
(1998) 01 DEL CK 0045

In the Delhi High Court

Case No : C.W. 1564/97 and C.M. 2807/97

Brindavan Agro Industries Ltd. and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 29-01-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)

Citation : (1998) 2 AD 377 : (1998) 71 DLT 622

Hon'ble Judges : R.C. Lahoti, J;J.B. Goel, J

Bench : Division Bench

Advocate : Nariman, Mr. Ravinder Narain, Mr. Aditya Narain and Mr. Sajan Narain, for the Appellant; Mr. Rakesh Tikku and Mr. A.K.Wali, for the Respondent

Judgement

J.B. Goel, J.—By this writ petition under Article 226 of the Constitution of India the petitioners have challenged the constitutional validity of Section 33(1) of the Monopolies and Restrictive Trade Practices Act, 1969 (for short the Act) as violative of Articles 14 and 19(1)(g) of the Constitution; sought for quashing the order dated 21.2.1997 (Annexure E) of the Monopolies and Restrictive Trade Practices Commission (for short, the Commission) directing inquiry and the notice of inquiry (Annexure F) sent to the petitioners and also sought for quashing similar notices sent to other bottlers with whom petitioner No.3 has entered into similar agreements, list of which has been given in Annexure G.

2. Briefly the facts are that M/s. Coca Cola company, (Petitioner No.3) is a corporation, incorporated in the United States of America with principal office at City of Atlanta, State of Georgia, USA, and is engaged in the manufacture and sale of certain concentrates, beverage basis and syrups used in the preparation of certain nonalcoholic beverages such as Coca Cola, Fanta, Sprite, Gold Spot, Limca, Thums Up etc. which are offered for sale in bottles or other containers, under various Trade Marks for which it has the exclusive right to prepare, package and to manufacture and sell the same in India.

3. Petitioner No.3 has entered into agreement dated 9.8.1993 (Annexure B)

called Bottler's Agreement with petitioner no.1, an Indian Company, called "the Bottler" granting license to the latter authorising it to prepare and package the beverages in authorised containers and to distribute and sell the same under its trade marks only in the specified territory, i.e. in the districts of Agra, Mathura and Aligarh in the State of U.P. on the various terms and conditions mentioned therein. The agreement inter alias contains the following terms and conditions to which objection before the Commission is that these are restrictive trade practices falling in Clauses (g), (a) and (c) of SubSection (1) of Section 33 of the Act:-

(1) The Coca Cola company hereby authorises the Bottler, and the Bottler undertakes, subject to the terms and conditions contained herein, to prepare and package the beverages in Authorised Containers, as defined, and to distribute and sell the same under the Trade Marks, in and throughout, but only in and throughout the territory which is defined and described in Appendix III (hereinafter referred to as the "Territory").

6(d) To sell and distribute the Beverages in Authorised Containers only to retail outlets or final consumers in the Territory, provided, however, that the Bottler shall be authorised to distribute and sell the Beverages in Authorised containers to wholesale outlets in the Territory who sell only to retail outlets in the Territory. Any other methods of distribution shall be subject to the prior written approval of the CocaCola Company.

13(a) The Bottler shall not, without the prior written consent of the Company, prepare, sell or distribute or cause the sale or distribution in any manner whatsoever of any of the Beverages outside the Territory.

13(b) In the event of any of the Beverages prepared, packaged, distributed or sold by the Bottler are found in the territory of another authorised bottler of the products of the Company (hereinafter referred to as the "Injured Bottler") then in addition to all other remedies available to the Company.

(1) The Company may, in its sole discretion cancel forthwith the authorisation for the Authorised Container(s) of the type which were found in the Injured Bottler's territory;

(2) The Company may charge the Bottler an amount of compensation for the Beverages found in the Injured Bottler's territory to include all lost profits, expenses, and other costs incurred by the Company and the Injured Bottler; and

(3) The Company may purchase any of the Beverages prepared, packaged, distributed or sold by the Bottler which are found in the Injured Bottler's territory, and the Bottler shall, in addition to any other obligation it may have under this Agreement, reimburse the Company for its cost of purchasing, transporting and/or destroying such Beverages.

13(c) In the event that Beverages prepared, packaged distributed or sold by the Bottler are found in the territory of an Bottler, the Bottler shall make available to

representatives of the Company all sales agreements and other records relating to such Beverages and assist the coca cola company in all investigations relating to the sale and distribution of such beverages outside the Territory.

