no unfair or discriminatory condition in the purchase or sale of goods or services has been imposed by the bank on the issue of cards and therefore there was no violation of section 4(1) of the Competition Act. Further, the agreement entered into by the customers is not anticompetitive nature and does not violate any provision of the Contract Act. The bank stated that it is a small player in the credit card market having a share of only 17%.

5. The Additional D.G. made further queries regarding the cost of doing business. The bank replied that the cost of doing business consisted of the following factors:-

- Cost of Customer acquisition including sales, credit decisioning and underwriting costs.
- Cost of Credit Losses including bad debts, loss provisioning and cost of settlement waivers.
- Cost of Operations including transaction processing, franchisee fees, card embossing/dispatch, statement/payment handling, account maintenance, infrastructure and systems support, marketing/loyalty programs, etc.
- Cost of Funds
- Cost of Servicing including set up and maintaining 24x7 customer care centres PAN India.

On the basis of these costs, approved by the Board of Directors the interest charged on the MasterCard gold card issued by the bank in different years were

May 2007	Approx 2.95% per month
June 2010	Approx 3.25% per month

The bank also charged consumers other different charges as under:-

Charges associated with usage of the credit card facility: viz: Finance Charges on Revolving Balances, Finance charges are levied at monthly APR rates (as applicable) on all transactions from the date of transaction in the event of card members not paying his balance in full.

Charges in case customer displays deviant behaviour: These charges are nominal and are designed to act as a deterrent for deviant behaviour and to ensure that the card account is maintained in regular status to avoid any inconvenience to the customer.

Following are some of the deviant behaviours on which the Bank levy's charges:

- Late payment charges: If customer pays less than 5% of Total bill amount due by the payment due date.
- Payment Return Charges: If customers payment instrument has been returned / dishonoured.
- Overlimit Charges: If customer has exceeded his sanctioned credit limit.

Regarding 'free credit period', it was explained as follows:-

- Credit Card is a convenience product.
- The Interest free period enables the Cardmember to use the card as per his/her convenience and repay the amount as per the payment due date applicable to the Cardmember.
- It is not intended to be a tool for longer term financing period. Most customers use this credit facility for a limited period of 1-2 months only.
- The Interest free period could range from 20-50 days, depending upon when the transaction has been incurred in the statement cycle and if the previous month's balance has been paid fully by the Cardmember.

Regarding different charges paid on credit card, it was explained as follows:-

- Interest Rates are levied as per range of Credit Cards offered by the Bank.
- Product level charges are standard for all Credit Card holders without any discrimination.

In respect of credit limit given to a consumer, it was stated as follows:-

Credit Limits are arrived at basis Banks assessment of credit worthiness of the customer.

Credit Worthiness assessment takes into account the following factors:

- Income documents and self declaration of income submitted by customer
- Other relevant financial relationships with the bank (viz; liability / asset relationships).
- Customers credit worthiness with other Banks as reported in CIBIL.

The bank did not maintain segment wise accounts for the card business and the income was accounted for under the head 'other banking operations'.

6. The additional DG enquired from the I.P. regarding the outstanding amounts of the other holders of credit cards taken by him as well as details of any other supporting evidence to support his case. Regarding the outstanding amounts on the other credit card holders the I.P did not submit the details. Regarding the other items asked for I.P. has stated that the very use of unethical, illegal and unfair trade practices gave the bank competitive edge over other banking companies carrying on its credit card business. It was further stated that by mentioning in the Cardholder Agreement that the use of the card would amount to the acceptance of the terms of the agreements and would also lead to the loss of the freedom of choice of I.P. It has also been stated that many

items were hidden in the agreement such as numerous onerous clauses. It was therefore argued that the bank not only eliminated the choice of the I.P. but also tricked him into accepting severely onerous terms. Then the I.P. relied on the explanation of section 4 which states that the position of strength enjoyed by an enterprise in the relevant market in India enables to affect its competitors or consumers or the relevant market in its favour. It was therefore argued by the I.P. that the abuse of dominant was established in the case by the bank.

7. The Additional D.G. obtained the details of the outstanding amounts on the other cards which have been taken by the I.P. But the details are not been discussed here because they are not relevant to the points at issue. Another letter was issued by the Additional D.G. to the RBI and on the basis of the letter of the RBI as on 30th June 2010, the HDFC bank is the second largest issuer of credit cards i.e.45,16,377. The largest issuer bank is ICICI Bank having 64,08,707 clients. The RBI also informed the Additional D.G. that banks whose net profit is over Rs.100crores and above were eligible to undertake credit card business without any further approval from the RBI. Regarding the regulation of the credit card business the RBI had come out with the Master Circular on 30.06.2010. A copy of the Circular was enclosed. A perusal of the Master Circular gives the following facts:-

"Credit card dues are in the nature of non-priority sector personal loans and as such, up to June 30, 2010 banks were free to determine the rate of interest on credit card dues without reference to their BPLR and regardless of the size in terms of the Master Circular on Interest rates on advances. However, banks have been advised vide our circular no. DBOD No.Dir BC.88/13.03.00/2009-10 dated April 09, 2010 that Base Rate system will replace the BPLR system with effect from July 01, 2010. All categories of loans should henceforth be priced only with reference to the Base Rate except:

(a) DRI advances

(b) Loans to bank's own employees

(c) Loans to bank's depositors against their own deposits.

