
(1979) 12 DEL CK 0014

In the Delhi High Court

Case No : Civil Writ Appeal No. 782 of 1974

Colgate Palmolive India (P) Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 13-12-1979

Acts Referred:

Citation : (1980) 50 CompCas 456 : (1981) ILR Delhi 249

Hon'ble Judges : S.B. Wad, J;Rajinder Sachar, J

Bench : Division Bench

Advocate : A.B. Divan, N. Phataphekar, Ravnder Narain, T.M. Ansari, S.C. Malik, K.N. Kataria and Chandrashekhar Mullherkar, for the Appellant;

Judgement

Sachar, J.

(1) Is the Central Government under a legal obligation to give a hearing to the undertaking before making a reference under sub-section (1) of section 31 of the Monopolies and Restrictive Trade Practices Act (to be called the Act) to the Monopolies and Restrictive Trade Practices Commission (to be called the Commission) for an enquiry and report is one of the main questions that calls for decision in these three Writ Petitions namely C.W. 782/74, C.W. 547/74 and C.W. 1309/73, which were heard together. Another question of law that arises relates to the scope and extent of power of the Central Government and the Commission respectively and the areas that are carved out to each of them which reference is made u/s 31 of the Act. The main restions of law being common to all the petitions will bo disposed of by this order. There were certain special facts relating to each petition which were argued by their counsel in their respective petitions and we shall deal with those matters after dealing with the main questions of law.

(2) The first petition was argued by Mr. Anil Dewan and we shall take the facts from that case for the purpose of deciding the main questions of law.

(3) On 28-3-1974 the Central Government passed the following order in exercise

of its powers conferred by sub-section (1) of Section 31 of the Act :

" WHEREAS it appears to the Central Government that the Colgate-Palmolive (India) Pvt. Ltd., Bombay a subsidiary of the Colgate Palmolive Poto Company incorporated in the United States of America, which is a multi-product company, engaged among other things, in the production of soap, shampoos. Tooth Paste, Tooth Powder. Tooth Brush, Shaving Brush, Shaving Cream, Cream Oil, Hair Oil. Hair Cream and Powder under trade names, such as "Colgate", "Palmolive" etc. are indulging as monopolistic trade practices as a result of which the cost relating to the production, supply and distribution of the said products manufactured by them has unreasonably been increased : (1) earning a very high gross profit on sales around 31 per cent and a gross profit rate of 42 per cent to 44 per cent on cost of sales as against a reasonable return of 5 per cent on cost of sales; (2) earning exorbitant rate of profit at the rate of nearly 118 per cent in 1970 and over 158 percent in 1971 on capital employed ; (3) earning unreasonable net profits, after paying taxes, of over 50 per cent in 1970 and 46 per cent in 1971 on the average employed by the company to the detriment of the consumer; (4) reaping profits without making any large investments in India as fixed block in buildings etc. and in not incurring substantial expenditure on research and development in India with a view to produce consumer items of better quality at cheaper rate for the benefit of the consumer; and (5) selling not only what the company produces, but also a few products which it gets manufactured in other units and allowing such products to be sold under its own brand name-while these products are manufactured for Colgate by outside agencies with indigenous raw materials and know-how, the company reaps unreasonable profits to the detriment of the consumer and the smaller units who produce such products. Now, Therefore, in exercise of the powers conferred by sub-section (1) of Section 31 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) the Central Government hereby refers the said matter to the Monopolies and Restrictive Trade Practices Commission for an inquiry as to whether, having regard to the economic conditions prevailing in the country and to call other matters which appear in the particular circumstances to be relevant, the trade practices alleged to be indulged in by the said company operate or likely to operate against the public interest".

(By order and in the name of the President of India.)

(4) On 2-4-1974 the Commission issued a notification giving the substance of the order of 28-3-1974 and. requesting all persons who wish to give information and their comments to send the same to the Commission so as to reach the Commission by 6-5-1974. The notice having reached the petitioner company it wrote to the Commission on 16-4-1974 that 14 days time for filing the objections was too short and requested for extention of time and at the same tune reserved its right to seek remedies available to it by. law. The Commission by its letter of 15-5-1974 permitted the petitioners to file their objections up to 30-6-1974. The Assistant Director of the Commission also sought various information. and sent a

proforma, informing the petitioner that if it thought that information could be furnished in some other convenient manner the officials of the Commission as well as the petitioner could meet together so that undue work could be avoided on the petitioner's side and this matter could be sorted out at a meeting arranged mutually. Apparently the petitioner was in no mood to comply with the directions or to join the proceedings before the Commission; it Therefore filed the present Writ Petition challenging the legality and the validity of the reference made on 28-3-1974. The matter was admitted to Db and ordered to be heard Along with Cw 1309,73, which had already been admitted stay of proceedings before the Commission was given which was subsequently confirmed. The matter has thus remained at this stage for the fast over 5 years and we are now to determine the legality and the validity of title reference. Section 31(1) and (2) read as under;