13(d) The Bottler shall immediately inform the Company if at any time any solicitation or offer to purchase Beverages is made to the Bottler by a third party which the Bottler knows or has reason to believe or suspect would result in the beverages being marketed, sold, resold, distributed or redistributed outside the Territory in breach of this Agreement.

17(a) The Bottler shall not manufacture, prepare, package, distribute, sell deal in or otherwise be concerned with any other beverage products other than those prepared, packaged distributed or sold by the Bottler under authority of the Company unless prior written consent from the said Company is obtained.

17(e) During the term of this Agreement and for a period of two (2) years thereafter, and in recognition of the valuable rights granted by the Company to the Bottler pursuant to this Agreement, not to manufacture, prepare, package, distribute, sell, deal in or otherwise be concerned with any beverage put out under the name "Cola" (whether alone or in conjunction with any other word or words) or any phonetic rendering of such word.

4. Besides the petitioner No.1 similar agreements have also been entered into with other bottlers for various other areas.

5. All these agreements (as per list Annexure G) were sent to the Director General of Investigation and Registration (for short DG) appointed under the Act for registration u/s 35 of the Act with a caveat that the agreements were not in the nature of restrictive trade practices but to avoid the consequences of nonregistration, if held to be so, be registered.

6. The DG on receipt of these applications filed applications before the Commission for inquiry u/s 10(a)(iii) of the Act in respect of these agreements and on notices being sent to them, the petitioners Nos. 1 and 3 filed their replies (Annexures C and D) in respect of their agreement (Annexure B) taking various objections against this action submitting that their trade practices did not amount to restrictive trade practice u/s 2(o) of the Act. The Commission made order (Annexure E) directing issuance of notice of inquiry and Annexure F is one of such notice pertaining to petitioners herein issued under Regulation 51 taking the view that the Clauses (1), 6(2), 13(a), (b), (c) and (d) and 17(a) and (e) of the agreements extracted and reproduced hereinabove amount to restrictive trade practices within the meaning of clauses (g), (a) and (c) of Section 33(1) and sub clauses (i) and (ii) of Section 2(o) of the Act and requiring them to file their reply thereto.

7. Apparently, without filing replies to such notices of inquiry the petitioners have filed the present writ petition challenging the virus of Section 33(1) of the Act as amended by Amendment Act 30 of 1984 so far as it provides for "deeming"

provision in respect of category of agreements as specified in Clauses (a) to (l) thereof making them as statutory restrictive trade practices for the purposes of the Act and thereby putting unreasonable restrictions and depriving the petitioners an opportunity to show that the terms and conditions agreed upon between the petitioners as per bottlers Agreement (Annexure B) are not in the nature of restrictive trade practices as defined u/s 2(O) of the Act but are of the nature of promoting competition in the trade, further that the notice of inquiry is also bad for lack of material particulars in the application of the D.G. as to how the agreements in question have the effect of restricting or impeding competition, as required to be given under Regulation 47 of the Monopolies and Restrictive Trade Practices Commission Regulations 1991 (for short the Regulations) and for quashing the order and notices of inquiry (Annexures E & F).

8. The respondents have in their counter affidavit denied the various objections taken by the petitioners against the validity of the provisions of the Act and the order and notice in question. Rejoinder has also been filed by the petitioners.

9. Shri F.S.Nariman, learned Senior Advocate for the petitioners has contended that Section 2(O) of the Act defines "restrictive trade practice" and a trade practice which does not have the effect of preventing, distorting or restricting competition but promotes competition will not come under the definition of the term u/s 2(O) of the Act but without amending this definition power of Commission to determine whether a practice is restrictive trade practice within the meaning of this definition has been taken away by the amendment made in Section 33(1) of the Act as the trade practices falling within one or more of the categories of Clauses (a) to (l) have been made statutory illustrations of restrictive trade practices irrespective of the fact whether it restricts or promotes competition. This is arbitrary, unreasonable and contrary to the ratio of the Judgment of the Supreme Court in Tata Engineering and Locomotive Co. Ltd., Bombay Vs. The Registrar of the Restrictive Trade Agreement, New Delhi, (for short, TELCO's case) wherein it was held that the test to be applied in determining whether a trade practice is restrictive or not should be the rule of reason and not on the doctrine that any trade practice will per se be a restrictive trade practice whether or not it restricts or promotes competition. Such a restriction is unreasonable and affects the right to trade and business of the petitioners and is violative of their rights under Articles 14 and 19 (1)(g). Reliance has also been placed on Chintaman Rao Vs. The State of Madhya Pradesh, and Hasmattullah Vs. State of Madhya Pradesh and others, . It was further submitted that by this amendment the petitioners are also exposed to the risk of liability to pay compensation u/s 12-B of the Act without affording any opportunity to show that the trade practice is not a restrictive trade practice. This is violative of the rule of natural justice also.