In the same Circular under the same head the RBI has mentioned that the bank should prescribe a ceiling rate of interest including processing and other charges in respect of small value personal loans and loans similar in nature. This included credit card also. It has also been mentioned in the said circular that banks can charge interest rate which vary based on payment / default history of the cardholder but that there should be transparency in levying of such differential interest rates. The RBI circular mentions that the higher rate of interest being charged to the card holder on account of payment / default history should be made known to the cardholder and the method by which the interest rate is calculated should be intimated to the cardholder. It has also been stated in the Circular that the changes in the charges should be made only with prospective effect giving at least one month's notice. If a credit card holder wanted to surrender his card then the bank should accept the surrender subject to settlement of the dues by the cardholder. The RBI desired that there should be transparency without any hidden charges while issuing the credit card. The RBI also desired by the Circular that the confidentiality of the customers' record and fair practices should be followed by all the banks. The RBI also stated as before reporting default history of cardholder given to Credit Information Bureau of India Ltd. (CIBIL) or any other credit information Company, a notice should be given to the cardholder. As far as debt collections are concerned, the RBI observed that the Fair Practice Code should be followed and agents of the banks should refrain from any action that would damage the cardholder. The RBI opined that there should be a grievance redressal procedure for the case of cardholders and that the redressal of grievances should be completed within 30 days of filing of the complaint and that the cardholder could also approach the Banking Ombudsman. The Bank i.e. HDFC submitted details of the Cardholder Agreement, Fair Practices code

of Credit Card Operations. The Additional DG has also obtained the Cardholder Agreement of State Bank of India and ICICI Bank. He also obtained a copy of the decision of the National Consumer Disputes Redressel Commission in Complaint Case No. 51 of 2007 as well as revision Petition No. 1913 of 2004. The Additional D.G. then submitted a Report.

8. While analysing the relevant market the Additional D.G. held that the relevant market has to be defined with reference to relevant product market as well as relevant geographical market. As far as relevant product market is concerned in his view the relevant product market was the market for credit card services. As far as relevant geographic market is concerned the relevant geographic market in his view was whole of India.

9. The Additional D.G. then examined the interest rates on the outstanding amount on the credit cards. His findings are as under:-

	Country	**Interest rate on outstanding amount**
(i)	India	36%
(ii)	USA	13%
(iii)	UK	9% - 17%
(iv)	Australia	18% - 24%
(v)	Philippines	36% - 42%
(vi)	Indonesia	36% - 42%
(vii)	Mexico	36% - 42%

One of the reasons given by the Additional D.G. for the high interest rates in India was that one out of every ten cardholder in India defaulted in clearing their outstanding on credit cards whereas in the U.S. one in twenty five Cardholders defaulted. It was also argued by the Bank that huge amount of outstanding dues on cards were written off as bad debts. The details of such debts were not furnished by the bank. The claim of

the bank is not established as no segment wise accounting has been maintained. Further there is no material to hold that the default on credit cards is one out of ten in India and that is the reason for a high interest rate on card outstandings. The bank regulator, the Reserve Bank of India has not issued any guidelines regarding the charging of Interest and it has left it to the banks. In country like USA the credit card business has not regulated by the Central banks but by consumer / fair trade regulators.

10. The Additional DG then examined as to whether the bank was in a dominant position. He relied on the data of the RBI wherein it has been stated that the market share in the card business by the bank was only 17%. The Additional DG examined the capital, reserve and surpluses and deposits of HDFC Bank, ICICI Bank and State Bank of India and he found that HDFC did not enjoy a dominant position in the relevant market. The data relied upon by the Additional DG was in respect of all the banking operations and not credit card operations and therefore a finding on this basis that the bank was not in a dominant position is erroneous. The Additional DG further held that growth in the credit card issued by the banks was due to normal competition and not due to any anti-competitive measures taken by the bank. He also stated in Para 8.7 of the Report that the bank did not possess any particular market power which enabled the bank to act independently of the competitive pressure in the market. In his opinion the bank had no power or ability to charge a monopolist price and that in the credit card market the consumers were free to choose the card issuers and were equally free to dump the bank in case they were not satisfied with the services. The Additional DG has further stated that once the consumer had accepted terms and conditions as per the Cardholder Agreement they were bound by the opaque, onerous and unfair conditions imposed by the card issuer. He has also found that all the banks were having similar terms and conditions and therefore there was least dependence of the consumer on the bank. In his opinion there

could be case of unfair practice against the credit card issuers. In his view the credit card in India is not mature and that the market has been operated by banks. The additional DG agreed with the findings of NCDRC that the credit card issuers have indulged in unfair trade practices and that there was a need for intervention by the banking regulator i.e. the Reserve Bank of India. The Additional DG held that no evidence of abuse of dominance was produced by the IP and that no such findings could be made on the basis of investigation carried out by him. In his view as the bank was not dominant in relevant market in India no case for abuse of dominant position in terms of section 4(2) of the Act could be made out.

11. After the report of the D.G. was received, the Commission decided to send the report to the I.P. and the bank and obtain their comments before taking up the case. In January 2011 the bank replied that on the issue it had already given its submission to the D.G. It was stated the said reply should be treated as part and parcel of the submission made before the Commission. In addition to the earlier arguments some other arguments were advanced before the Commission. It has been stated that the issue of credit cards to consumers could not be treated as the imposition of unfair and discriminate conditions on the consumers. There was therefore no violation of section 4 of the Act. It was also stated that the agreements between the bank and the consumers were not anticompetitive and therefore the provisions of section 3 were not attracted. The bank stated that the findings of the D.G. that the bank was not in a dominant position considered with reference to the factors mentioned in section 19(4) are correct. Further it was stated that the findings of the D.G. that the bank could not be treated as a dominant player is correct. But the bank has not accepted the findings of the D.G. that the issuers of the credit cards were indulging in 'unfair trade practice'. The bank wants the case should be closed forthwith. It was argued that the issue of credit cards are in accordance with the Circulars of the RBI and further Cardmember agreement is also in line with the

circulars of the RBI. It was also argued that transparency as envisaged in the RBI Circulars has been followed by the bank and the findings of the D.G. support this view. It was further argued that MITC was read and signed by the customers and that the customers were aware of the terms and were bound by the terms of the agreement. The bank denied that it had indulged in any fraud or cheating the customers. It was also stated that the conditions in the MITC came for adjudication before the MRTP Commission in the case UTPE No. 34 of 2005 and that after the bank introduced some customer friendly measures in the MITC, the case was dismissed by the Commission. It was also stated that the issue of unfair trade practice was only a passing reference made by the bank and therefore the same should be ignored.

