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IN THE HIGH COURT OF JUDICATURE AT MADRAS

| | |
|---------------------|------------|
| Order reserved on | 28.04.2025 |
| Order pronounced on | 11.06.2025 |

CORAM:

THE HON'BLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

A.No.4193 of 2023 in
C.S.(Comm Div) No.186 of 2023

1. Google India Pvt. Ltd.
Represented by its Managing Director
Corporate Identification No.U72900KA2003PTC033028
With its registered address at:
No.3, RMZ Infinity – Tower E, Old Madras Road
4th & 5th Floors, Bangalore,
Karnataka 560 016.
..1st Applicant/
6th Defendant
 2. Google India Digital Services Pvt. Ltd.
Represented by its Managing Director
(CIN) U74999DL2017PTC376205
5th Floor, DLF Centre, Block-124
Narindra Place, Sansad Marg,
New Delhi-110 001.
..2nd Applicant/
7th Defendant
- v.
1. Testbook Edu Solutions Private Limited
Through their Authorised Signator,



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Mr. Sankalp Aggarwal

Corporate Identification No.U72200MH2013PTC241118

Having registered address at:

1st & 2nd Floor, Zion Building,
Plot No.273, Sector 10, Kharghar, Panvel
Navi Mumbai Raigarh
Maharashtra, India-410 210.

..1st Respondent /
Plaintiff

2. Alphabet Inc.

Represented by its Authorized officer,
1600 Amphitheatre Parkway Mountain View,
CA 94043, United States of America.

..2nd Respondent/
1st Defendant

3. Google LLC

Represented by its Authorized Officer
A Limited Liability Corporation
With its registered address at:
251 Little Falls Drive
Wilmington, Delaware 19808
United States of America

..3rd Respondent/
2nd Defendant

4. Google Asia Pacific Pte. Ltd.

Represented by its Authorized Officer
Unique Entity Number 200817984R
With their registered address at:
8 Marina Boulevard,
#05-02, Marina Bay Financial Centre,
Singapore 018981

..4th Respondent/
3rd Defendant



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5. Google Payment Corp.

Represented by its authorized officer

1600 Amphitheatre Parkway Mountain View,
CA 94043, United States of America.

..5th Respondent/
4th Defendant

6. Google Payments India Private Ltd

Represented by its Managing Director

(CIN) U72200DL2007PTC360455

5th Floor, DLF Centre, Block-124,

Narindra Place, Sansad Marg,

New Delhi-110 001.

...6th Respondent/
5th Defendant

PRAYER: Judge's Summons filed under Order XIV Rule VIII of Original Side Rules and Order VII Rule 11 of the Code of Civil Procedure praying that this Court to reject the plaint in C.S.(Comm Div) No.186 of 2023 and pass such others as this Court may deem fit in the facts and circumstances of this case and thus render justice

For Applicants : Mr.P.S.Raman, Senior Advocate
for 1st Applicant
Mr.Sajan Poovayya, Senior Advocate
for 2nd Applicant for
M/s.G.Balasubramanian, S.Anand for
M/s.Leela & Co.

For Respondents : Mr.Abir Roy, Mr.Devashish Marwah,
Mr.Aman Shankar, Mr.Sastribata Panda,
Ms.Ridhima Sharma



ORDER

WEB COPY In the suit instituted by a plaintiff presented and admitted in July, 2023, the plaintiff, which is an ed-tech services company, has prayed for declaratory relief to declare the Google Payment Terms of Service-Seller Payment Policies, clause 15.3 of the Developer Distribution Agreement (DDA) and the charges levied by the defendants under the Google Play Billing System (GPBS) and the User Choice Billing (UCB) system as illegal and unenforceable. The plaintiff has also prayed for a permanent injunction restraining the defendants from removing/delisting the apps operated, owned and marketed by the plaintiff in the Google Play Store in India on account of refusal to subscribe to the Google Payment Terms of Service - Seller Payment Policies.

2. The 6th and 7th defendants in the suit presented this application seeking rejection of the plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908 (the CPC). The application has



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been presented on the grounds of non-disclosure of cause of action

[Order VII Rule 11(a) of the CPC] and that the suit is barred by law

because the jurisdiction of civil courts is barred under the

Competition Act, 2002 (Competition Act) and the Payment and

Settlement Systems Act, 2007 (the PSS Act) [Order VII Rule 11(d) of

the CPC].

Counsel and their contentions

3. The first applicant/sixth defendant was represented by

Mr.P.S.Raman, learned senior counsel, and the second

applicant/seventh defendant by Mr.Sajan Poovayya, learned senior

counsel. They were instructed and assisted by Mr.G.

Balasubramanian of M/s.Leela & Co., Advocates. Mr.Abir Roy,

learned counsel, appeared on behalf of the first respondent/plaintiff.

Both parties also filed written submissions.



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4. Mr.P.S.Raman opened his submissions by pointing out that the subject of the suit is the service fee charged by Google to app developers intending to display their app on the Google Play Store. He submitted that about 13 suits were filed earlier by other app developers seeking identical reliefs; a learned single Judge of this Court, by common judgment dated 03.08.2023, allowed applications filed by the present applicants for rejection of the plaint in those suits; and that the said judgment was carried in appeal by the respective plaintiffs before the Division Bench of this Court. By judgment dated 19.01.2024, he submitted that the batch of appeals (OSA (CAD) Nos.97 to 100 and 102 to 110 of 2023 and Cross Objection Nos.56 to 68 of 2023) were rejected. He also pointed out that the plaintiffs therein carried the matter to the Supreme Court by way of special leave petitions and that the special leave petitions are pending, but the judgment impugned therein has not been stayed by the Supreme Court and operates as on date.



