

COMPETITION APPELLATE TRIBNAL
Unfair Trade Practices Enquiry No. 151/2009
CORAM

Hon'ble Mr. Justice V.S. Sirpurkar
Chairman

Hon'ble Mr. Rahul Sarin
Member

Hon'ble Mrs. Pravin Tripathi
Member

IN THE MATTER OF :-

Federation of All Maharashtra
Petrol Dealers' Association,
C/o Excel Service Centre,
17-A/18 Karve Road,
Pune, - 411 004.

....Complainant

Versus

1. Hindustan Petroleum
Corporation Limited
17, Jamshedji Tata Road,
Mumbai – 400 020
2. ICICI Bank Limited,
9th Floor, South Towers,
ICICI Towers Bandra Kurla Complex,
Bandra (E) Mumbai,
Maharashtra.

...Respondent

Appearances: Ms. Neela Gokhale, Advocate for the Complainant
Mr. M.M. Sharma with Ms. Deepika Rajpal and Ms. Shweta Mishra,
Advocates for Respondents...

ORDER

MR. JUSTICE V. S. SIRPURKAR , CHAIRMAN

The Federation of All Maharashtra Petrol Dealers' Association has approached the Monopolies & Restrictive Trade Practices Commission (hereafter referred to as the "**Commission**" for short) by way of an application under Sections 36 and 37 of the Monopolies & Restrictive Trade Practices Act, 1969 (hereinafter referred to as an "**Act**"). In their application, the Federation has joined the Hindustan Petroleum Corporation Ltd. as the first respondent and ICICI Bank Limited as the second respondent who shall be referred to as **R-1** and **R-2** hereinafter.

2. The petitioner Federation is having petrol Dealers Associations in Maharashtra as its members. While R-1 is the Oil Company engaged in the business of procurement, distribution, supply of petrol, diesel, kerosene and other petroleum and allied products all over India. R-2 is a Bank registered under the Banking

Regulation Act. It is claimed that all the petrol dealers in Maharashtra and India are supplied petrol, diesel and other petroleum and other allied products from R-1 and as such the petrol dealers and federation are the customers of R-1. Specific statement is made that petrol dealers are not permitted to purchase petrol, diesel and petroleum and other allied products from any other source. It is contended that the petroleum dealers are using EDC / OPT machine/terminals of various banks at their petrol pumps in order to facilitate its customers to use their debit/credit card. It is contended that by its communication dated 20.8.2008 the first respondent intimated all the outlet retailers including members of the complainant that it had a successful co-branded credit card and debit card agreement for R-2 Bank and that co-branded credit cards have evolved over the years and that it had entered into exclusive tie up with R-2. It is complained that vide the said communication the petrol dealers were informed that R-2 shall provide ICICI Bank EDC swipe terminal to facilitate payments through credit/debit cards and all HPCL dealers are required to accept all credit cards such as VISA / MASTER cards exclusively on these ICICI Bank terminals. In the said communication it was warned that any user of any other EDC / OPT's will be violating clause 9 of DPSL agreement signed by them. The complainant has also pointed out by another communication dated 24.3.2009 first respondent had directed the members of the complainant to use ICICI Bank EDC Terminals only so that all the credit/debit cards transactions should happen on ICICI Bank Terminals. It was urged further in the said letter that keeping any other Bank Terminals at their outlet would be a violation of agreement signed by R-1 with ICICI Bank and as such could not be allowed to be continued. Any other Bank terminal could not be allowed to be set up in the petrol outlet. It was further contended that first respondent had sent letters to the members of the complainant informed that exclusive tie-up with the second respondent for credit/debit cards and that R-2 would be reimbursing Rupee One per valid credit/debit cards transaction to all the dealers towards telephone costs w.e.f. June, 2008. It is claimed by the complainant further that it was expressed in the said communication that as per the exclusive tie up all the dealers must use OPT Terminals provided by ICICI Bank only so that all the credit/debit card transaction would take place only on such terminals provided by R-2. According to the complainant there was further communication warning to the dealers keeping any other banks' terminal would be a violation of agreement signed by R-1 with R-2 and could not be allowed to be continued. It was further communicated to the dealers who are members of the Complainant Association that any other banks terminals at the outlet of the dealers must be de-installed by 1st April, 2009. The complainant, therefore, complained that R-1 was compelling members of the petitioner federation to execute agreement with it regarding usage of only EDC of R-2 Bank and that some of its members had succumbing to the pressure of the first respondent were