12. As far as the I.P. is concerned, written submissions were given which are reproduced as under:-

"The IP has alleged contravention of S.4(1) of the Competition Act, 2002 (hereinafter referred to as "the Act") and the Commission is inquiring into the alleged contravention under S.19(1)(a) of the Act. Pursuant to a direction of the Commission under S.19(1) of the Act, the DG has investigated (as distinct from "inquired") into the matter, so as to assist the Commission as per S.16(1) read with S.41(1), and the DG has filed a Report purporting to give his findings under S.19(3) of the Act. The DG has recorded no findings of fact in respect of allegations made by the IP. The DG has, however, recorded an opinion (as distinct from findings) in Para 10 that the enterprise does not have a dominant position and therefore there is no contravention of S.4(1), even though there could be unfair trade practice (vide Paras 9 and 9.1). The DG has analyzed the reasons for such opinion in Paras 8.5 to 8.9 of the Report of the Report. Accordingly the Commission has called for objection / suggestion under s.26 (5).

Essentially, whether the enterprise has a dominant position is to be an inference of law by applying the provisions of Explanation (a) (ii) to S.4(2) considering the relevant factors enumerated in S.19(4) and found to exist in this given case. Likewise, whether the enterprise has abused its dominant position is to be an inference of law by applying the provisions of S.4(2)(a) of the Act to relevant facts found in this given case. The DG, as investigating agency, is to collect evidence and give his findings as to relevant facts, the relevancy being determined having regard to the aforesaid provisions. That is the nature of assistance contemplated by the Act.

Let us have a clear idea of the concepts "dominant position" and "abuse of dominant position" as applicable to this case.

Explanation (a) to S.4(2) of the Act runs thus:

"For the purpose of this section, the expression:-

(a) 'dominant position' means a position of strength, enjoyed by an enterprise, i the relevant market, in India, which enables it to:-

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

(ii) affect its competitors or consumers or the relevant market in its favour"

The use of the word "or" in the above provision implies that the provision contemplates 4 distinct types of dominant position:

Type A – The position of strength enables the enterprise to completely insulate itself competitive forces in the relevant market;

Type B – The position of strength enables the enterprise to affect the relevant market in its favour;

Type C – The position of strength enables the enterprise to accept its competitors in its favour;

Type D – The position of strength enables the enterprise to affect consumers in its favour.

In this case we are concerned with dominant position of Type D as distinct from types A, B and C. Great importance attaches to Type D because it effectuates the purpose of the Act set forth in the Preamble, viz. "to protect the interest of the consumers." For this reason also the definitions of the words "consumer" (S.2(f)), "goods" (S.2(i)) and "service" (S.2(u)) are wider even than those in the Consumer Protection Act, 1986. The leading case in which the Supreme Court ahs spelled out the position of strength enjoyed by large corporate and government bodies qua consumers or ordinary citizens in the context of standard from agreements or so-called contracts of adhesion (as in the present case) in Brojonath Ganguly's case, AIR 1986 SC 1571, followed in AIR 1991 SC 101 and AIR 1995 SC 1811 (paras 31 – 48).

Clauses (a), (b), (c), (d) and (e) or S.4(2) of the Act define abuse of dominant position enumeratively. Use of the work "or" separating these clauses imply that each clause can be treated as a stand-alone and sufficient definition. For inquiring whether there has been an abuse, one or more of these clauses could be invoked. Clause (a) is most relevant to Type D of dominant position with which we are concerned. Clause (a) of section 4(2) reads:

> *"there shall be an abuse of dominant position under subsection (1), if an enterprise or a group, -*
>
> *(a) directly or indirectly, imposes unfair or discriminatory –*
>
> *(i) condition in purchase or sale of goods or services; or*
>
> *(ii) price in purchase or sale (including predatory price) of goods or service*
>
> *Explanation . -..... (not relevant).*

In this case IP has alleged unfair, indeed unconscionable and illegal, conditions imposed in the Cardmember Agreement as well as unfair, indeed hugely excessive and legally untenable, price - which includes

"interest", "finance charge", "service charge", "illegally collected "service tax" and interest thereon, non-refundable entrance fee and annual membership fee, cumulative interest on interest in the event of a single default – unilaterally imposed on the Cardmember.

The IP has also alleged abuse of dominant position having regard to Clause (c) of Section 4(2) which says:

> *"There shall be abuse of dominant position under subsection (1), if an enterprise or a group, - (c) indulges in practice or practices resulting in denial of market access in any manner"*

The IP alleges that the enterprise foists on him all the unfair conditions and prices by providing that the Cardmember shall be deemed to have accepted the Cardmember Agreement containing the conditions by merely using the card, while the said Agreement is hidden somewhere in small print in the Users' Guide without being indexed, couched in legal jargon, and sent for the first time with the card ready for use. This denies the Cardmember his right to access the open market of credit cards by exercising any intelligent and informed freedom of choice. It is immaterial that the IP or other Card members have become victims of similar practices by two or three other card-issuers. Two or three cases of victimization of the IP cannot be called his freedom of choice. It is not as if he has discarded one in favour of another at the time of entry into the market or subsequently. Having been tricked into a debt trap he has been unable to he has been discard one and choose another – surrender costs money, indeed payment of false and illegal "dues".