WEB COPY 5. Mr.Raman contended thereafter that the plaintiff has attempted to differentiate this suit from the earlier suits by making cosmetic changes. While the plaintiffs in the earlier suits used the phrase 'abuse of dominant position', this plaintiff uses the phrase 'superior bargaining power'. Other than these cosmetic changes, learned senior counsel submitted that the pleadings are substantially similar, and, in fact, nearly identical. After further submitting that one of the earlier suits was filed by an entity called Nasadiya Technologies Private Limited (Nasadiya), learned senior counsel invited my attention to a comparative table of the pleadings of Nasadiya and the pleadings of the plaintiff with the minor differences shown therein in bold font. In fact, he pointed out that even the alleged violation of Sections 16 and 27 of the Indian Contract Act, 1872 (the ICA) was pleaded at paragraphs 97 and 98 of Nasadiya's plaint. Likewise, he submitted that it was also pleaded by Nasadiya that the defendants are joint tortfeasors. Mr.Raman further



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submitted that leave to sue was obtained by the plaintiff by asserting that the present suit is identical to suits filed earlier by similarly situated parties, wherein leave was granted. In support of this contention, he relied upon paragraph 99 of the plaint. Indeed, he submitted that interim relief was obtained in the first instance by the plaintiff by contending that interim relief had been granted to other similarly situated plaintiffs. In these circumstances, Mr. Raman submitted that the present plaint should also face the same fate as the other plaints which were rejected.

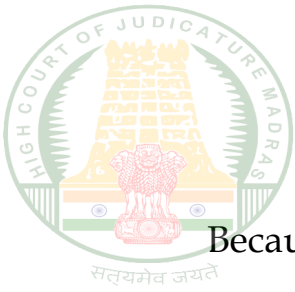
6. Mr.Sajan Poovayya, learned senior counsel, made submissions on behalf of the second applicant/seventh defendant. He first submitted that both Apple and Google charge app developers a service fee. As regards Google, he submitted that service fees are charged either if the apps are subscription-based or if goods or services are sold commercially on the app. After referring to the clause in the contract that enables Google to charge service fees,



he also pointed out that such charges range between 10% and 30%.

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By referring to the order dated 25.10.2022 of the Competition Commission of India (the CCI) in proceedings initiated by persons situated similarly as the plaintiff, he pointed out that the CCI did not impose an embargo on the charging of service fees although the issue was raised in those proceedings. His next submission was that the endeavour of the plaintiff to differentiate the present suit from the earlier suits is liable to be rejected. In order to substantiate this contention, learned senior counsel referred to paragraph 6(xvi) and (xvii) of the judgment of the Division Bench wherein the contentions of the respective plaintiffs on novation and restraint of trade were noticed. In that context, he submitted that the Division Bench recorded a categorical finding that the reliefs claimed are not beyond the realm of the authorities constituted under the Competition Act and the PSS Act. He also referred to paragraph 31(iii) of the judgment of the Division Bench wherein it was held that the jurisdiction of the civil court is barred by implication by the PSS Act.



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Because the plaint, in this case, is substantially similar to the rejected complaints, learned senior counsel concluded his submissions by contending that the same result should follow.

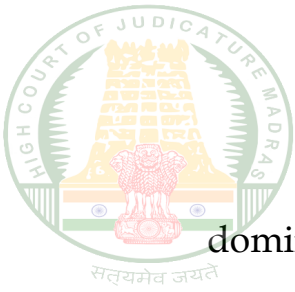
7. Mr.Abir Roy, learned counsel, made submissions in response and to the contrary. His first contention was that the Division Bench referred to the plaint in C.S.(Comm.Div.) No.109 of 2023, *People Interactive (India) Private Limited v. Alphabet Inc & Others (People Interactive)*, but not to any other plaint. Put differently, his contention was that the comparison between the plaint in this suit and that in Nasadiya is not appropriate because the comparison made by the Division Bench was only with the plaint of *People Interactive*. He countered the contention that breach of provisions of the ICA was considered by the Division Bench by referring to the contentions of the present applicants, as mentioned in the judgment of the Division Bench. With specific reference to paragraph 7(xii) and (xiv) of the judgment of the Division Bench, he pointed out that the contention of



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the applicants that the complaints in those suits lack pleadings to the effect that the introduction of the UCB Policy amounted to novation of the DDA under Section 62 of the ICA was recorded therein. He also pointed out that the applicants contended that the ingredients of Section 16 of the ICA had not been pleaded in those suits. A similar contention with regard to the lack of pleadings on alleged tortious interference was also adverted to by him.

8. By contrast, with reference to the pleadings at paragraphs 80, 86, 87 and 93 of the complaint in this suit, learned counsel submitted that the complaint contains specific pleadings on the violation of various provisions of the ICA. By referring to paragraphs 28 and 30 of the judgment of the Division Bench, learned counsel submitted that the said judgment was in the context of pleadings alleging abuse of dominant position by Google. Thus, learned counsel contended that the Division Bench concluded, in light of such pleadings, that the CCI had exclusive jurisdiction in matters relating to abuse of



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dominant market position as per the Competition Act, but not with regard to contractual issues.