(1)Where it appears to the Central Government that one or more monopolistic undertakings are indulging in any monopolistic trade practice, or that monopolistic trade practices prevail in respect of any goods or services, that Government may refer the matter to the Commission for an inquiry and the Commission shall, after such hearing as it thinks fit, report to the Central Government its findings thereon.

(2)If as a result of such inquiry, the Commission makes a finding to the effect that, having regard to the economic conditions prevailing in the country and to all other matters which appear in particular circumstances to be relevant, the trade practice operate or is likely to operate against the public interest the Central Government may, notwithstanding anything contained in any other law for the time being in force, pass such orders as it may think fit to remedy or prevent any mischief's which result or may result from such trade practice.

Sub-section (3) empowers the Central Government to pass an order including the order regulating the production, supply of goods or prohibiting the undertaking from resorting to any practices which prevent or lessen competition and also to order fixing of standard for the goods and also declaring unlawful any agreements as may be specified in the order and to such extent as may be specified.

(5) It is common case that no show cause notice was issued nor any opportunity given by the Central Government to the petitioner company as to why a reference should not be made u/s 31(1) of the Act before passing the impugned order of reference dated 28-3-1974. It is on these undisputed facts that the first argument was raised by Mr. Dewan that principles of Natural Justice have been violated in as much as no hearing has been given by the Central Government before making the impugned order of reference. Connected inevitably with this argument was the further formulation that condition precedent to the reference u/s 31(1) was the existence of monopolistic undertaking (to be called M.U.) and further that it was indulging in a monopolistic trade practice (to be called the M.T.P.). Both these facts have to be first determined finally by the Central

Government and it was only thereafter that the Central Government was competent to make the reference; the necessary corollary from this being that both these aspects are outside the purview of the enquiry by the Commission. The enquiry by the Commission thus being restricted to only enquiring whether the trade practice operates or is likely to operate against public interest. Now if that contention was correct it is apparent that as no hearing has been given by the Central Government the order of reference would be bad because a decision would have been made without giving any opportunity of hearing to the concerned party. This naturally calls for consideration as to the scope and ambit of section 31 of the Act because it is well settled that the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the frame work of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary turn a just decision on the facts of that case (see A.K. Kraipak and Others Vs. Union of India (UOI) and Others, . There is no principle or authority in support of the view that whenever a public authority is invested with power to make an order which prejudicially affects the rights of an individual whatever may be the nature of the power exercised, whatever may be the procedure prescribed and whatever may be the nature of the authority conferred, the proceedings of the public authority must be regulated by the analogy of rules governing judicial determination of disputed questions (See Sadhu Singh v. Delhi Administration, 1966(1) SCR243

(6) The Preamble, which is key to the understanding of the purpose of the Act lays down that it is 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.

(7) Para 20.1 of the Report of the High Powered Expert Committee on Companies and Mrtp Acts lays down that one of the avowed objective underlying the Monopolies and Restrictive Trade Practices legislation is to ensure that the operation of the economic system does not result in the concentration of economic power to the common detriment. The authority for this is derived from the Directive Principles of State Policy contained in Article 39 of the Constitution which lays down that the State shall direct its policy towards securing that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. The specific measures for attaining this objective are contained in Chapter Iii of the Act.

(8) The need to prevent concentration of economic power which may lead to common detriment did not suddenly emerge from the Act. For quite some time

earlier, a feeling had been growing in the country that economic power was being concentrated in a few hands. Prof. Mahalanobis and Prof. Hazari committee had highlighted the finding that the industrial policy had helped in the growth of large houses and urgent action was called for to check these trends.