executing agreements under protest. It was complained that this action has resulted in concentration of power to the common detriment and has resulted in creating monopolistic and restrictive trade practice. It was contended that the act of R-1 under the guise of promoting and encouraging the customer of the petrol dealers to use and have access to the facilities of R-2 bank alone was in fact a compulsion on the petrol dealers as well as the customer to use the facilities of second respondent bank alone which has resulted in unreasonably preventing and cutting competition with the facilities of other banks of the choice of petrol dealers. It was further suggested that this would be distortion or restriction on the competition. Amongst grounds of the objection, the complainant has suggested that R-1 has abused its dominant position by directly imposing unfair and discriminatory condition in the sale of petrol and allied products at the outlets run by the members of the complainant. It is further complained that prohibition on the part of R-1 vis-à-vis petrol dealers not to use any other banks' EDC/OPT swipe terminals barring OPT swipe terminals provided by R-2 amounted to restrict the provisions of service. It is further complained that such prohibition would amount to indulgence on the part of the first respondent resulting in denial of market access, unreasonably preventing and lessening competition. It is complained that monopolistic and restrictive trade practice adopted by the respondents are prejudicial to the public interest. The agreement between the respondent has been described as a restrictive trade practice. It is further complained that consumer interest would be seriously jeopardized as consumers would not be able to use any other card except ICICI Bank. Apart from this, the complainant has also complained that the compulsory removal of other bank terminals would affect their relations with their bankers.

3. The first respondent has resisted all these contentions. They have firstly challenged the status of the complainant. It had denied that there is no monopolistic or restrictive trade practice adopted by respondent. They claimed that any other valid credit / debit / pre-paid card could be used on ICICI bank terminal installed at HPCL petrol pumps and that there was no compulsion of using only ICICI bank card on its terminals. They pointed out that in case any other terminals except ICICI Bank are permitted at the petrol outlet could have as many as six terminals which were not desirable.

The reliance was placed on Clauses 38 and 44 which provide that the dealer shall take approval of the Corporation before getting into an Agreement with other parties for provision of services at the petrol pump and that no dealers had not taken consent of first respondent before entering into contractual obligation with other banks. It was also highlighted that ICICI Bank is paying Rupee one per valid transaction for reimbursement so that the arrangement was to the benefit of the dealers.

It was reiterated that customers holding credit/debit/ pre-paid card of other banks could carry transactions through terminals installed by R-2 and there was no mandate for the customers and dealers to use ICICI bank card or open an account with R-2 and therefore, the allegations are baseless and incorrect.