9. The next contention of Mr.Abir Roy was that the plaintiff has pleaded waiver at paragraph 87 of the plaint, and that this plea was not raised, expressly or implicitly, in any of the earlier suits. By referring to the DDA, learned counsel submitted that clause 15.3 thereof enables Google to impose a service fee. By virtue of not charging a service fee for several years, learned counsel submitted that there was an implied waiver. In this connection, by referring to paragraph 306 of the order of the CCI dated 25.10.2022, learned counsel submitted that Google had admitted the belated introduction of the billing rules due to its tardiness. By further submitting that Section 62 of the ICA deals with waiver, learned counsel contended that only a civil court and not the CCI can consider the issue of waiver.



WEB COPY 10. By referring to Section 4(2) read with Explanation (a) thereto of the Competition Act, learned counsel submitted that the jurisdiction of the CCI is limited to cases of abuse of dominant position by an enterprise in the relevant market in India, as defined therein. By further referring to sub-sections 6 and 7 of Section 19 of the Competition Act, learned counsel submitted that the CCI is empowered to conduct an inquiry to determine whether an enterprise enjoys a dominant position in terms of Section 4 of the statute and whether it has abused such status. According to him, the jurisdiction exercisable by the CCI is completely different from that exercisable by a civil court. Learned counsel referred to paragraphs 25, 66 and 70 of the plaint in the suit filed by *People Interactive* and pointed out that abuse of dominant position was pleaded therein. In that factual context, learned counsel submitted that the Division Bench concluded that the suits are barred by the Competition Act.



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11. The next contention of learned counsel was that it is immaterial that the reliefs claimed in the present suit are identical to those in earlier suits. According to him, the relevant consideration is whether the cause of action is identical. In this connection, by referring to paragraph 16 of the judgment of the Hon'ble Supreme Court in *Sopan Sukhdeo Sable and others v. Assistant Charity Commissioner and Others*, (2004) 3 SCC 137, learned counsel submitted that the Supreme Court categorically held that the reliefs claimed do not constitute the cause of action. On the contrary, they constitute the entitlement, if any, on the basis of pleaded facts.

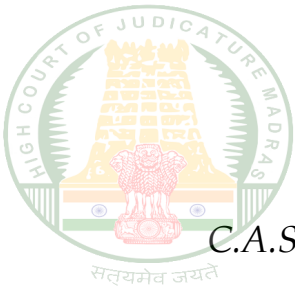
12. By further referring to the judgment of the Hon'ble Supreme Court in *Gas Authority of India Limited v. Indian Petro Chemicals Corporation Limited and Others*, (2023) 3 SCC 629, particularly paragraph 24 thereof, learned counsel submitted that the Supreme Court interfered in a contractual dispute on the basis of the unequal bargaining power of GAIL at the time of signing the contract.



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Learned counsel also referred to the judgment of the Hon'ble Supreme Court in *LIC of India and another v. Consumer Education & Research Centre and Others*, (1995) 5 SCC 482, for the proposition that the relative bargaining power of the contracting parties may be examined for the purpose of assessing whether the terms of contract are unreasonable or unfair.

13. By relying on paragraph 21 of the judgment of the Delhi High Court in *Uttrakhand Agricultural Produce Marketing Board & Others v. Competition Commission of India & Another*, 2017 SCC OnLine Delhi 10906, learned counsel submitted that recourse to multiple proceedings on the same set of facts is not barred unless the proceedings are mutually destructive. Learned counsel relied on the judgment of the Hon'ble Supreme Court in *Kalpraj Dharamshi and another v. Kotak Investment Advisors Limited and Another*, (2021) 10 SCC 401, particularly paragraphs 131 to 148 thereof, with regard to estoppel and waiver. He also relied upon the order of the CCI in



C.A.Sreeram Mushty, Chartered Accountant v. Sriram Chits Limited, Case

WEB COPY No.70 of 2013, particularly paragraph 7 thereof, for the proposition that the CCI does not have the jurisdiction to adjudicate *inter se* contractual disputes between parties.

14. Mr.Raman made submissions in rejoinder. By referring to paragraph 81 of the plaint in the Nasadiya suit, he submitted that tortious interference was pleaded therein. He also submitted that tortious interference was pleaded in the suit filed by *People Interactive*. As regards novation, by referring to paragraph 6(xvi) of the judgment of the Division Bench, learned senior counsel submitted that this aspect was considered therein even though it was not expressly pleaded in the *People Interactive* plaint. In that connection, he also referred to paragraph 80 of the plaint in *Nasadiya* as evidence that novation was pleaded therein. As regards the alleged breach of Section 27 of the ICA, learned senior counsel submitted that the contract would be rendered void if such

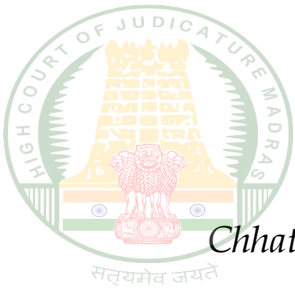


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contention were to be accepted by the Court, thereby bringing the commercial relationship to an end. By contrast, he submitted that Section 27(d) of the Competition Act even enables the CCI to modify a contract.

15. Thus, except for the plea of waiver, learned senior counsel submitted that all the other contractual pleas were considered in the Division Bench judgment. Even with regard to waiver, by referring to paragraph 87 of the plaint, learned senior counsel submitted that the plea of waiver was made after pleading that Google had provided free services for several years so as to reap the benefits of a network effect. In other words, he submitted that the plea of waiver is also built on alleged abuse of dominant position, albeit described as superior bargaining power.