10. The learned counsel for the contesting respondents has contended that the amendment is within the competence of legislature in view of Articles 31-C and 39(e) of the Constitution. The apprehensions of the petitioners are not well

founded, the Commission can pass an adverse order u/s 37 of the Act only on being satisfied, after giving opportunity to the person affected, of the availability two conditions:- (1) that the practice is prejudicial to the public interest and does not fall within the exceptions (a) to (k) to SubSection (1) of Section 38, and (2) that the restriction is not reasonable having regard to the balance between these circumstances and any detriment to the public. Only those restrictions which directly or indirectly restrict or discourage competition to any material degree in any relevant trade or industry are intended to be curbed and not those which promote competition. These conditions are reasonable in the interest of public and are in furtherance of and to give effect to the Directive Principles. So it was contended that the challenge to the virus of Section 33(1) of the Act is wholly unjustified.

11. Section 2(o) of the Act defines a "restrictive trade practice" as :-

"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 effect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions."

12. Section 33(1) of the Act before its amendment by the Amendment Act 30 of 1984 read as under:

33. Registerable agreements relating to restrictive trade practices (1) Any agreement relating to a restrictive trade practice falling within one or more of the following categories shall be subject to registration in accordance with the provisions of this Chapter, namely :

The categories of the trade practices are enumerated in Clauses (a) to (I) thereof.

13. This Section provided for registration of only those agreements which contain one or more of the trade practices of the categories mentioned in Clauses (a) to (I) and which are genus of those defined in Section 2(o). Others were not compulsorily registerable under that Section.

14. The scope of this provision was considered by the Supreme Court in Tata Engineering and Locomotive Co. Ltd., Bombay Vs. The Registrar of the Restrictive Trade Agreement, New Delhi, wherein it was said:

"An agreement will be registerable when it will have both the effect of restricting competition within the meaning of Section 2(o) of the Act and also deal with the subject matter described in Clauses (a) to (I) of subsection (1) of Section 33 of the Act. Clauses (a) to (I) aforesaid describe some species of agree ment which require registration if they are within the genus of restrictive trade practice

defined in Section 2(o) of the Act. A practice which is not restrictive u/s 2(o) of the Act cannot be restrictive trade practice only because of Clauses (a) to (l) of subsection (1) of Section 33 of the Act. Section 33, does not provide statutory illustrations to Section 2(o) of the Act but only enumerates some types of trade practices which, if they are restrictive within Section 2(o) of the Act require registration."

It was laid down that the decision whether a trade practice is restrictive or not has to be arrived at by applying the rule of reason and not on the doctrine that any restriction as to area or price will per se be a restrictive trade practice.

15. Telco's case was followed in Mahindra and Mahindra Ltd. Vs. Union of India (UOI) and Another, , where after making reference to the case of Telco and relevant provisions of Section 2(o) and Section 33 it was again said:

"It is clear from the definition that it is only where a trade practice has the effect, actual or probable, of restricting, lessening or destroying competition that it is liable to be regarded as a restrictive trade practice. If a trade practice merely regulates and thereby promotes competition, it would not fall within the definition of restrictive trade practice, even though it may be, to some extent, in restraint of trade. Whenever, Therefore, a question arises before the Commission or the Court as to whether a certain trade practice is restrictive or not, it has to be decided not on any theoretical or a prior reasoning, but by inquiring whether the trade practice has or may have the effect of preventing, distorting or restricting competition. This inquiry obviously cannot be in vacuo but it must depend on the existing constellation of economic facts and circumstances relating to the particular trade. The peculiar facts and features of the trade would be very much relevant in determining whether a particular trade practice has the actual or probable effect of diminishing or preventing competition and in the absence of any material how a decision can be reached by the Commission that the particular trade practice is a restrictive trade practice."

16. The law thus before amendment was that every trade practice which is in restraint of trade is not necessarily or per se a restrictive trade practice. It had to satisfy the requirements of Section 2(o) and the decision whether a trade practice is restrictive or not had to be arrived at by applying the rule of reason in the light of the facts and circumstances relating to the particular trade.

