



4th DSNLU

NATIONAL MOOT COURT COMPETITION

February 23-25, 2018

in association with Competition Commission of
India.

MOOT PROPOSITION

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1. Avalon is a republic with 29 states and, New Town as its capital. New Town is one of the biggest cities in Asia and inhabits almost 20 Million people from diverse cultural and socio-economic backgrounds.
2. The laws of Avalon are *in pari materia* with the laws of India, with the limited exceptions created in this problem. Avalon courts often refer to decisions of courts, tribunals, and commissions in India, which have high persuasive value in Avalon.
3. In 1991, the Government of Avalon opened its market and, in order to address any emergent issues, Avalon enacted its competition law, the Avalon Competition Act (the “**Competition Act**”), in 2002. However, due to various policy considerations and judicial challenges, the Competition Act was brought into force in phases, with first tranche of substantive provisions coming into force on 20 May 2009. The Competition Act replaced the Avalon Monopolies and Restrictive Trade Practices Act, 1969 (“**AMRTP Act**”).
4. The Competition Commission of Avalon (the “**CCA**”) regards the decisions of the Competition Commission of India as well as other decisions of Indian courts on the Indian Competition Act, 2002, of high persuasive value. The CCA also gives due regard to the competition regulators of the European Union and the United States, and relies on precedent from these jurisdictions as well.
5. New Town, the capital of Avalon, is a culturally rich city with people from diverse economic and social backgrounds. Despite there being economic disparity, the people of New Town are considered to have high disposable income. Festive season in New Town is a treat for the eyes and palate, during which everyone indulges excessively in gifting, dining and exchanging sweets. With the passage of time and the due to the impact of emerging modern lifestyle, the conventional sweets are increasingly being

replaced with pastries, cakes and other confectionaries. However, a large population of New Town continues to buy and use traditional sweets.

6. In view of the variety of options available for customers, Mr. Gaurav Sharma, an entrepreneur decided to explore the opportunity of making all the bakeries and home bakers accessible to customers on a single platform, and thus, a new online venture by the name of ZapApp was established.
7. ZapApp was conceptualized as a mobile based application to serve as an information platform for the residents of New Town regarding small bakeries, patisseries, and home bakers which had come up in New Town. With the increasing popularity of the Mobile Application, ZapApp started providing a listing and marketing platform for small bakeries and home bakers to enable them to compete with the established bakeries. It also entered into an agreement with Zoom Service a startup that provides door to door delivery for delivering the orders placed through its mobile application. ZapApp charged a nominal commission from the bakery /home baker on every order placed through it. In a very short span of time, ZapApp's popularity sky rocketed and people started relying on the same for their day to day needs. Simultaneously, as a result of being listed and promoted on ZapApp, small bakeries and home bakers' businesses began to flourish and their presence and acceptance in the market increased.
8. Swaggy, another food listing application entered the market of New Town with a business model identical to that of ZapApp. Swaggy entered the market with huge funding from Goldman, the world's biggest venture capitalist, and started spending vigorously in marketing and expansion. However, a survey conducted by the popular lifestyle magazine, Go Gourmet, revealed that even three months after the commercial launch of Swaggy, there was only a marginal decline in the usage of ZapApp and it continued to be the preferred choice of customers in this space. The survey also revealed that there has been a sharp increase in the sales made by home bakers and small patisseries as a result of being listed on ZapApp and this has impacted the established bakeries of New Town.