16. By referring to paragraphs 25 and 26 of the judgment of the Supreme Court in *Shri Mukund Bhavan Trust and Others v. Shrimant*



Chhatrapati Udayan Raje Pratapsinh Maharaj Bhonsle and another, 2024

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SCC OnLine 3844, learned senior counsel submitted that the Supreme Court reversed the judgment of the High Court and rejected the plaint by holding that the spirit and intention of Order VII Rule 11 (d) of the CPC is for courts to nip at the bud any litigation which *ex facie* appears to be a clear abuse of process. For the same principle, by relying on paragraphs 16 and 17 of the judgment in *The Correspondent, RBANMS Educational Institution v. B.Gunashekar and another, 2025 SCC OnLine SC 793*, learned senior counsel pointed out that the Supreme Court concluded that the Court should not shut its eyes to settled principles of law and direct parties to trial in cases which are barred by law or where the cause of action is illusory. The judgment of the Supreme Court in *Charu Kishor Mehta v. Prakash Patel and Others, 2022 SCC OnLine SC 1962*, particular paragraph 18 thereof, in the context of the SARFAESI Act, was also relied on.



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17. Mr. Sajan Poovayya submitted, in rejoinder, that the waiver plea of the plaintiff should be examined by looking at the entire paragraph. By referring to paragraph 87 of the plaint, learned senior counsel pointed out that it refers to paragraph 306 of the order of the CCI. By also referring to paragraphs 311, 395 and 396 of the said CCI order, learned senior counsel submitted that even the plea of waiver, when examined in context, is entirely based on alleged abuse of dominant position. In this regard, by also referring to paragraph 65 of the plaint, he contended that it is predicated on abuse of dominant position and that paragraph 65 is almost identical to paragraph 63 of the plaint in *Nasadiya*. On the merits of the waiver plea, by referring to clauses 3.4 and 16.2 of the DDA, learned senior counsel submitted that the contract provides that even if there is waiver in one instance, it should not be construed as a waiver of the relevant provisions or rights conferred thereby subsequently.



WEB CO Discussion, Analysis and Conclusion:

18. The present application has been filed under Order VII Rule 11 (a) and (d) CPC. Therefore, the application should be adjudicated keeping this statutory context in mind. In relevant part, Order VII Rule 11 is as under:

“Rejection of Complaint - The complaint shall be rejected in the following cases:

(a) where it does not disclose a cause of action;

....

(d) where the suit appears from the statement in the complaint to be barred by any law;”

19. I first propose to examine whether the suit, on the basis of statements made in the complaint, appears to be barred by any law. The contention that the suit is barred by law is made by relying on Section 61 of the Competition Act. The said provision is set out below:



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“Exclusion of jurisdiction of civil courts

61. No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Commission or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act”

20. The contention of the applicants/6th and 7th defendants is that the matters complained of in the suit are matters which the CCI is empowered to determine under the Competition Act and, consequently, this Court – being a civil court – is barred from entertaining the same. In order to determine whether this contention is liable to be accepted, it becomes necessary to first examine the plaint and, thereafter, the relevant provisions of the Competition Act pertaining to the jurisdictional powers of the CCI.



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21. After stating that it is an ed-tech company providing online coaching for government examinations, the plaintiff has stated the following with regard to the nature, and downloading, of its apps on the Google Play Store:

“11. The Plaintiff owns and operates 736 Apps under the brand name “Testbook” on the Google Play Store for the purpose of online coaching and catering to different exams (“Plaintiff’s Apps/Apps”). The list of the Plaintiff’s Apps are filed herewith for the kind reference of this Hon’ble Court. The Plaintiff’s Apps provide subscription-based products and service offerings and there are more than 44,471 active paid subscribers for the Plaintiff’s Apps in Chennai alone.

12. The Plaintiff’s Apps and Website are accessible across India and is also used extensively by persons residing in the City of Chennai, Tamil Nadu, India. The Plaintiff’s Apps could be downloaded from “Google Play Store”, from where it had recorded 51,71,220 downloads, ever



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since its inception. The total number of customer base of Testbook all over India is nearly 4 Crore. Out of this, as accounted, there are about 10 lakh (from inception to July,2023) just in Chennai. Further, out of the above Download, the Plaintiff's Apps have 44,471 active paid subscribers in the City of Chennai."

22. The plaintiff has also dealt with Google Play Services.

Paragraphs 13 and 23, which deal with the above, are as under:

"13. The Plaintiff further humbly submits that there are presently two major Mobile Phone Operating Systems in the global market, namely, "Android (owned, operated, developed and distributed by the Defendants)" and "iOS(owned and operated by Apple Inc.)". As of 2022 the percentage of mobile phones running on the Android Operating System in India is 96% (approx.). Since a vast majority of the Plaintiff's customers use mobile phones which run Android Operating System, approximately 64% of the overall subscription revenue for the Financial



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Year 2022-2023 were generated from the Plaintiff's Apps through subscribers, who have downloaded the App from Google Play Store. It is on record that as on date, the Plaintiff's customers make payment for subscription services, being provided by the Plaintiff, through Debit Cards/Credit Cards/Net-Banking / UPI/ UPI QR Code and a very nominal and a mutually agreed fee aggregating to 0.4% is paid to the System Providers/Payment Processors (viz., Razorpay, PayTM, PayU, Juspay) offering the above Payment Methods.