17. Section 33(1) has since been amended by Amendment Act (Act No.30 of 1984) and it now reads as under:-

Registerable agreements relating to restrictive trade practices.- (1) Every agreement falling within one or more of the following categories shall be deemed, for the purposes of this Act, to be an agreement relating to restrictive trade practices and shall be subject to registration in accordance with the provisions of this Chapter, namely:

Besides Clauses (a) to (l) as existing earlier, two additional Clauses (ja) and (jb)

have been added. By this amendment the agreements containing terms of the nature falling in these categories have been statutorily recognised per se as restrictive trade practices and such agreements are made compulsorily registerable ones.

18. The scope of this amended provision was considered by the Supreme Court in *M/s. Voltas Ltd. Bombay Vs. Union of India and others*, wherein it has been held as under:-

"But now with the amendment of main part of subsection (1) of Section 33 with a statutory fiction the situation has changed. It can be said that clauses (a) to (l) of subsection (1) of Section 33 provide statutory illustrations of restrictive trade practices. The framers of the Act have now in clear and unambiguous words said that every agreement falling within one or more of the categories specified in clauses (a) to (l) of subsection (1) of Section 33, shall be deemed for the purposes of the said Act, to be an agreement relating to restrictive trade practices and shall be subject to registration in accordance with the provisions of Chapter V. Now it is no more open to the Commission or to this Court to test and examine any of the trade practices mentioned in clauses (a) to (l) of subsection (1) of Section 33 in the light of Section 2(o) of the Act, for the purpose of recording a finding as to whether those types of trade practices shall be restrictive trade practices within the meaning of Section 2(o) of the Act..... Trade practices enumerated in clauses (a) to (l) of subsection (1) of Section 33 shall be deemed to have now been statutorily determined and specified as restrictive trade practices. Neither the Commission nor the Court can question the wisdom of the Parliament for having statutorily determined certain trade practices as restrictive trade practices unless in this process there is contravention of any of the provisions of the Constitution."

19. In that case the contention, similar to the one raised before us, that while amending sub section (1) of Section 33, Section 2(o) was not deleted or substituted and that has left an apparent conflict between these two provisions was negated and it was said that there is no conflict between Sections 2(o) and 33(1). Clauses (a) to (l) of subsection (1) of Section 33, specify such trade practices which have been statutorily recognised as restrictive trade practices. But there may be other trade practices, not covered by clauses (a) to (l) of Section 33, which can be examined by the Commission in the light of Section 2(o).

20. It is then contended that after this amendment there is no forum where a person can show that the clauses of their agreement are not of the nature of restrictive trade practices as specified in Clauses (a) to (l) of subsection (1) of Section 33.

21. Because of statutory fiction incorporated in subsection (1) of Section 33, no further inquiry is to be done as to whether such agreement relates to restrictive trade practices or not. Such agreement is compulsorily registerable under Section

35 of the Act. It is only in case an agreement does not contain any clauses relating to any of the restrictive trade practice specified in Clauses (a) to (l), such person need not get the agreement registered u/s 35. He will be at liberty to satisfy the Commission on that question. The Parliament is competent to determine any trade practices as restrictive trade practice to effectuate the object of the Act so long as it does not contravene the provisions of the Constitution.

22. Now the question is what is the effect of the amendment made in Section 33(1) of the Act? The agreements relating to any of the trade practices enumerated in Clauses (a) to (l) under SubSection (1) of Section 33, though restrictive in nature and, Therefore, compulsorily registerable are not per se void or illegal. In respect of such agreements, the obligation of the parties to the agreement is confined to having them registered with the D.G. After amendment of subsection (1) of Section 33, as aforesaid, the Commission has no jurisdiction to determine the nature of trade practice, being restrictive if covered by Clauses (a) to (l) of Section 33 but otherwise the function of the Commission does not come to an end. If a complaint is made before it or otherwise in case an inquiry contemplated u/s 37 of the Act is proposed to be held it is obliged to make such inquiry u/s 37 of the Act and before passing appropriate order the person concerned will be entitled to show that his case comes under any of the exceptions provided in Clauses (a) to (k) of SubSection (i) of Section 38 of the Act. Section 37(1) of the Act so far as relevant reads as under:-

"37. Investigation into restrictive trade practices by Commission. (1) The Commission may inquire into any restrictive trade practice, whether the agreement, if any, relating thereto has been registered u/s 35 or not, which may come before it for inquiry and, if, after such inquiry it is of opinion that the practice is prejudicial to the public interest, the Commission may, by order, direct that

(a) the practice shall be discontinued or shall not be repeated;

(b) the agreement relating thereto shall be void in respect of such restrictive trade practice or shall stand modified in respect thereof in such manner as may be specified in the order.