(9) With a view Therefore for detailed investigation the Government of India in April 1964 appointed a five member Monopoly Enquiry Commission. Its terms of reference included to enquire amongst others into the extent and degree of concentration of economic power in private hands and also the factors responsible for monopolistic and restrictive practices and their social and economic consequences. The commission gave its report on 31-10-1965. The Commission found high degree of concentration of economic power in the hands of fewer business groups and also evidence of a fairly large scale of various restrictive and monopolistic trade practices. The Government of India's decision on this report was in the form of resolution of 5-9-1966 which proposed establishment of a Monopolies and Restrictive Trade Practices Commission. The Mrtp bill was introduced in Rajya Sabha on 18-8-1967 and became an Act on 27-12-1969. The act was brought into force on 1-6-1970. It is important to note that the Monopolies Inquiry Commission (M.I.P.) in its report at page 139 stated that, "the foregoing study had convinced it that the dangers from concentrated economic power and monopolistic and restrictive practices are not imaginary but do exist in a large measure either at present or potentially". The report was emphatic that members were "clearly of opinion that a permanent body should be set up with the duty and responsibility for exercising vigilance and for taking action to protect the country against the dangers that we think do exist. We are fortified in this view by the general support of many of the Chambers of Commerce representing big business in the country who appeared before us. We are convinced that the existing powers of Government have not been able to check the growth of concentration of economic power in private hands or to eliminate the evils of monopolistic and restrictive practices. The experience of other countries when faced with similar situation shows that a body specially entrusted with the duty of looking after these matters can be of great use in preventing excessive concentration of economic power or the evils resulting there from and also evils that frequently result from monopolistic and restrictive practices".

(10) The Act recognised the importance of the Commission as an institution to fight the evils of Monopolisation etc. because Section 5 dealing with the establishment and the Constitution of Commission lays down that the Chairman of the Commission is to be a person who is or has been a qualified Judge of the Supreme Court or of a High Court and the members also are to have vast experience in the problems relating to economic, law commerce, and accountancy.

(11) Now Section 31(1) does not in so many words lay down that the Central Government has to determine finally whether there is a M.U. or that it is

indulging in M.T.P. Sub-Section (1) of Section 31 which empowers the Commission to Act whenever it "appears" to it by its very wording militates against the suggestion of the Central Government determining finally the question of there being an M.U. or it indulging in M.T.P. There is no question of final determination of these points of M.U. or M.T.P. being made by the Central Government. Only a prima facie opinion of the Central Government will Suffice to enable it to exercise its power to refer the matter to the Commission for an enquiry, who shall report to the Central Government its findings thereon, The counsel for the petitioners however) sought to contend that what the Commission as to do is to give its findings only with regard to whether the trade practice operates or likely to operate against public interest as mentioned in sub-section (2) and not with regard to the question whether there is M.U. or it is indulging in M.T.P. In our view such a limitation on the scope of enquiry by the commission is not warranted by the language of the statute. Section. 31(1) clearly says that the government may refer the matter to the Commission who will report to the Central Government its findings "thereon" . It is obvious that when sub-section (1) emphasises the referring of the "matter" to the Commission it has a reference to what has preceded it i.e. whether there is a M.U. and whether it is indulging in any M.T.P. The requirement of Section 31(1) which directs the Commission to give its findings there on can only be complied with when we read Section 31(1) is requiring a determination, on these two points by the Commission. No doubt sub-section (2) of Section 31 also requires the Commission to give its finding on public interest aspect. There are Therefore two findings to be given by the Commission one under sub-section (1) and the other under sub-section (2) Of course as the proceedings are one connected whole. and the enquiry is also one, the report which is ultimately sent to the Central Government has necessarily to incorporate in one single report, all the findings, namely --(a) whether there is M.U. or (b) whether it was indulging in M.T.P.: (c) and also a finding whether she trade practices operate or is likely to operate against public interest. The language of the statute Therefore does not support the argument of the counsel for the petitioners that the determination of there being a M.U. and indulgence in M.T.P. is outside the purview of the Commission. On that view the argument of alleged infirmity in the order of the Central Government in referring the matter to the Commission without a prior hearing being given to the petitioners can have no relevance of force. The question of prior hearing can only arise if when the facts assumed by the Central Government to exist were not to be allowed to be so raised before the Commission. In that case one would, unless the statute was to say so specifically otherwise presumably read into the section a requirement of giving a hearing to the petitioners before sending it to the Commission. But the statute does not so contemplate. Rathler the statute contemplates the giving of a hearing before the Commission. Section 31(1) clearly postulates that after the Government has referred the matter to the Commission for an enquiry, the Commission shall after hearing as it thinks fit report to the Central Government its finding thereon. This obviously means that the legislature has indicated the stage at which and by

whom an opportunity of hearing is to be given to the parties concerned, and also that it is by the Commission and not by the Central Government. This statute has itself provided that it is no requirement of justice that hearing be given by the Central Government.