23. The Plaintiff humbly states that it is common knowledge that any mobile phone that runs on Android Operating System would have "Google Play Services" for its operations and will by extension, have "Google Play Store" pre-installed. As stated above, Android mobile phones constitute a majority of the total devices used not only in India but across the Globe. Google Play Store is, therefore, an unavoidable and indispensable trading partner for an App Developer, particularly, in India. The fact that a mobile



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application is one of the most essential business models for a business, more specifically an e-commerce business, can neither be denied nor be disputed."

In substance, the two paragraphs extracted above refer to Google's dominant position by virtue of approximately 96% of mobile phones running on the Android operating system in India and, consequently, having the Google Play Store pre-installed on the devices.

23. In paragraph 26, the plaintiff has set out a few paragraphs of the order dated 25.10.2022 of the CCI. Thereafter, in paragraph 27, it is stated that the proceedings before the CCI are not essential to the present suit. The decision taken by Google after the above mentioned order of the CCI are dealt with in the subsequent paragraphs. After setting out relevant clauses from the Service-Seller Agreement at paragraph 39, the plaintiff has pleaded as under in paragraph 40 with regard to alleged novation:



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“40. Based on the above definition of Service fee appearing in the Service-Seller Agreement, it can be clearly seen that the service fees are just for payment processing purpose. However, Google has surreptitiously altered the scope and ambit of service fee and stated in the amended Payments Policy of April 2023 and as clarified in one of its FAQs (as discussed supra) that “The service fee supports our investments across Android and Google Play, reflects the value provided by Android and Google Play, enables us to deliver an affordable and innovative user experience, helps developers reach users and build sustainable businesses, and keeps the platform safe and secure”. This on the very face of it is without any mutual consent, amounts to novation by changing the substratum of the contract unilaterally, is arbitrary and unconscionable. Google does all this by being conscious of the fact that it can unduly influence Plaintiff to accept these one-sided terms since Google is an indispensable trading partner.”



WEB COPY 24. Thereafter, by asserting that the charging of 4% or more towards payment processing is both unconscionable and an abuse of the superior bargaining position, the plaintiff has alleged special damage, tortious interference, undue influence, novation and waiver in paragraphs 82 to 87, which are set out below:

“83. The said conduct of Google is causing 'special damage' to the Plaintiff, which is more than mere nominal damage where Google is effectively asking the Plaintiff to make its business unviable. That such commission would cause economic duress to the Plaintiff. The said conduct of Google is a direct interference with the business of the Plaintiff and the same amounts to tortious interference.

84. Apart from the above, the Defendants had introduced, among other things, Clause 15.3 in its DDA, which stipulates:

“15.3 If You do not agree with the modifications to the Agreement, You may terminate Your use of Google



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Play, which will be Your sole and exclusive remedy. You agree that Your continued use of Google Play constitutes your agreement to the modified terms of this Agreement."

85. As alluded hereinabove, the Defendants continue to adopt "Take-it or Leave-it" approach, which would be amply clear from a plain reading of the above Clause, without any elaboration. As such, the said Clause and the Definition of "Authorized Provider" along with all payment Policies, Policies relating Service Fee and also the Service-Seller Agreement, deserves to be declared as Illegal and Unenforceable. The Plaintiff also apprehends that the Defendants would impose its will and dominant position to delist the Plaintiff's Apps, by inducing the Plaintiff to terminate the DDA, as could be gathered from the terms of the said DDA. Such an approach in entirety is arbitrary, unconscionable and against the vires of Section 16 of the Indian Contract Act, 1872, wherein Google operates as an indispensable trading partner.



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86. Moreover, Google unilaterally decides the terms of the Agreement between the parties by putting the App Developers like the Plaintiff under "duress". App developers have no alternative but to deal with the Defendants, which hold an unfair bargaining position. The entire DDA and corresponding agreements have been offered on a "**Take It or Leave It**" proposition. App Developers have no meaningful choice but to give assent to the contract imposed by the Defendants, the terms of which are clearly unfair, unreasonable and unconscionable. Although the Defendants themselves defined 'services' as payment processing, they subsequently alter the understanding of 'services' and make the payment of service fees mandatory and making App Developers pay an unconscionable amount of 15 to 30%, effectively **resulting in novation of the contract**. Google has changed the substratum of the entire agreement unilaterally. It is essential to note that any app developer in India, who wishes to be enlisted in the Google Play Store is required (without even a pretence of choice, negotiation or



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mutuality) to accept all the conditions set out in the DDA and the only remedy which an app developer has is to terminate the contract (Clause 15.3 of the DDA), which is impossible as Google is an indispensable trading partner having a market presence of over 96%. Thus, clause 15.3 of the DDA (which provides that in case an app Developer does not agree with any modification to the Agreement, the sole remedy for the App developer is to terminate their usage of Play Store) is in stark violation of Section 62 of the Indian Contract Act.