(2) The Commission may, instead of making any order under this section, permit the party to any restrictive trade practice, if he so applies to take such steps within the time specified in this behalf by Commission as may be necessary to ensure that the trade practice is no longer prejudicial to the public interest, and in any such case, if the Commission is satisfied that the necessary steps have been taken within the time specified, it may decide not to make any order under this section in respect of that trade practice.

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23. For the purpose of such inquiry though subsection (1) of Section 38 contains

a statutory fiction to the effect that a restrictive trade practice shall be deemed to be prejudicial to the public interest, however, no order u/s 37 is to be passed to desist or discontinue such practice or to declare any part of the agreement as void, if it is proved to the satisfaction of the Commission that any of the circumstances specified in Clauses (a) to (k) of SubSection (1) of Section 38 are available in the case. These have been described as "gateways" to escape the consequences flowing u/s 37(1).

24. Section 38 reads as under:-

38. Presumption as to the public interest (1) For the purposes of any proceedings before the commission u/s 37, a restrictive trade practice shall be deemed to be prejudicial to the public interest unless the Commission is satisfied of any one or more of the following circumstances, that is to say

(a) that the restriction is reasonably necessary, having regard to the character of the goods to which it applies, to protect the public against injury (whether to persons or to premises) in connection with the consumption, installation or use of those goods;

(b) that the removal of the restriction would deny to the public, as purchasers, consumers or users of any goods, other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such whether by virtue of the restriction itself or of any arrangements or operations resulting there from;

(c) that the restriction is reasonably necessary to counteract measures taken by any one person not party to the agreement with a view to preventing or restricting competition in or in relation to the trade or business in which the persons party thereto are engaged;

(d) that the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms of the supply of goods to, or the acquisition of goods from, any one person not party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such a trade or business who, either alone or in combination with any other such persons, controls preponderant part of the market for such goods;

(e) that, having regard to the conditions actually obtaining or reasonably for seen at the time of the application, the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area, or in areas taken together, in which a substantial proportion of the trade, or industry to which the agreement relates is situated;

(f) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to cause a reduction in the volume or earnings of the export business of India or in relation to whole business (including export business) of the said trade or industry;

(g) that the restriction is reasonably required for purposes in connection with the maintenance of any other restriction accepted by the parties, whether under the same agreement or under any other agreement between them, being a restriction which is found by the Commission not to be contrary to the public interest upon grounds other than those specified in this paragraph, or has been so found in previous proceedings before the Commission;

(h) that the restriction does not directly or indirectly restrict or discourage competition to any material degree in any relevant trade or industry and is not likely to do so;

(i) that such restriction has been expressly authorised and approved by the Central Government;

(j) that such restriction is necessary to meet the requirements of the defense of India or any part thereof, or for the security of the State; or

(k) that the restriction is necessary to ensure the maintenance of supply of goods and services essential to the community;

and is further satisfied (in any such case) that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by such parties, or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from the operation of the restriction.

25. The Preamble of the Act sets out the object for which the Act is enacted as under:-

"An Act to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto."

26. In the Statement of Objects and Reasons it was stated that "The Bill is designed to ensure that the operation of the economic system does not result in the concentration of economic power to the common detriment and to prohibit such monopolistic and restrictive trade practices as are prejudicial to public interest." Part IV of the Constitution of India enshrines what are called the Directive Principles of State Policy. These Directive Principles are not enforceable in a Court of Law but are nevertheless fundamental in the governance of the country and are to be applied by States in making laws. Article 39 of the Constitution, inter alia, provides that the State shall, in particular, direct its policy towards securing:

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

This Act has obviously been enacted to give effect to the Directive Principles of State Policy as enunciated in Article 39 (b) & (c) of the Constitution. The object sought to be achieved by the Act being for the larger interest of the public, Therefore, the provisions of the Act will be given such interpretation as would not defeat the very object for which the Act is enacted. The monopolistic tendencies have the effect of concentration of economic power in the hands of and for the good of a few and result in great detriment to the public and are eminently prejudicial to the public interest. Monopolies have also tendencies to restrict competition with the result that the monopolistic concerns have a hold on the prices of commodities which ultimately result in the exploitation of the common man. Such practice, thus, being detrimental to the interest of the large section of the community and opposed to the common interest must be kept under control to achieve this object.