4. In the similar manner the second respondent refuted the contentions raised by the complainant and has dubbed the complaint as baseless. They have pleaded that the bank had entered into an agreement for issuance of co-branded credit cards to the customers of the first respondent. It was described that this was done for better facilities to the customers. By the agreement between the Bank and the first respondent they have similarly reiterated that any other card can be used at ICICI Terminals installed at the petrol outlets. In short, they contend that there is nothing wrong in the agreement with the first respondent. The parties have relied on number of documents.
5. Basic issue, therefore, is as to whether the first respondent could have insisted that the petrol dealers at their outlets should install ICICI bank terminal alone. Further whether the first respondent could insist on the removal of the terminals set up by other banks at the said outlets. Further, it is to be decided as to whether by issuing directions to use ICICI Bank terminals exclusively and removing all other terminals from the outlets the first respondent has violated any of the provisions of the MRTP Act.
6. The learned counsel appearing on behalf of the complainant very strongly urged that the first respondent has unnecessarily insisted upon the removal of all other terminals from the outlets of its member dealers. She pointed out that if the customer uses any other credit card in terminals used by ICICI Bank then the customers have to pay 2.5% more than the actual cost of petrol. She, therefore, argues that action on the part of the first respondent was nothing but to monopolise the ICICI Bank service and removing from the field of competition the other banks to the detriment of consumers, who would have to pay 2.5% more than the actual cost of their purchase if they use the credit/debit card on the ICICI Bank terminal which they would not be required to pay if they use their card on the terminal of the other bank which has issued the card. The arguments further goes on to suggest that such insistence on the part of the first respondent would also be a restrictive trade practice inasmuch as the dealer would then be restricted from dealing with any other bank than ICICI Bank with whom he may have trade arrangements.
7. Shri Sharma for R-1 could not deny this specific statement regarding the consumer having to shell out 2.5% extra on the user of any other card except ICICI bank even on the terminal of ICICI Bank. He tried to counter the argument by saying that

by insisting upon the user of ICICI Bank terminals in fact consumers were being helped inasmuch as they would not be required to part with 2.5% of the credit card bill which would be to their benefit. Shri Sharma insisted that under the dealership agreement of the outlet dealers with first respondent it was imperative that in such financial arrangement which had the direct nexus with the trade of outlet dealer had to be approved by the first respondent and that the insistence on the part of the outlet dealers to use any other bank terminals by setting them at the site of the outlets without the approval of the first respondent in breach of that agreement.

8. It is to be seen whether the first respondent was justified in the insistence of exclusive user of ICICI bank terminals at the outlets and further whether the first respondent was justified in its direction to remove the terminals of other bank than ICICI from the petrol outlets.
9. There can be no dispute that there was an internal financial arrangement of the first respondent with the second respondent bank because of which the first respondent as well as the second respondent could increase their business. It can also be not disputed under that arrangement the first respondent had insisted upon the setting up of only ICICI Bank terminals to such petrol outlets whose dealers were prepared to honour the credit cards. However, it is obvious in that case the dealer would be compulsorily required to set up ICICI Bank terminals at their outlets even if they do not want to transact with ICICI bank. The matter do not stop there. Further insistence on the part of the first respondent in giving the exclusive status to ICICI bank terminal is, in our opinion, completely unjustified. Shri Sharma could not refute the statement made by the learned counsel for the complainant that in case any other bank card than the ICICI bank card is used on the proposed ICICI bank terminals than the customer i.e. the consumer has to shell out 2.5% as the bank service charges. The result of insistence on the part of the first respondent would, therefore, be an insistence vis-à-vis consumer to use ICICI Bank card only in order to escape the excess payment of 2.5%. That would deprive him a facility to use any other card at any other terminal of any other Bank. This will also further result in denying an opportunity to the outlet dealer to transact with any other bank even if such transaction is beneficial for him and therefore would amount to a restrictive trade practice. Whether the first respondent can allege the breach of dealership agreement in case the outlet dealer provide the facility of any other bank terminal being set up at the outlet side is not for this Tribunal to decide. This Tribunal would restrict itself to examining such directions. In the back drop of provisions of MRTP Act and close scrutiny thereof such directions would definitely lead to the irresistible conclusion that the insistence on the part of the first respondent for the exclusive use of ICICI Bank terminal and the removal of other Bank terminals would certainly affect

the competition amongst the banks and would also amount to restrictive trade practice vis-à-vis the dealer. It is axiomatic that the consumer would like to save 2.5% which he is required to shell out on account of all the user of any other bank card or terminal.