9. Being conscious of the increasing presence of smaller players in the market and keeping in mind the fact that ZapApp had marketed itself as a ‘*doorway to desserts*’, established bakeries, i.e. Apple Delights, BlueBerry, and Candy Corner, approached ZapApp for getting listed on its platform with a view to maintain their market position. However, despite being listed on ZapApp for six months, Apple Delights, BlueBerry, and Candy Corner continued to witness a dip in their sales and market shares. ZapApp, which had to put greater resources for lesser returns (by way of commission) in the promotion of Apple Delights, BlueBerry, and Candy Corner, decided to increase the commission charged from these three companies as compared to the smaller bakeries and home bakers.
10. Due to this unfair treatment, Apple Delights, the oldest and the most popular bakery of New Town decided to delist itself from ZapApp and set up its own online mobile application called Appilicious which was launched at a big event preceding the ‘*delicious dessert fair*’. Equally aggrieved by the unfair treatment being meted out to them, within 10 days of launch of Appilicious, BlueBerry and Candy Corner also decided to delist them from the ZapApp and approached Apple Delights for getting listed on Appilicious. Appilicious had the same business model as ZapApp and also listed the home bakers and patisseries on the mobile platform. At the time of its launch, the products of Appilicious were available at a 40% discount as compared to the rates of other sellers like BlueBerry and Candy Corner which were listed on its app.
11. Reacting to the situation of big brands leaving its platform, ZapApp decided to waive off the commission charged from the parties still listed on its platform. Additionally, ZapApp approached the CCA and filed an information under Section 19(1)(a) of the Competition Act before the CCA alleging cartelization between Apple Delights, BlueBerry, and Candy Corner. The CCA found that there was a *prima facie* case of violation of Section 3 of the Competition Act, and directed the Director General

(“DG”) to investigate into the alleged cartelization between Apple Delights, BlueBerry, and Candy Corner (Case No.1 of 2018).

12. In response to this Information filed by ZapApp, Apple Delights filed an Information alleging that ZapApp had created barriers to entry for Appilicious into the online market for promotion and delivery of confectionary products in New Town. After having found a *prima facie* case against ZapApp, the CCA directed the DG to investigate the matter (Case No. 2 of 2018).

13. Even after being listed on Appilicious for three months, BlueBerry, and Candy Corner continued to face decline in sales. The sales made by BlueBerry and Candy Corner through Appilicious were also lower than that of the products of Apple Delights. BlueBerry and Candy Corner, through their letter dated 13 September 2017, approached Apple Delights raising the concern over different prices of similar products on Appilicious. Through its reply dated 17 September 2017, Apple Delights informed BlueBerry and Candy Corner that it had made significant investment in setting up Appilicious, which had to be recovered. The letter also stated that it was the proprietor of Appilicious and the terms and conditions of listing were at its discretion. Aggrieved by this conduct, BlueBerry and Candy Corner filed an Information against Apple Delights under Section 19(1)(a) of the Competition Act before the CCA alleging that it had misused its dominant position in the market of production and sale of confectionary products in New Town, to enter the online market of promotion and delivery of confectionary or sweet products in New Town.

14. The CCA reviewed the information filed by BlueBerry and Candy Corner respectively and found that there was a *prima facie* case of violation of Section 4 of the Competition Act in both the cases. Accordingly, the CCA directed the DG to investigate into these matters together (Case No. 3 & 4 of 2018). Due to the commonality of the parties involved, the CCA also directed that Case No. 1 of 2018, 2 of 2018, and 3 & 4 of 2018 be clubbed together and a common investigation report be prepared.

15. The DG sought information and explanations from Apple Delights, BlueBerry, Candy Corner, and ZapApp, as well as their competitors regarding the allegations against them. The investigation of the DG revealed that Apple Delights, BlueBerry and Candy Corner had written a common letter to the Food Safety and Standardization Authority of Avalon (“FSSAA”) stating that a policy should be implemented to regulate ZapApp and other players in this space to check and ensure that the quality and safety standards are met by all listed on their platforms including small bakeries and home bakers. A copy of said letter was attached to the DG report as *Annexure A*. The investigation of the DG also revealed that the representatives of Apple Delights, BlueBerry and Candy Corner had met at the “delicious dessert fair” on 10 – 12 May 2017.
16. The investigation also revealed that Apple Delights, BlueBerry and Candy Corner had a common supplier of raw materials. On being summoned by the DG for deposition of statement, the representative of the common supplier revealed that in March 2008, Apple Delights, BlueBerry and Candy Corner had common storage and warehouse facilities and at times had arrangements regarding exclusive production of specific cakes. For example, during the Christmas season in 2008, Apple Delights was the only one out of the three selling plum cakes; BlueBerry was the only one selling pumpkin pastries; and Candy Corner was the only one selling carrot cakes.
17. In response to the Notice of the DG, Apple Delights, BlueBerry and Candy Corner also submitted that the common warehouse and storage facility were discontinued in January 2009. Further, there are no linkages between them and, the arrangement to supply specific cakes was co-incidental and a one off instance. In any event, these instances are from the period before the commencement of the Competition Act and are not the subject matter of present dispute. Further, the AMRTP Commission had found no restrictive or unfair practice in relation to the exclusive selling of confectionary in the relevant period. They submitted that since the coming into force of the Competition Act, their association was limited to participating in common food

festivals and exhibitions and sometimes to raise common grievances / issues with regulators and government authorities. The three Bakeries also cited the letter written to FSSAA as an example of collective effort to address a common concern.