27. Article 19(1)(g) confers a fundamental right upon a citizen to practice any profession, or to carry on any occupation, trade or business. Article 14 enjoins that the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India. Article 13(2) provides that the State shall not make any law which takes away or abridges rights conferred by Part III of the Constitution and any law made in contravention of this clause shall to the extent of the contravention, be void. The Supreme Court, dealing with Fundamental Rights as given in Part III and the Directive Principles as detailed in Part IV of the Constitution, in the Constitution Bench decision in *Minerva Mills Ltd. and Others Vs. Union of India (UOI) and Others*, has observed that under the scheme of the Indian Constitution Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution. The Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one or the other is to disturb the harmony of the Constitution. This harmony and balance between Fundamental Rights and Directive Principles is an essential feature of the basic structure of the Constitution. These Directive Principles specify the socialistic goal to be achieved. The goals set out in Part IV have, Therefore, to be achieved without the abrogation of the means provided for by Part III. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution.

28. Right conferred by SubClause (g) of Article 19 is not absolute one. This right is subject to the reasonable restrictions that may be imposed by law by the State in the interests of the general public under Clause (6) of that Article. Reasonableness of the restriction imposed by the law if disputed is to be determined by the Court. That question cannot to be determined on a general notion of what is reasonable in the abstract or even on a consideration of what is reasonable from the point of view of the person or persons on whom the

restrictions are imposed, as no one would like any restrictions being imposed on his right and if imposed, will invariably be considered as unreasonable by him. The reasonableness is to be decided not from his point of view but from the point of view of the general public interest. In other words what the court has to do is to consider whether the restrictions imposed are reasonable in the interest of general public.

29. In the State of Madras Vs. V.G. Row, the Supreme Court laid down the test of reasonableness in the following terms :

"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

30. Furthering the social interest is another test laid down in Jyoti Pershad Vs. The Administrator for The Union Territory of Delhi, as under :-

"The tests of `reasonableness" have to be viewed in the context of the issue which face the legislature. In the construction of such laws and particularly in judging of their validity the court must approach the problem from the point of view of furthering the social interest which is the purpose of the legislation to promote for the courts are not in these matters functioning in vacuo but as parts of society which is trying, by enacted law, to solve its problem and furthering the moral and material progress of the community as a whole."

31. Both these cases have been followed by the Constitution Bench in Municipal Corporation of the City of Ahmedabad and Others Vs. Jan Mohammed Usmanbhai and Another, .

32. The question is whether the deeming provision made applicable in subsection (1) of Section 33 of the Act imposes an unreasonable restriction on the right of the petitioners to carry on their trade, occupation or business in the light of objects and purpose sought to be achieved in enacting the provisions of the Act.

33. As already noticed the purpose of the Act is, inter alia, prohibition of restrictive trade practices. Section 2(o) of the Act defines the "restrictive trade practice". Section 33 of the Act before its amendment provided that any agreement relating to restrictive trade practice falling within one or more of the categories (a) to (l) of Section 33(1) shall be subject to registration. Under that provision only such agreements which amounted to restrictive trade practices as defined in Section 2(o) of the Act were registerable as held by the Supreme Court in two Judgments of Telco (supra) and Mahindra and Mahindra(supra). But now after amendment of Section 33(1) the trade practices mentioned in aforesaid clauses (a) to (l) have been statutorily declared to be restrictive trade

practices and require compulsory registration. In other words, it has been taken out of the jurisdiction of the Commission to determine a restrictive trade practice in respect of the categories (a) to (l). If the legislature has the power to enact the Act with its aims and objects as contemplated in the enactment there seems to be no valid reason for holding that the legislature would not be competent to identify the restrictive trade practices which according to it are objectionable and need to be controlled or curbed by the provisions of the Act. Normally, the legislature is the best judge of what is good for the community whose collective wisdom it represents, though the ultimate responsibility for determining the validity of the law must rest with the court. In the present case it is not that the agreements containing the statutorily recognised restrictive trade practices are declared illegal or void per se. There is no prohibition against entering into such agreements though such agreements are subject to scrutiny u/s 37 and for that purpose guidelines are provided in Section 38 of the Act to escape from the consequences provided u/s 37. The affected person is entitled to show that his case does not fall in that category because of the circumstances enumerated in Clauses (a) to (k) of SubSection (1) of Section 38. In other words he can escape the consequences contemplated u/s 37 of the Act by proving existence or availability of any such gateways as are provided by Section 38.