87. It is pertinent to note that an app developer pays 25 USD to get listed on the Play Store. Google's business model since inception has been such. To bring facts on record before the court, it is not the case that the Plaintiff want to avail all the services of Play Store by just paying 25 USD fees. The business structure of Google is such that on the top it appears to be simple and fair, however, in practice its intertwined and a hoodwink. A majority of the revenue generated by defendants is through advertisements and for that



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Google offers majority of its services for free and churn out data secretly. That's been the business model of Google since inception, and it is not the case that Google is doing any charity. The Plaintiff pays a substantial amount of advertisement expenses on a monthly basis to Google to effectively host and distribute their apps. In the last three financial years, Plaintiff has paid more than 33 crore rupees to Google on ad-spend. As also noticed by the Hon'ble CCI in Paragraph 306 of the order, **Google by offering the Play Store, ostensibly for free, built the network effect.** It didn't enforce the service fee for long to augment the network. This also has a self-serving motive as found by the Hon'ble CCI. When all the app developers and users were part of Google's network it is now asking for a high service fee which is devoid of any commercial logic. The Plaintiff is a start-up and is loss-making who is operating its business by taking money from investors. If Google continues to take a cut of 26% in the revenue which almost equates to 15.5 Crore Rupees for the preceding financial

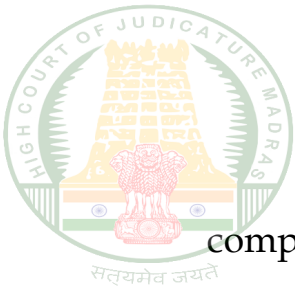


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year 2022-2023, the Plaintiff will be faced with severe financial distress. This hits at the very core of unconscionability in contractual terms wherein Google knows that it is an indispensable trading partner. Furthermore, by not enforcing the service fees for long, although it existed, effectively Google has waived its right to enforce it."

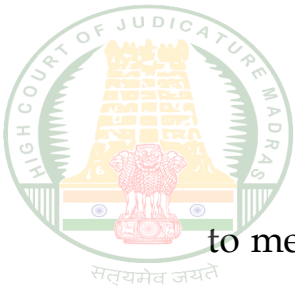
25. In the backdrop of these pleadings, the contention of the applicants - on the basis of the judgment of the Division Bench that the plaintiff does not deserve to be treated differently and that this plaint is also liable to be rejected in terms of the judgment of the Division Bench - falls for consideration first. From paragraph 16.1 of the judgment of the Division Bench, it is evident that the plaint in C.S.(Comm.Div) No.109 of 2023, which was filed by *People Interactive*, was used as the basis to determine whether the plaints are liable to be rejected. The agreed position, however, is that all the plaints under consideration by the Division Bench, including the plaint filed by *Nasadiya*, were rejected. The applicants have also submitted a



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comparative chart to substantiate the contention that there is more than substantial similarity between the plaint in this case and the plaint in the suit filed by *Nasadiya*.

26. From paragraph 6 (xvi) and (xii) of the judgment of the Division Bench, it is noticeable that some of the parties had pleaded novation and restraint of trade. Likewise, it is noticeable from paragraph 7 (xii) and (xxiv) of the judgment of the Division Bench that the applicants' contentions that the allegations of breach of Sections 16, 62 and other provisions of the ICA were bereft of pleadings were recorded. A similar contention with regard to alleged lack of pleadings on tortious interference was also recorded in the judgment of the Division Bench. In that factual context, the Division Bench concluded that the grievance raised by the plaintiffs therein could be dealt with by the CCI under the Competition Act. The Division Bench also took note of Sections 61 and 62 of the Competition Act and concluded that Section 61 cannot be interpreted



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to mean that an individual can institute proceedings in a commercial court alleging abuse of dominant position by disregarding Section 61.

27. While the Division Bench noticed contentions regarding breach of Sections 16 and 27 of the ICA, it is common ground that waiver was not raised in any of the earlier suits. In paragraph 87 of the plaint in this suit, the plaintiff has raised waiver on account of Google not charging service fees for a considerable number of years. Especially in the context of Clause 16.2 of the DDA, the sustainability of the waiver argument is *prima facie*, at a minimum, debatable and contentious. It should also be noticed that the plea of waiver was raised after pleading that no service fee was charged for many years so as to create a network effect. At this juncture, however, the merits of the assertions are not material. The only question that warrants decision is whether the suit is barred on the basis of statements made in the plaint. This question, in my view, cannot be decided on the basis of the judgment of the Division Bench, but must be determined



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with reference to the specific pleadings in this plaint and the relevant provisions of the Competition Act. I deal with the latter next.

28. The Competition Act replaced the Monopolies and Restrictive Trade Practices Act, 1969. The statute was later amended by Act 39 of 2007. Chapter II of the statute provides a clear indication of the scope of the statute. Section 3 thereof prohibits enterprises or associations of enterprises, or persons or associations of persons from entering into agreements which cause or are likely to cause an appreciable adverse effect on competition within India. Section 4 prohibits the abuse of dominant position, as defined therein. Sections 5 and 6 deal with the regulation of combinations.

29. The power of the CCI in relation to the above mentioned matters is evident from Chapter IV. Section 18, which deals with duties and functions of the Commission, prescribes as under:



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"Duties and functions of Commission

18. Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India:"

Section 19 enables the Commission to inquire into any alleged contravention of sub-section 1 of Section 3 or sub-section 1 of Section 4, either on its own motion, or on receipt of information from any person, Central Government, state governments or statutory authorities. Section 20 empowers the Commission to inquire into combinations.

30. On the facts of this case, it is evident that combinations are not relevant. The application of the Competition Act in the factual context of this case would be confined to Sections 3 and 4 read with Section 19. In relevant part, Section 3 is as under:



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“Anti-competitive agreements

3. (1) *No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.*

(2) *Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.*

(3) *Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-*

(a) directly or indirectly determines



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purchase or sale prices;

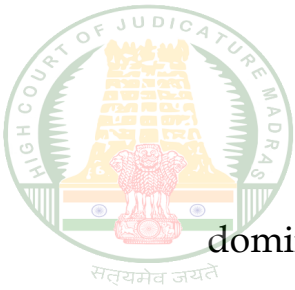
(b) limits or controls production, supply, markets, technical development, investment or provision of services;s

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:"

As is evident from the text of the extract from Section 3, the critical question would be whether the agreement that forms the subject of proceedings before the CCI causes or is likely to cause an appreciable adverse effect on competition as defined in sub-section 3 of Section 3.