18. The DG analysed the evidence and concluded that the prevailing circumstances indicated a meeting of minds between Apple Delights, BlueBerry and Candy Corner and that they acted in concert to boycott ZapApp. The DG also noted that such a conduct amounts to a violation of Section 3 of the Competition Act.
19. In relation to the allegation against ZappApp, the DG also found that in addition to implementing a zero commission policy, ZapApp also started paying much higher salaries to the delivery staff of Zoom. The DG noted that ZapApp imposed no restrictions upon the parties on its platform, from getting them listed on other similar portals. However, if any of the bakeries / bakers were listed on competing platforms, ZapApp would start charging commission for sales made through its platform. ZapApp explained that this was necessary to ensure availability of supplies from the small bakeries and home bakers. It explained that since the set up for these was much smaller and there was very low inventory, having various channels of promotion would lead to situations in which orders from ZapApp will have to be cancelled due to unavailability of the products. This would lead to lower customer satisfaction and the risk of customers considering ZapApp to be unreliable.
20. The DG also noted that soon after Apple Delights delisted itself from ZapApp's platform and set up its own mobile application, the ratings of Apple Delights on ZapApp's information portal suspiciously declined and even the information page, which was an unpaid general feature of ZapApp, was not updated for Apple Delights leading to incorrect and outdated information being available to customers.
21. ZapApp denied that there was any question of its dominance as it was operating in an emerging market with no barriers to entry. It stated that it had only implemented the scheme of no commission to benefit the small players. It also stated that ZapApp only earns from the advertisement revenues on its application and is already in plans of diversifying into the online payment systems and e-wallets. ZapApp also associated

itself with quality and explained that it listed the Bakeries after proper and thorough verification. Further, the ratings on its Application are based in an algorithm with minimal human involvement. Further, the ratings are a function of number of visitors browsing the information about a particular bakery and the number of orders placed.

22. The DG agreed with the explanation provided by ZapApp and held that there was no abuse by ZapApp as it did not compete with Apple Delights at horizontal level and that Apple Delights was free to implement policies and practices to enter the Mobile Application segment.
23. The DG rejected the explanation provided by Apple Delights that, on its online portal Appilicious, it was free to charge its products at the price it desires as long as it is not predatory or otherwise unfair. The DG in its Report recorded the findings of the Go Gourmet survey that found that in the segment of Bakery / Patisserie, Apple Delights enjoyed an enviable market share of 58% with the closest competitors i.e. BlueBerry and Candy Corner with market share of 16% and 14% respectively. Go Gourmet had also captured the reaction of the founder of Apple Delights, Mr. Chetan Mehta on the findings of the survey where he had said:

“The survey has only revealed what was obvious; in fact, the market share could only be higher than what is suggested in the survey. I would like to thank the people of New Town for showering their love and helping us remain at the Top. We at Apple Delights have believed in quality and service, we were the first entrepreneurs of New Town to introduce the taste of quality confectionary to its people. We only compete with us as we enjoy serving the people of New Town.”

24. In light of the above statement by Mr. Mehta, the DG rejected the submission of Apple Delights that the reason to sell its products through its Mobile Application was to consolidate and retain its market position. The DG observed that the conduct of

Apple Delights in deciding the arbitrary terms of listing amounted to a violation of Section 4 of the Competition Act.

25. The DG submitted its Report to the CCA with its conclusions. The CCA served the copy of the Investigation Report to the Parties inviting objections to the DG's Report. ZapApp submitted its objections justifying the findings of the DG in relation to cartelization among Apple Delights, BlueBerry and Candy Corner and that there were no barriers created by it for Appilicious to enter the market. Apple Delights opposed the findings of the DG on all counts; it submitted that the DG has erroneously concluded that ZapApp was not creating any hurdles for it to enter the market. It also challenged the finding of violation of Section 3 of the Competition Act on various grounds including overreach by the DG in collecting evidence from the period before the enactment of the Competition Act.