Further, the IP has alleged abuse of dominant position having regard to Clause (e) of Section 4(2) which says:

> *There shall be an abuse of dominant position under subsection (1), if an enterprise or a group,- (e) uses its dominant position in one relevant market to enter into or protect other relevant market.*

The enterprise in this case has two distinct "relevant markets" as defined in Clauses (r), (s) and (t) of S.2 of the Act: (1) the relevant market of banking services all over India, and (2) the relevant market of credit card services all over India. The banking services are defind and controlled by the provisions of SS.5(b) and (c) and 6 of the Banking Regulation Act, 1949 and are essentially services arising from acceptance of deposits of money from the public. Credit card services are a form of pure money-lending business which can be carried on by any person including non-banking financial institutions Indeed, one need not be a customer of a bank in order to avail and use a credit card. But the relevant market of banking services is distinct from the relevant market of credit card services because a banking service cannot be regarded interchangeable or substitutable with a credit card service by the consumer. In this connection S.19(7) of the Act may also be referred to (to the extent the clauses thereof are applicable). In that view of the matter S.4(2)(e) forbids the present enterprise to use its dominant position in the relevant market of banking services – huge capital with country-wide network – to enter into the relevant market of credit card services by adopting unscrupulous techniques and to protect its credit card relevant market by exercising lien on bank deposits without notice, invoking hidden contractual terms (vide p.31 of the Cardmember Agreement) or banker's general lien. Banker's general lien is available in the relevant market of banking services, but it has been claimed in the present case in the relevant market of credit card services, vide p.38 of the Report. It is also noteworthy that in the present case the immunity available to banking companies under S.21A of the Banking Regulation Act, 1949 from application of the Usurious loans Act, 1918 in respect of the relevant market of banking services (because of the Reserve Bank's control of interest rates) has been illegally extended to the relevant market of credit card services (where there is no control of the Reserve Bank). Extension of these privileges of a bank to the relevant market of credit card services amount to abuse of the bank's dominant position.

Section 19(4) Provides:

"The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely

(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

(d) economic power of the enterprise including commercial advantages over competitors;

(e) vertical integration of the enterprises or sale or service network of such enterprises;

(f) dependence of consumers on the enterprise;

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

(i) countervailing buying power;

(j) market structure and size of the market;

(k) social obligations and social costs;

(l) relative advantage, by way of contribution to the economic development, by the enterprise enjoying dominant position having or likely to have appreciable adverse effect on competition;

(m) any other factor which the Commission may consider relevant for the inquiry."

Lacunae and errors in DG's Report

Whereas Reg. 20(4) CCI (General) Regulations, 2009 mandatorily requires that the Report of the DG "shall contain his findings on each of the allegations made in the information or reference, as the case may be, together with evidences or documents or statements or analysis collected during investigation," the present Report does not give findings on all the allegations made by the IP. The findings of the IP are contained in paras 9 and 9.1 of the Report. These paras merely state (wrongly) that the analyses of the allegations of the IP reveal that they pertain primarily to 'unfair trade practice'. The DG has completely ignored all the pertinent allegations of the IP pointing to dominant position of the enterprise in the light of the aforesaid position of law. The DG has not given his own findings on the unfair practices alleged by the IP and revealed by the Cardmembers Agreement produced by him. If he had given his findings on the unfair practices, abuse of dominant position would have been established. The DG has wrongly held that the IP has produced no evidence. The clauses in the Cardmember Agreement produced by the IP are themselves unfair conditions and unfair prices within the meaning of S.4(2)a) of the Act. The DG being a mere investigating agency should not have been concerned with burden of proof and should not have drawn adverse inference from the IP not producing further evidence that Cardmember Agreement and other documents besides his allegations on oath. The DG erred in ignoring the provision of Explanation (a)(ii) to S.4(2) of the Act as regards dominant position of the Type D qua consumers, and the provision of S.4(2)(a) as regards abuse in the form of unfair conditions and unfair price, and also violations in terms of S.4(2)(c) and (e) as stated above, and wrongly held that no evidence of abuse of dominant position could be found during the course of investigation. The DG should also have recorded his findings on whether the enterprise is indulging in practices mentioned in paras 2.3.2 and 2.3.3 above (as

alleged in the information) and thereby abusing its dominant position in terms of S.4.2(c) and (e) of the Act.

This being primarily a case involving dominant position qua consumers (Type D) as distinct from dominant position qua competitors Types (A and C) and dominant position qua relevant market (Type B), the DG failed to select the right factors enumerated in S.19(4) of the Act. The statement in para 9 of the Report that 'there is enough competition in the market of credit card services is relevant to the dominant position qua competitors (Types A and C) and not dominant position qua consumers (Type D). The crucial question is not the existence of competitors but whether the practices indulged in by the enterprise prevents the consumers from making free and intelligent choice of the available enterprises and undue advantage accrues to this enterprise because of these practices (as mentioned in paras 2.3.2 and 2.3.3 above). The DG has recorded no findings on these questions. The DG ought to have noted that competition in the market of credit card services is really competition in commission of unfair practices and illegalities in the absence of regulation by the Reserve Bank, no accountability and no-holds-barred operati8ons in the market.

Some of questions of crucial importance, raised by allegations of the IP, on which the Report of the DG contains no finding are as follows:-

(i) In the context of S.4(2)(a), whether the price of credit card service, including "interest", "interest after one month free period", "finance charges", "service charge", "illegally collected 'service tax' and interest thereon", "non-refundable entrance fee", "non-refundable annual membership fee" and "interest on capital increments after every month's default while keeping the card alive for accrual of interest by allowing payment of a small percentage of the defaulted amount", etc., is excessive and unfair. The finding should take into account the annual percentage of bad debts being written off and whether the defaults give rise to a lucrative business income.

(ii) Whether the enterprise treats the interest as accruing in the same rate and same manner under the Agreement, even after the card is blocked, i.e. even after the enterprise has rescinded the contract.

(iii) Whether there is adequate prior notice/declaration to the consumer of his financial commitment in using the card and the fact that it is subject to unilateral change by the enterprise.

(iv) What is the extent and percentage of profit earned by the enterprise in its credit card business.

(v) In the context of S.4(2) of the Act, whether the market of banking services is a 'relevant market' distinct from the relevant market of credit card services and what is the percentage of credit card holders who are also customers of the Bank.

(vi) Whether in the context of S.4(2)a)(i) and S.4(2)(c) it is a fact that the Cardmember Agreement is not supplied to the consumer before or at the time of his application or grant of his application for study and acceptance and it is supplied only along with the issued card with a stipulation therein that it shall be "deemed" to have been unconditionally accepted by merely "keeping" and "using" the card.