31. Section 4, which deals with prohibition of abuse of



dominant position reads, in relevant part, as under:

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“Abuse of dominant position

4. [(1) No enterprise or group shall abuse its dominant position.]

(2) There shall be an abuse of dominant position [under sub-section (1), if an enterprise or a group]. –

(a) directly or indirectly, imposes unfair or discriminatory –

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

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

(i) production of goods or provision of



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services or market therefor; or

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

(c) indulges in practice or practices resulting in denial of market access [in any manner]; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation. – For the purposes of this section, the expression –

(a) “dominant position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to –

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

(ii) affect its competitors or consumers or



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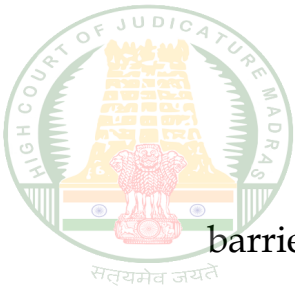


the relevant market in its favour.

(b) “predatory price” means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

[(c) “group” shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5. “

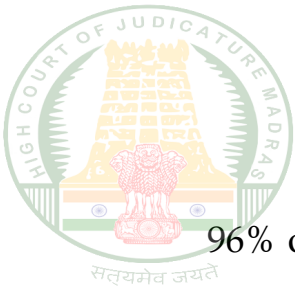
32. As stated earlier, if a case were to fall within the scope of Section 3 or 4, the CCI is empowered to conduct an inquiry under Section 19 to ascertain whether the agreement is anti-competitive or whether an enterprise has abused its dominant position. It is also evident that the determination under Section 19 is on the basis of an inquiry entailing *inter alia* consideration of the market share, size and resources of the enterprise, the size and importance of competitors, dependence of consumers on the enterprise, whether such enterprise is a monopoly or is otherwise in a dominant position, and entry



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barriers. The entire exercise is, thus, required to be undertaken by taking into consideration the position of the enterprise vis-a-vis the relevant market as a whole, and not by examining the position of the enterprise vis-a-vis the counter party to a particular contract(s). By contrast, whether the plaintiff before a civil court alleges abuse of dominant position or superior bargaining power, the specific words not being dispositive, the jurisdiction of the civil court would be restricted to the contract between the parties to the dispute. The proceedings would, therefore, be *in personam* and the adjudication would be confined to the parties before the Court. Put differently, the scope of inquiry would be limited to whether the defendant is in a dominant or unequal bargaining position vis-a-vis the plaintiff and not whether the defendant is in a dominant position vis-a-vis the relevant market.

33. In the specific context of the service fee charged by Google either under GPBS or UCB, especially in view of the assertion that

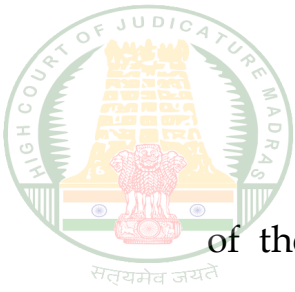


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96% of mobile phones in India run on the Android operating system

and have Google Play Store pre-installed on such devices, it certainly

would have been possible for the plaintiff to approach the CCI seeking relief for alleged violation of Sections 3 and 4. The agreed factual position is that the plaintiff has not adopted this course of action. If such complaint had been made by the plaintiff, the CCI would have conducted an inquiry under Section 19. The focus of inquiry would have been on whether the agreement causes or is likely to cause an appreciable adverse effect on competition and whether Google is in a dominant position and, if so, whether such dominant position has been abused. For such purpose, the determination as to whether Google is in a dominant position could only be undertaken by the CCI in the context of the relevant market, i.e. by considering Google's position relative to other players providing similar services in the market, particularly in relation to the hosting of apps for use on mobile phones. In effect, the proceedings before the CCI are proceedings *in rem* and the decisions



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of the CCI would therefore be applicable to and binding on all stakeholders. Pursuant to such inquiry, the CCI is also empowered to grant remedies under Section 27, including interim orders under Section 33.

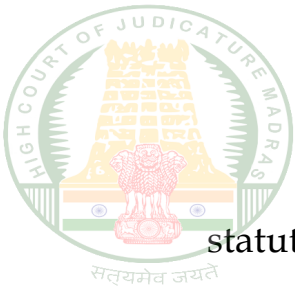
34. Hence, notwithstanding the conclusion that the plaintiff could have approached the CCI seeking relief, the critical issue is not whether the plaintiff could have approached the CCI, but whether the plaintiff is barred under Section 61 of the Competition Act from approaching this Court either because of the availability of the option of approaching the CCI or for any other reason. It is pertinent to mention, in this regard, that a civil court provides private law remedies that are typically non-discretionary with a few exceptions such as interlocutory remedies. Ouster of jurisdiction is, therefore, not inferred lightly as held in *Dhulabhai v. The State of Madhya Pradesh and another*, AIR 1969 SC 78.