34. Learned counsel for the petitioners has contended that before this amendment the Commission had to apply the rule of reason in finding out whether the trade practice is intended to promote competition or restricted or destroyed competition, which requirement has been done away with by the amendment, and that by itself is unreasonable. In our opinion, this will still be the part of enquiry as provided under Clause (h) of Section 38(i) which reads as under:-

"(h) that the restriction does not directly or indirectly restrict or discourage competition to any material degree in any relevant trade or industry and is not likely to do so." In fact the Commission has further to be satisfied that the restriction is not prejudicial to the public interest having regard to the balance between the circumstances (a) to (k) and any detriment to the public. The legislature has identified certain trade practices as per se restrictive trade practices. This classification of restrictive trade practices as identified by the legislature cannot be said not to have a rational relation to the objects sought to be achieved by the statute.

35. The Supreme Court in the Constitution Bench Judgment of Municipal Corporation of the City of Ahmedabad and Others Vs. Jan Mohammed Usmanbhai and Another, has reiterated the following principles to test the constitutional validity of an enactment in case of challenge under Article 14:-

"It is now well established that while Art.14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation and that in order to pass the test of permissible classification two conditions must be fulfilled, namely, (i) the classification must be founded on an intelligible differentia which

distinguishes persons or things that are grouped together from others left out of the group, and (ii) such differentia must have rational relation to the object sought to be achieved by the statute in question. The classification, may be founded on different basis, namely, geographical, or according to objects or occupation or the like and what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. There is always a presumption in favor of constitutionality of an enactment and the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. The courts must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed against problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common rapport, the history of the times and may assume every state of facts which can be conceived to be existing at the time of legislation."

36. Learned counsel for the petitioner has relied on Chintaman Rao Vs. The State of Madhya Pradesh, and Hashmattullah Vs. State of Madhya Pradesh and others, in support of his contention that unreasonable restriction on the fundamental right to carry on trade or business renders the enactment as void.

31.1 In the case of Chintaman Rao the Deputy Commissioner u/s 4 of the Central Provinces Regulation of Manufacture of Bidis Act 1948 made an order forbidding all persons residing in certain villages from engaging in the manufacture of bidis. This order was held void being in contravention of Article 19(1)(g) of the Constitution on the ground that a total prohibition of the manufacture imposes an unreasonable and excessive restriction upon the lawful occupation of manufacturing bidis and the object could be achieved by imposing other reasonable alternative restrictions.

36.2 In the case of Hashmattullah Section 4(1)(a) of the M.P. Agricultural Cattle Preservation Act 1959 as amended by Amendment Act of 1991 imposed total ban on slaughter of bulls and bullocks irrespective of the fact that they became unfit for breeding, draught, milch or other purposes. It was held to be void as it imposed unreasonable restriction on the fundamental rights of the appellant to carry on trade or business of butchers.

36.3 Both these cases are based on their own facts. It would depend upon the facts of each case whether the restriction is unreasonable affecting the rights of an individual under Article 19(1)(g) of the Constitution.

37. In the present case the petitioners are not being prohibited from carrying on their business as per terms and conditions of the agreement in question absolutely so long as their activities do not come in conflict with the provisions of

the Act. Right of showing that their activities are not in contravention of the object of the Act is available to them though the burden has been cast on them to show that the agreement falls in any of the exceptions enumerated u/s 38(1) of the Act.

38. In our view in the facts and circumstances, the amendment made in Section 33(1) of the Act does not impose restrictions so unreasonable as may be vocative of the fundamental rights of the petitioners under Article 19(1)(g) of the Constitution.

39. Although we have dealt with each of the contentions raised on behalf of the petitioner, but we cannot resist observing that there was hardly any occasion to lay challenge to the virus of the impugned provisions of the Act in the manner in which it has been laid in the present petition after the decision of the Supreme Court in *Voltas Ltd.* (supra). The scheme of the Act (as amended) shows that clauses (a) to (l) of Section 33(1) specify different types of agreements which shall be deemed for the purposes of the Act to be agreements relating to restrictive trade practice and shall be subject to registration in accordance with the provisions of Chapter V of the Act. Over and above, the types of agreement catalogued in clauses (a) to (l) by Section 33 (1) there may still be agreements incorporating restrictive trade practice within the meaning of Section 2(o). Agreements covered by clauses (a) to (l) of Section 33(1) are subject to registration and are fictionally treated to be agreements relating to restrictive trade practices. However, such agreements are not void by themselves. On an enquiry being held u/s 37, the Commission may form an opinion that the practice is prejudicial to the public interest and the Commission may direct that the practice shall be discontinued or shall not be repeated and that the agreement relating to any such restrictive trade practice shall be void and shall stand modified in respect thereof. Thus, avoidance of the agreement needs adjudication by the commission.