(vii) Whether the Cardmember Agreement, being a standard-form agreement or a contract of adhesion, running to 29 pages in small print, hidden inside "Card Usage Guide" without being indexed, and without the onerous clauses being highlighted, is hit by the law relating to standard-form agreements and amounts to unfair practice of foisting an onerous contract on first contact excluding exercise of intelligent choice by the consumer.

(viii) Whether in the context of S.4(2)(a)(i) of the Act, the clauses in the Cardmembers Agreement relating to exclusive jurisdiction of court at Chennai, lien and right of set-off as against unilaterally determined computer-generated dues, the right to "unilaterally" and "without prior notice" vary any of the terms and conditions

of the Agreement, the right to unilaterally sell, transfer or assign outstanding dues to any third party of the Bank's choice, the right to unilaterally appoint third parties to collect dues and claim immunity for wrongful acts of such third parties, all amount to unfair conditions.

(ix) Whether in the context of "social cost" mentioned in S.19(4)(k) of the Act, and unregulated credit expansion in the economy due to credit card issues in the relevant market of credit card services, the Reserve Bank of India exercises any control over issue of credit cards, and what is the total volume of credit created (i.e. total nominal credit limit of the cards issued and total credit so far availed of) and the share of the present enterprise in such credit.

(x) For aforesaid reasons no meaningful decision can be arrived at on the basis of the Report of the DG.

(xi) It is therefore necessary in the interest of justice that further investigation / inquiry may be made in terms of S.26(7) of the Act."

13. A perusal of the arguments raised by the I.P. are mainly against the findings of the D.G. The first argument is that the factors enumerated in section 19(4) have not been examined by the D.G. while submitting the report. Further, Regulation 20(4) requires that the D.G. should examine all the allegations made by the I.P. Even the findings of the DG that the case may be one of unfair trade practices have not been supported by the facts. Even the explanation defining dominant position in section 4 with reference to the consumers have not been looked into by the D.G. The D.G. has also not discussed the information asymmetry in the case of consumers when they were making the choices. Some other legal issues have been raised by the I.P. and for the reason it has been argued that the case should be sent for further investigation under section 26(7) of the Act.

14. The D.G. in his report has also enclosed a copy of the order of National Consumer Disputes Redressal Commission in case no. 51 of 2007. In this case a complaint was lodged against the RBI, HSBC, American Express, Citi Bank and Standard Chartered Bank. The issue raised before the commission were:

(i) Whether the RBI is required to issue any circular or guidelines prohibiting the Banks / Financial Institutions /money lenders for charging interest above a specific rate.

(ii) (a) Whether banks can charge credit card users interest at rates charging from 36% - 49% per annum if there is any delay or default in payment within the time specified.

(b) Whether interest at the above-stated rates amounts to charging usurious rates of interest.

In this case the RBI in its argument before the Commission agreed that large number of complaints were being received by the RBI against the charging of very high rates of interest. It was argued that RBI had already issued a direction to the banks that excessive rates of interest should not be charged. On behalf of Citibank, it was argued that under section 35A of the Banking Regulation Act the RBI can fix the maximum rates of interest charged by the banks. It was stated if the RBI does not prescribe the interest rate then the banks cannot be held liable for charging very high rates of interest. It was also argued that the rate of interest was calculated taking into account the defaults and the risk involved and therefore the charging of interest at the rates of interest 36%-49% was not excessive. On the other hand RBI argued that it was not rendering any services and therefore the Consumer Act could not apply to it. It further argued that the charging of interest does not amount to unfair trade practice. The RBI further stated that it was for the RBI to determine as to what would be excessive or usurious rate of interest. The charging of interest depends on various factors. The RBI then relied on Usurious Loans Act, 1918 where 'excessive interest' has

been defined to mean as to what the Court deems to be in excess of what should have been charged taking into account the risks involved. According to the RBI, the card business is in the non-priority sector and that the banks were free to fix the rate of interest, without reference to their "benchmark prime lending rates". They also argued the RBI was a regulator and therefore cannot be made subject matter of proceedings before the Commission. It was also argued that the policy decision had been taken by the RBI after the liberalization of the economy that the RBI would not regulate rates of interest charged by banks. HSBC argued that the charging of interest could not be the subject matter of disputes before the Commission in view of section 21A of the Banking Regulation Act 1949. HSBC further argued that the interest due was calculated only on the unpaid balance. Similar arguments were advanced by the American Express Bank. It was also argued that the credit card market in India was very small and that the chances of recovery in India in view of the legal complexities involved was very small. The Commission considered all the arguments and held that the complaint was maintainable under the Consumer Protection Act. The Commission also held that the practices followed by the banks were unfair trade practices. The Commission, therefore, directed that the bank should not charge interest in excess of 30% per annum. It also held that the penal interest can be charged only once for one period of default and cannot be capitalized. It was further held that the interest with monthly rests is also unfair trade practice. The Commission bank therefore directed that the banks should not indulge in the aforesaid unfair trade practices. Aggrieved against this order of the National Consumer Dispute Redressal Commission, the banks went to the Supreme Court. The Supreme Court has stayed the order of the Commission.

15. From perusal of the above discussion, it is clear that in this particular case the complaint is only against the HDFC bank. The practice followed by all the banks in the credit card market is the same. Therefore

it is a case of class action and a case of practices followed by the banks in the credit card business.

16. Before proceeding further it is necessary to examine the nature of the credit card business in India. The business is mainly carried out in the credit card area through the provision of the services provided by two American Companies i.e. Visa card and Master card. These two American Companies have signed agreements with shops, establishments, enterprises that they would accept payments by cards on purchase of goods and services made by the customers. The banks have also taken help from Visa and Master cards by paying fees and on the strength of their agreements with these two American companies banks have issued cards to various customers. The Customers or the cardholders holding the cards of the banks issued in association with Visa and Master card can make purchases without carrying any money. After the transaction of purchase or services is made the data gets electronically transferred to the computer base of Visa or Master card and after settlement the amounts are transferred to the banks by the card operators. A bank then raises the bills on their customers and gives them a grace period. If the customers make the payments within the grace period no interest is charged by the banks. The bank also gives an option to the cardholders that they could make the payments in installments known as EMI on which the banks charge interest and service charges. Most of the banks in India have their card services division located at Chennai and therefore all the bills are raised from Chennai.