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35. As noticed earlier, the plaintiff has raised several pleas relating to the alleged violation of provisions of the ICA. By way of reiteration, the plaintiff has alleged that clause 15.3 of the DDA is in stark violation of Section 62 of the ICA; that Google's conduct is causing special damage; that Google has imposed its will and is inducing termination thereby violating Section 16 of the Contract Act; and that Google has waived its right to charge a service fee by not doing so for a considerable period of time. Although the plaintiff makes reference to the superior bargaining position of Google, all these assertions are in respect of the bilateral contract(s) between the plaintiff and Google.

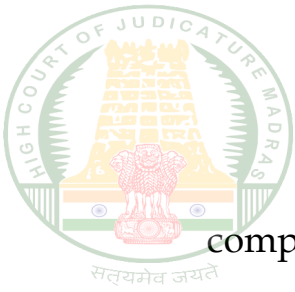
36. In view of the nature of jurisdiction exercised by a civil court, in contrast to the *in rem* proceedings before the CCI, in the present suit, the plaintiff has only requested for relief in relation to the specific bilateral contract(s) between the parties to the suit. Such *in personam* disputes cannot be adjudicated by the CCI, which is



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statutorily empowered to examine whether an enterprise has abused its dominant position in the relevant market and not whether one party to a contract is in a dominant position vis-a-vis the counter party and whether, in that context, the relevant contract was entered into without the free consent of the aggrieved counter party or is otherwise in violation of public policy because it is unconscionable on account of the abuse of the unfair bargaining power. The above discussion leads to the conclusion that the present suit is not barred by Section 61 of the Competition Act.

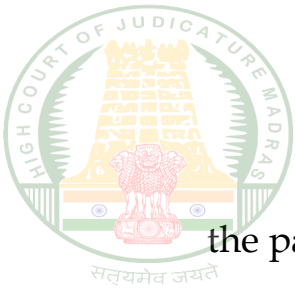
37. In *inter alia* paragraphs 45 to 51 and 66 of the plaint, the plaintiff has alleged that the PSS Act has been violated by the defendants. The plaintiff also asserts that the defendants have violated RBI guidelines on settlement and escrow account management. The applicants herein state that the Reserve Bank of India (the RBI) is the sole authority empowered to deal with violations of the PSS Act. It is further stated that the PSS Act is a



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complete code and that only the RBI is empowered by this statute to issue directions or lodge a written complaint under Section 28 thereof. Therefore, it is contended that the suit is implicitly barred by the PSS Act.

38. Perusal of the PSS Act reveals that it does not contain any provision that expressly bars the exercise of jurisdiction by a civil court. Section 28 thereof deals with the lodging of criminal complaints for offences under the statute, but not with civil disputes. While Section 24 thereof provides for a mechanism for settlement of disputes relating to the operation of the payment system by a panel of system participants and for reference of such dispute to the RBI if parties are not satisfied with the panel's decision, the statute does not prescribe the powers of the panel or even of the RBI while dealing with such disputes. With reference to the facts of this case, it does not appear that either the panel or the RBI can determine the dispute relating to the contractual terms being allegedly in violation of the PSS Act and, therefore, invalid. Additionally, without doubt, neither



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the panel nor the RBI can adjudicate the primary grievance regarding alleged breach of provisions of the ICA and alleged tortious interference. In the absence of any explicit or implicit indication that the dispute settlement mechanism in respect of civil disputes is comprehensive, as per settled principles relating to the ouster of a civil court's jurisdiction, I conclude that the plaint is not liable to be rejected as barred under the PSS Act.

39. By citing the exclusive jurisdiction clause of the DDA, the applicants contended that this is an additional reason to reject the plaint. The plaintiff stated in response that a plaint cannot be rejected on this basis when the cause of action has arisen partly within jurisdiction. Under Order VII Rule 11(d) of the CPC, a plaint can only be rejected, if barred by any law. An exclusive jurisdiction clause in a private contract does not qualify as law. For the same reason, an application for rejection of plaint under Order VII Rule 11(d) cannot be filed on the basis of an arbitration clause. In view of Sections 8 and 45 of the Arbitration and Conciliation Act, 1996, an application for



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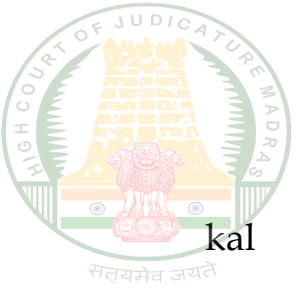
reference of the dispute to arbitration may, however, be filed. Hence, the plaintiff cannot be rejected on this ground.

40. The application was also filed on the basis that the plaintiff does not disclose a cause of action. While deciding whether a plaintiff discloses a cause of action, it is unnecessary to examine whether the plaintiff would be in a position to establish all elements of the cause of action so as to obtain the relief sought in the suit. It is sufficient if the averments in the plaintiff disclose a cause of action and the sustainability thereof is not germane at this stage. The relevant averments in the plaintiff have been set out fairly extensively earlier. On perusal thereof, irrespective of the merits of the assertions, on which no opinion is being expressed at this juncture, it certainly cannot be concluded that no cause of action is disclosed in the plaintiff.

41. Therefore, the application to reject the plaintiff is dismissed without any order as to costs.

11.06.2025

Index : Yes/No
Internet : Yes/No
Neutral Citation : Yes/ No



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SENTHILKUMAR RAMAMOORTHY J.

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Pre-delivery order made in

A.No.4193 of 2023

in

C.S.(Comm Div) No.186 of 2023

11.06.2025

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