26. Apple Delights also assailed the findings of the DG regarding the misuse of alleged dominant position and implementing arbitrary conditions of listing for BlueBerry and Candy Corner. BlueBerry and Candy Corner on the other hand agreed with the conclusion of the DG that Apple Delights was misusing its dominant position. However, denied the finding of the DG regarding the violation of the Competition Act.

27. The CCA decided to hear all the four cases together and invited Parties to submit oral arguments.

NOTE:

1. All the members of an alleged cartel are made pro-forma Respondents in proceedings before the CCA. For the purposes of this Proposition, the Counsel for Apple Delights will argue in the case on behalf of BlueBerry and Candy Corner as well.
2. For the purposes of this Proposition, the Counsels for ZapApp will also represent BlueBerry and Candy Corner in their case against Appilicious and Apple Delights.

3. Counsels representing both sides are encouraged to explore additional arguments in addition to the issues that have been specifically identified in the Problem.

ANNEXURES

BY SPEED POST

Ms. Usha Kapoor

10 February 2017

President
Food Safety and Standards Authority of Avalon
FDA Complex
New Town, 112345, Avalon

Subject: Regulation of online platforms engaged in marketing and delivery of bakery products

Dear Ms. Kapoor,

We are writing to you as owners and sole proprietors of our bakeries namely Apple Delights, Candy Corner, and Blueberry respectively. All three bakeries listed above are in full compliance with all rules and policies laid down by FSSAA to ensure the safety and quality of food products being supplied to customers across New Town. The compliance certificate numbers are ABC123, DEF234, and GHI567 respectively.

As you may be aware, in the recent past, a new concept has come up in relation to food ordering and delivery. ZapApp, a company recently established, is working on the model of promoting and marketing small bakeries and home bakers on an online mobile application, and even provides doorstep deliveries to customers for the orders placed on the mobile application.

This is to bring to your notice that through discussions with a few of our ex-employees who have now set up small bakeries, we understand that ZapApp has no safety and standard check protocols before listing these bakeries and home bakers on its mobile platform. Further, there are no mandatory site checks to ensure hygienic working conditions at these small bakeries and premises of home bakers.

As you would understand and fully appreciate, safety, health, and hygiene are the pillars on which any food business can survive. Keeping this ideology in mind, FSSAA has laid down very strict safety and standard policies, all of which need to be complied with by all

restaurants in New Town. At present these policies do not apply to small set up's (with less than 7 employees), and as such most of the small bakeries and home bakers are not bound by these.

Separately, due to the new business model based on modern technology adopted by ZapApp, there is no food safety and standards policy governing the operations of portals like ZapApp. While we are fully cognizant of the fact that ZapApp does not prepare any food item, the fact that it is instrumental in delivering food to the customers should be sufficient to cover it under the ambit of policies applicable to restaurants.

As a result of there being no policies governing small bakeries and home bakers, and similarly none for ZapApp, in essence, customers are at a great risk of being supplied food products not fit for consumption. In fact in a recent issue that was brought to our notice, stale cakes were received by a customer thorough ZapApp, from one of the small bakeries in our neighborhood. Such incidents cast serious aspersions on all bakeries and, customers start considering the option of traditional sweet shops thereby harming our businesses. Further, since ZapApp is a convenient option as compared to our bakeries, customers have started preferring to order from ZapApp without realizing the health issues that they are being exposed to.

In light of the abovementioned reasons and keeping in mind the health and safety of the people of New Town, you are requested to look into the matter and frame policies and guidelines to be adhered to by mobile platforms such as ZapApp.

In light of the above, we may be constrained to disassociate ourselves from any such unregulated platform.

Kindly acknowledge receipt of this letter, and please let us know if we can be of any assistance in the matter discussed above.

Thanking You,
Yours Sincerely

Chetan Mehta
Owner: Apple Delight

Dev Dixit
Owner: Candy Corner

Noopur Narain
Owner: Blueberry