17. The card business started in the USA. Initially the person who started the business attached a magnetic strip to the card and the said person contacted many shops and establishments which would honour the card. The cardholders made the payment by card and the data of the transaction was captured on the magnetic strip. The customer would then go to the bank and the bank on the basis of magnetic strip would

work out the amount payable by the customer and customer would pay the amount. Subsequently, with improvement in computer science and telecommunication the card system got a boost in the USA and the first company which started the system of credit cards was Diners card sometime in the 1960s. Subsequently the banks took up the business and started issuing cards. But after the entry of Visa & Master cards, after 1970s the credit card business took over as it became a source of credit for the consumers. In India also Diners card made an entry in around 1980 and the foreign banks introduced the credit card system in India afterwords. The first public sector bank which introduced credit card in India was Bank of Baroda. Subsequently, the other banks followed. The credit card business has a huge potential in India though it has not been popularized till today.

18. In fact in 2008 there were 27 million holders of credit card in India and in 2011 the total number of credit cards in India came down to 18.85 million. Thus there was a decrease of approximately 8 million cards within a period of nearly three years. There are certain consumer organizations in India which are asking consumers to surrender their credit cards for the simple reason that the bank are following unfair trade practices by charging very high rate of interest and by capitalizing interest and the service charges every month. It was therefore primarily due to the practices followed by the banks that the credit card business has not grown by leaps and bounds in India. In fact before the RBI there are over nearly 18,000 complaints in respect of overcharging, non-transparency and misselling of the credit cards.

19. On the other hand the debit cards in India have increased by 31% in the last one year and the total numbers of debit cards are 137 million in India. These debit cards also marketed by the banks in association with Visa and Master Cards and the Cards are linked with the accounts of the holder of the cards in the various banks. In the case of debit cards,

one cannot spend more than the available balance in the bank accounts. Debit cards in India are more popular because Indians by nature are saving lot of money as the saving rate in India is nearly 33% whereas the saving rate in the USA prior to 2008 was 0.2%.

20. Credit cards give credit to the credit cardholders in the market and this helps in the following ways:-

(i) It can help eliminate black money.
(ii) As people are not required to carry any currency, the cost of currency for the government decreases.
(iii) It can help in tracking transactions and frauds.
(iv) It increases economic efficiency.
(v) The payments made are more secured and convenient and it leads to decrease in crimes such as theft and robberies.
(vi) It increases consumption and purchase of goods which leads to economic growth. In fact studies have shown that the doubling of private credits leads to 2% annual increase in economic growth.
(vii) Protects consumers and merchants.
(viii) Electronic payment is more fast and cost effective.

21. The above discussion shows that growth in credit cards leads to the growth of credit in the markets in India and it leads to higher consumption by the consumers and therefore economic development. Under the Competition Act, 2002, one of the key elements is economic development in India and the other item is the protection of consumers. Maintaining and sustaining competition in the markets in India is only for the benefit of the consumers. All these items are mentioned in the Preamble to the Competition Act. The Preamble also talks of having freedom of trade for all the participants in India. Freedom of trade means freedom of choice, lower switching costs and proper information system for the consumers to make the right choice. Freedom of trade amounts

to the protection of consumers and participants in the market from anticompetitive agreements, protection from cartels, from anticompetitive trade practices, control of markets, collusive bidding, refusal to deal, tie in arrangements etc. and abuse of dominance. Abuse of dominant position involves the above named factors, unfair and discriminatory practices and prices, denial of market access, supplementary obligation and protecting other markets. Freedom of trade, equality before in law and liberty of thought are also incorporated in the Constitution of India. Therefore the Competition Law expands the scope of Constitutional guarantees. These are all incorporated in Sections 3 and 4 of the Competition Act.

22. A salient feature of the Act is the presence of markets. Freedom of trade can only exist when markets exist. All the factors mentioned in Sections' 3 and 4 presuppose the existence of a market. In a market there has to be a buyer and a seller. The buyer is also known as a consumer and economy does well when consumer surplus increases. In fact anticompetitive agreements are those which create an appreciable adverse effect in the markets in India. Market is a general terms whereas relevant market is a special and a narrower term. Under the provisions of section 4, an abuse of dominant position can exist only in a relevant market.

23. In this case when the consumer wanted to subscribe to a credit card, there were a large number of banks which had the products which the consumer could take. The market for credit cards was vibrant as there were large number of players and no player was a monopolist. Choosing a good credit card depended on the perception of the consumers. Such perception is built on advertisement and the persuasive powers of the agents of the card issuers. Incidentally in India the card issues in India are mainly banks. But the card business of the bank is a different market from the main banking business of the banks.

24. Further, the trade practices followed by most of the banks are the same. Most of them charge very high rate of interest when a person defaults in payment. They also capitalize the interest on daily basis and also include some hidden costs which is charged to the consumers. Therefore in reality though the banks are having a different card system there is no difference as far as the levy of the charges on the consumer is concerned. In fact once the consumer opts for credit card of a bank then he is captured by the bank and once the captured he is made to pay heavy payment of interest which is capitalised on daily / monthly basis. Once a consumer opt to take a card of another bank he is out of the market of credit card but he can re-enter the credit card market if he takes the card of another bank. Thus there are different relevant markets i.e. one is the banking market and the other is credit card market. But once a consumer opts for a card he is out of both the markets and he is in the market where the dominant player is the bank which has issued the credit card to him. This market is sometime known as the aftermarket or the market of servicing of credit taken on the credit cards. This third market is different from the banking market or credit card market and the main players in the market happen to the consumer and the bank issuing the card unless there is a securitisation of the outstanding on the credit cards.