10. At the beginning of the debate the learned counsel appearing on behalf of the complainant very fairly made a statement that the complainant would be satisfied if its members who are the outlet dealers were permitted and continue to use any other Bank terminals. In order to settle the controversy, we made an offer to the first respondent should not insist on the removal of the other bank terminals from outlets of the dealers. To our surprise, however, the first respondent refused to make any such statement and instead argued that they would try to see a via media after negotiating with other banks. To say that we were surprised by this attitude on the part of the Government Oil Company would be an understatement. Be that as it may.
11. Section 2(o) defines Restrictive Trade Practice as under:-
"2(o) restrictive trade practice" means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular,-
 - (i) which tends to obstruct the flow of capital or resources into the stream of production, or
 - (ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified cost or restrictions;"
12. In the earlier paragraphs of this judgment, we have already shown as to how the practice adopted by the first respondent would result in restricting the competition amongst the banks in the matter of providing services to the consumer by setting-up terminals at the outlets. It is already shown that this direction to remove all the other terminals excepting the terminals of ICICI banks and insisting upon the consumer to transact only with ICICI bank would apart from affecting the competition, also impose unnecessary surcharge on the consumers using any other cards than the ICICI card on the ICICI banks terminals in as much as they would have to shell out 2.5% of the actual cost on petrol or diesel as the case may be, which they purchase on the basis of their credit card. The direction, therefore, clearly amounts to restrictive trade practices, such trade practices under the provisions of Section 38(1) would be deemed to be prejudicial to the public interest. It is not the case of the first respondent that it comes under any of the Clauses namely Sub-Clauses (a) to (k) of Section 38. No such contention was raised before us.
13. Section 36A defines the unfair trade practice. This Section is as under:-

“ In this Part, unless the context otherwise requires, "unfair trade practice " means a trade practice which, for the purpose of promoting the sale, use or supply of any good or for the provision of any services, [adopts any unfair method or unfair or deceptive practice including any of the following practices], namely:-

- (1) the practice of making any statement, whether orally or in writing or by visible representation which,-
.....
- (vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;”

14. A direction to remove the terminals of other banks excepting that of ICICI bank on the ground that it has a financial arrangement with ICICI bank would be clearly covered under language of clause quoted above.

Apart from this, it would amount to an unfair method for promoting the services of ICICI bank. The unfairness would be at large in as much as though the dealer has full right to utilize the services of any other bank, he would have to stop his business with other bank and would have to essentially transact with ICICI bank, which would affect the competition and would give an unfair advantage to ICICI bank over and above the other banks having their terminals at the site of the outlet. This would be apart from causing loss and injury to the ultimate consumer in as much as he would have to shell out 2.5% more than the actual transaction.

15. We may also refer to Section 2(u) of the Act. The definition of trade practice is as under :-

“(u) "trade practice" means any practice relating to the carrying on of any trade, and includes-

- (i) anything done by any person which controls or affects the price charged by, or the method of trading of, any trader or any class of traders,
- (ii) a single or isolated action of any person in relation to any trade;”

16. This clearly brings out a situation that the insistence on the part of respondent No.1, which we have indicated earlier, as a trade practice would amount to an unfair trade practice.

17. We, therefore, conclude that the insistence on the part of the first respondent, firstly, to exclusively use ICICI bank terminals and secondly to remove other banks terminals from the outlets cannot be sustained, as it clearly amounts to a violation of letter and spirit of MRTP Act and more particularly the provisions of Sections discussed above. Under the circumstances, we allow this complaint and direct the first respondent that it shall “cease” and “desist” from insisting upon the exclusive use of ICICI bank terminals from the outlets of the members of the complainant’s association. It shall also “cease” and “desist” from insisting upon to remove all other banks terminals at the

site of the dealers outlets. The direction as indicated above shall issue with the immediate effect. Cost of this complaint shall be borne by the two respondents jointly. Costs are assessed at Rs.2,00,000/- (Rupees two lakhs).

Pronounced in the open Court on 20th day of July, 2012.

(Justice V.S. Sirpurkar)

Chairman

(Rahul Sarin)

Member

(Pravin Tripathi)

Member