40. Section 38(1) declares a restrictive trade practice to be deemed to be prejudicial to the public interest unless the practice may escape through one of the "gateways" provided by Section 38(1). The scope of enquiry before the Commission is not curtailed by the amendment except to the extent of the fiction created. In spite of the agreement having been registered and in spite of the deeming provisions, the person concerned can satisfy the commission that such practice is not prejudicial to the public interest. If the commission is satisfied in respect of the existence and availability of any of the circumstances, specified in clauses (a) to (l) of subsection (1) of Section 38, no order u/s 37 would be passed. One of the very material gateways provided by clause (h) of Section 38(1) is that the restriction does not directly or indirectly restrict or discourage competition to any material degree in any relevant trade or industry and is not likely to do so.

41. Taking an overall view of all the relevant provisions of the Act we are satisfied that none of the provisions of the Act is in conflict with Articles 14 and

19 of the Constitution.

42. Learned counsel for the petitioners has also contended that the Commission has been empowered u/s 12-A of the Act to pass an ex parte injunction and thereby the petitioners would be exposed to penal consequences u/s 12-B of the Act. This apprehension is also baseless because the petitioners or any affected person would be entitled still to show that their case is covered under any of the gateways. The Chairman and other members of the Commission appointed u/s 5 of the Act are highly qualified and experienced persons and it cannot be assumed that they will act unreasonably or arbitrarily ignoring the provisions of the Act. Further, the commission's orders are appealable u/s 55 of the Act and if the Commission may commit any mistake it would be corrected in appeal. For this reason also the enactment made in Section 33(1) is not bad.

43. It was also contended that the application made before the Commission does not contain necessary and material particulars about the objectional trade practice as provided under Regulation 47 and for this reason the petitioners are not in a position to effectively defend the notice given by the Commission. Regulation 47 reads as under:-

"Application by Director General.

An application under Sub Clause (iii) of clause (a) of Section 10 by the Director General shall contain the facts, which constitute a restrictive trade practice and if it is in relation to any agreement registrable u/s 33 of the Act, shall set out such portions of the agreement as may be necessary to bring out the facts complained of and be signed and verified by the Director General in the manner prescribed in Regulation 49."

Rules of procedure are intended to subserve the rules of natural justice. In *Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others*, it was held that the Rules of natural justice vary with the varying constitutions of statutory bodies and the rules prescribed by the Act under which they function and the question whether or not any rules of natural justice has been contravened should be decided not under any preconceived notions but in the light of the statutory rules and provisions. In the application made by the D.G. to the Commission the relevant offending clauses of the agreement have been reproduced. It is also specified that the said Clauses amount to restrictive trade practices under Clauses (g), (a) & (c) of Section 33(1) of the Act and as such the agreement requires registration. In our view no material or relevant particulars are lacking in this case. Even if there is any such defect the petitioners could approach the Commission for further or better particulars under Regulation 65(1)(b).

43.1 In *Mahindra & Mahindra Ltd.* (supra), their Lordships have observed :

"Even if the application did not set out any facts or features showing how the trade practices complained of by the Registrar were restrictive trade practices,

the Registrar could still at the hearing of the inquiry, in the absence of any demand for particulars being made by the other side, produce material before the Commission disclosing facts or features which would go to establish the restrictive nature of the trade practices complained of by him and if the Registrar did so, the defect in the application would not be of much consequence."

43.2 In *Raymond Woollen Mills Ltd. Vs. MRTPC* 1982 TL R 2590 contention as to particulars came up specifically before the Division Bench for consideration. It was held:-

"A party called upon to meet a charge must know with sufficient particularity with that charge is.

Just as a complaint or a notice may contain vague allegations, and similarly so can a rejoinder.

In the case of vague allegations made in a complaint or a notice under S.10(a) (iv) of the Act the proper remedy would be before filing the reply thereto, and in the case of vague allegations made in a reply the proper time for asking for further and better particulars would be before filing the rejoinder thereto. Regn. 15 has expressly made the provisions of the Code applicable to the proceedings before the Commission in so far as such provisions are not inconsistent with any of the provisions expressly made in the Act or in the Regulations. Regn. 74 is not inconsistent with the provisions of Rr. 4 and 5 of O. 6, Civil P.C. and there is nothing in any of the other Regulations or in any of the sections of the Act which is inconsistent therewith."

43.3 We find ourselves in respectful agreement with the view taken by Bombay High Court. The notice can not be quashed on the ground of want of particulars.

44. For these reasons we do not find any merit in this writ petition and the same is hereby dismissed with costs, assessed at Rs.5,000/-.

45. I.A.2807/97 also stands disposed of.