25. The DG in his report has stated that even after an agreement is reached between a bank and a consumer market remains the credit card market and as HDFC bank is not a dominant player in the credit card market no case of abuse of dominance is made out. As already discussed above when we are considering the consumer and the bank the market is neither banking nor credit card market but it is a market of the serving of credit taken on the credit card. To this extent the findings of the DG are erroneous.

26. The DG has also stated that in order to be a dominant player in the market one has to be a biggest player in the market. In fact the issues raised by the I.P. before him were never considered by the DG. In the explanation to section 4 of the competition Act dominant position has been defined as follows:

> *"dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to –*
>
> *(i) Operate independently of competitive forces prevailing in the relevant market; or*
>
> *(ii) Affect its competitors or consumers or the relevant market in its favour.*

The above definition will show dominant position means a position of strength and does not mean that the player in the relevant market should be biggest player in the market. A position of strength is achieved when enterprise can operate independently of the competitive forces prevailing in the relevant market or it affects its competitors or consumers or the relevant market itself in its favour. In this particular case the relevant market has already been decided to being a market where a consumer services the loans or credits taken on his credit card. The geographical market in this case would be entire India. In this particular market the banks issuing the card enjoys a position of strength which affects its consumers in its favour. Therefore, all onerous charges on the consumer have to be borne by the consumer and he has to suffer abuse.

27. The question would arise about existence of a market consisting of only the bank and the consumer. This market known as an aftermarket is supported by the decision of the U.S. Supreme Court the case of Kodak [Kodak Co. Vs. Image Tech. SVCS504 U.S. 451(1992)]. In the case, Kodak was the manufacturer of photocopiers like many other manufacturers. Initially for repairs and servicing of photocopiers Kodak

appointed 17 persons as service agents. Some of the service agents were very efficient and started getting some items manufactured on their own for servicing the photocopiers of Kodak. As Kodak used to buy the entire spare parts from the part suppliers, it changed its business policy in respect of maintenance and service of photocopiers. Kodak cancelled the service contracts of the 17 service agents and it asked its customer to get the photocopiers serviced and maintained in the workshops of Kodak or some authorised agents of Kodak. As a result the 17 parties who were the earlier service agents suffered a loss and their business came to a standstill. These 17 persons therefore moved the Courts. The issue went to the U.S. Supreme Court which held that the market of photocopiers is different from the market of servicing and maintenance of photocopiers. Though Kodak was not a major player in the market of photocopiers, it became a monopoly player in the market of maintenance and service of the photocopiers as servicing and supply of spares was under the control of Kodak. The Supreme Court in this case held that Kodak abused its position in the relevant market of servicing and maintenance of photocopiers. While coming to this conclusion the Supreme Court held that the aspects to be seen in such cases of aftermarket abuse are the costs of switching and information asymmetry.

28. In this particular case we have to examine as to whether switching costs exist. A person can switch from the credit card of one bank to credit card of another bank after he has cleared of his dues with the earlier bank at whose hand the consumer may have suffered abuse. A consumer can take an additional card also in the credit card market but he cannot exit from the card of a bank where dues are still outstanding. Information asymmetry exists in this case because in this particular case the facts were not made known to the consumer and only when the Cardmember Agreement was given to the consumer. It can be assumed that the card member is supposed to read the card member agreement

but the recovery portion is written in such a manner that a normal person finds difficult to understand. There is no doubt that a consumer could refuse to use the card provided he was able to read and understand the terms which were there in the Cardmember Agreement. There is, therefore, a case of information asymmetry in this particular case.

29. A question may arise that once a consumer knowing all the terms agreed to the terms for the use of the card he is bound by the terms even if they are onerous. This view of privity of contract has been raised before the Supreme Court of India in various cases and the Supreme Court decided such a view was possible only in the 19th Century and not in the present era. According to the Supreme Court the factors to be seen while deciding the validity of a contract is whether the contract is opposed to a public policy and whether it violates Parts III & IV of the Constitution of India. If a contract contravened the above named items then such a contract was a void contract and not enforceable. The Supreme Court in some other cases has held that when a very big economic player enters into a contract with an individual who is economically weak, then the courts have to decide whether the contract is loaded in favour of the big player. In such cases, many contracts have to be examined and may be declared as void.

30. The agreement here i.e. cardholder agreement is not a proper agreement. For agreement to be valid there should be an offer and acceptance and then the terms can be drawn up in the form of agreement. Here the cardholder agreement is thrust on the cardholder provided he wants to use the card of the bank. In fact most of the banks and other business establishment follow this practice for historical reasons. Such a contract is known has a Contract of Adhesion. Whether such a contract is valid or not can only be decided by Court of Law and as

far as the Commission is concerned, such a contract can be considered only under Section 3(1) of the Competition Act.

31. The informant wants the case to be referred back to the DG for further investigation. The DG's role is that of a fact finding body and any opinion or any legal provision be given by the DG is not finding and it is for the Commission to decide the validity of such findings. In this particular case all the facts have been brought on record and therefore there is no necessity in sending the case to the DG for fresh investigation. The erroneous view of law propounded by the DG can be overruled by the Commission while deciding the case.

32. In this particular case the relevant market and the relevant geographical market have already been defined. The relevant market is the market where a consumer services the loans or credits taken on his credit card and the geographical market is entire India. The next question to be examined is as to whether there is an abuse of dominant position by the bank. In this case the dominant position of the bank in respect of consumer has already been discussed above. The only issue to be decided is the issue of dominance. In this particular case the first issue is a charging of interest on outstanding balance for the use of credit card. In the case of cards interest is charge on daily / monthly basis. But in the case of overdraft interest is charge on quarterly basis whereas in the case of agricultural loans interest is charged on yearly basis in accordance with the direction of the RBI. There is hardly any difference between overdraft facilities and credit availed of on the strength of credit cards. Both are borrowings and the borrowings are not secured by any assets. Following different practices of charging interest on credit cards and overdraft accounts it is discriminatory and in violation of section 4(2)(a)(i) of the Competition Act. The International practice is that

interest should be charged on half-yearly or the yearly basis. The question which arises as to why in the case of credit cards the interest is charged on daily basis.

33. The reason given for charging interest on daily / monthly basis is that the element of risk on the credit cards is very high. The element of risk in overdraft accounts is in the same as the risk on outstanding on credit cards. Therefore, this argument does not hold good. It is quite possible that this method of charging interest is the adopted by the banks in India following the foreign banks who introduced credit cards in India before the PSU banks entered this business. In the view of the foreign banks India was an underdeveloped country and had higher risks and therefore they started charging interest on daily / monthly basis. This practice is not followed by them in their home countries. This is a discriminatory behaviour. The Indian banks followed the same practice without the application of mind. The credit cards business in India exists for the last 30 years against 50 years in the U.S. The market is not nascent and market is quite mature. Further, India is not a underdeveloped country. It is one of the top five economies in the world. For this reason the element of risk in India is not very high. Moreover it was the duty of the bank to bring on record the element of risks by giving data in respect of bad debts dates on account of credit cards. This has not been done and therefore the arguments are not supported by any material. The total amount outstanding as bad debts in the books of banks is $28 billion i.e. Rs. 1,40,000crore approx. Against this as per the last date available the total outstanding on the credit cards of all the banks is approx Rs.6500crores. This is a very small amount compared to the total outstanding bad debts of banks.

34. In this case the bank is charging very high rate of interest on the outstandings on the credit card. In certain cases the interest charged is approximately 50%. The banks are relying on section 21A of the Banking Regulation Act 1949 and arguing that courts cannot look into the aspect of the charging of interest. Section 21A of the Competition Act reads as under:

> *Rates of interest charged by banking companies not to be subject to scrutiny by Courts.*
>
> *Notwithstanding anything contained in the Usurious Loans Act 1918, or any other law relating to indebtness in force in any State, a transaction between a banking company and its debtor shall not be reopened by a Court on the ground that the rate of interest charged by the banking company in respect of such transaction is excessive.*

The reading of the provision show that under this section anything contained in Usurious Loans Act or any other law relating with this Act and transaction between banking companies and it debtors could not be subject matter of an appeal would go any Court of Law on the ground that they are charging of interest is excessive. Section 10(b) of the Banking Regulation Act defines

> *"banking means the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawal by cheque, draft, order or otherwise.*

And section 10(c) defines

> *A banking company as one of which transacts the business of banking.*

From a perusal of the above definitions, it is clear that amount given as advance on the strength of a credit card cannot be regarded as a banking

business. HDFC bank is a banking company under the definition of section 10(c) of the Banking Regulation Act 1949. The issue which arises is that as HDFC is a banking company no court can examine the case in respect of charging of interest on the ground that it is excessive. But the Commission is not a court and it is an economic body having certain economic and judicial powers. Therefore, section 21A of the Banking Regulation Act is strictly not applicable to the Commission. Further in view of section 60 of the Competition Act, the Competition Act can override the provisions contained in any other law for the time being in force. According to section 62 of the Competition Act, the Competition Act will be in addition to, and not derogation of, the provisions of any other law for the time being in force. Whether the levy of interest is a competition issue or not, is the issue to be decided here. It is also constitutional mandate that economic freedom should be given to the citizens of the country as it mentioned in the Preamble of the Constitution of India as well as Article 19 of the Constitution and for this reason the provision of section 60 would override the provisions of section 21A of the Banking Regulation Act. But any discussion on this has to be in accordance with the treatment of this issue by the RBI. As already discussed above the RBI does not treat credit given on the basis of credit card as priority sector and therefore it has left the charging of interest to the banks themselves. In view of a discussion of the provisions of the Banking Regulation Act as well as Competition Act, the Commission is entitled to look into the charge of excessive interest by the banks in the case of non-payment of credit card dues. An outstanding amount on credit card is an unsecured credit and it has to be treated similarly as an overdraft account which is also an unsecured credit. There is therefore no reason why on credit card the bank should charged anything more than that in the case of unsecured loans such as overdrafts. Therefore the practice of the bank is discriminatory and it is hit by provisions of section 4 of the Competition Act.

35. while examining an issue under section 4 of the Competition Act, not only the provisions of section 4 have to applied, even the factors mentioned in section 19(4) have also to be seen. The explanation to section 4 talks of position of strength in the relevant market in India which enables an enterprise to affect its consumers in its favour. As already discussed above, the relevant market cannot be the credit card market. Once a person takes a credit card, he goes out of credit card market and he becomes a consumer of the bank whose credit card he has taken. The consumer is then governed by the contract of adhesion which the consumer had signed. Thus, the market is the aftermarket. In fact, the ratio laid down in Kodak's case is incorporated in the Competition Act, 2002. As far as the factors in Section 19(4) of the Act are concerned, clause (g) is applicable because it talks of dominant position acquired otherwise i.e. by the contract. The other factors such as clauses (a), (b), (c), (d), (f), (j) and (l) are clearly applicable to this case. There is no point in discussing them in detail as the facts have already been discussed in this order. The practices followed by the banks act as a brake to economic development and are therefore anticompetitive. The interest charged by the banks are usurious and require to be decreased. The charging of interest after the operation of the card and then compounding the said interest is unfair.

36. Therefore in pursuance of section 27 of the Act,

(i) the bank should cease and desist from carrying on business on the basis of the Cardmember agreement and the bank should not abuse its dominance with reference to its consumers.

(ii) the bank should not enforce the Cardmember agreement and should not recover from the informant than that what was due and should not charge any interest after the use of the card was stopped.

(iii) the charge of interest by the bank is excessive and no interest in excess of 30% should be charged. Penal interest should be charged once only and should not be capitalised. Even the interest charged with monthly rest is unfair trade practice and should be stopped.

(R. Prasad)
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