(12) A look at the various provisions of the Act will also show that the hearing before the Central Government could not be contemplated because in fact the real authority that has been constituted by the Act to determine and investigate various factual matters calling for detailed enquiry is only the Commission. An enquiry into M.T.P. by the Commission is one of the objectives of the Act. Not only in our country but in the rest of the world also the danger of monopoly is legislatively sought to be curbed. The legislative intent of this is indicated in our country by Section 10(b) of the Act which empowers the Commission to enquire into any monopolistic trade practices upon a reference made to it by the Central Government or upon its own knowledge or information. Thus by virtue of Section 10(b) of the Act the Commission can enquire into any M.T.P. on its own without waiting for a reference from the Central Government.

(13) When Therefore Section 10(b) empowers the Commission to enquire into monopolistic trade practices on its own it is futile for petitioners to contend that it is the Central Government alone which is competent to enquire whether there is M.U. and whether it is indulging in M.T.P. When the Commission can enquire into any M.T.P., it necessarily means that it can enquire into both these aspects. The effort of the petitioner to restrict the scope of enquiry u/s 10(b) only to the second part of section 31(1) i.e. to enquire whether M.T.P. prevail in respect of any goods or services is not warranted by the language of the statute. As a matter of fact the power of the Commission u/s 10(b) would extend to inquiring into any monopolistic trade practices indulged into either by a M.U. or by a non M.U. In that sense the power of the Commission u/s 10(b) of the Act is wider than the power of the Central Government; the later can make a reference u/s 31(1) only if the M.T.Ps. are being indulged into by a M.U. and not if the M.T.P. is being indulged by a non M.U. There is thus nothing wrong in both the Central Government and the Commission having such concurrent powers in the matter of M.T.P. being indulged into by a M.U. because in the matter of monopoly it is possible that an information may be available with" the Central Government, which may not be available with the Commission and unless the Central Government possesses such a power to refer the matter to the Commission the M.T.P. may avoid scrutiny and thus avoid being proceeded against with a necessary consequential damage to the national economy. It would be strange if having constituted such a high powered Commission as it is bound to do by virtue of the mandate of the Act the Central Government was to be held to have the last word in the determination of the important aspect of whether an undertaking was a monopolistic undertaking and whether it was indulging in M.T.Ps. The determination of these matters requires collection of detailed information and knowledge into various aspects of business, finance, statistics etc. This requires a deep study and a vast reservoir of facts so as to be able to

finally determine the matter. To accept the argument of the petitioners that this finding can be given only by the Central Government would be to go against the very object of the Act which is to constitute an impartial and independent Commission. free from the political and other pulls unlike the (Government of the day which is necessarily subject to such influence. it could not be argued, nor indeed in fairness to the counsel for the petitioners, was it argued that there was any requirement of justice that the Commission should give a hearing before deciding to hold an enquiry on its own u/s 10(b) of the Act. What logic Therefore, is in the argument that if decision to enquire by the Commission is not of its own, but on reference by the Central Government the former should give a hearing. .In principle we are not able to find any. At this preliminary stage it is a matter of discretion with the Central Government enabling it to act if in its opinion a set of given circumstances arc found to exist. We are, Therefore, satisfied that requirements of natural justice do not require any hearing to be given to the undertaking before making a reference under- Section. 31(1) of the Act. The whole controversy including the essential condition of there being a M.U. or it indulging in M.T.P. are at large before the Commission and can be canvassed fully before it. The regulations. framed by die Commission for procedure for enquiring into reference received u/s 31 provides detailed hearings and opportunities to the undertakings concerned. Regulation 36(5) (7) even provides for the Commission calling the concerned undertakings for such- discussion as it may consider necessary fur the enquiry and also permits it to depute its officers to meet its .such officer for discussion relevant to the reference. In the public hearings that may be fixed the concerned undertakings have full right to participate even by counsel and file any documents and material that they like. Thus the procedure before the Commission is in a way more elaborate and yet, informal than even before a regular court of law, the kind of informality indicated by holding discussions with the parties and visiting places is not to be found in proceedings before ordinary trial courts. This is as it should be, because the matter that is being examined before the Commission is not a matter of two adversaries fighting their litigation before a regular court. The matters and stakes raise high" policy decisions which concerns the economy and the well being of the country and it is only" proper that full discussion and fuller presentation of the material be available to the Commission in order to assist it to come to a right conclusion. But all this when the enquiry starts before the Commission and not otherwise. In our view the scope of enquiry before the Commission is not limited and encompasses all the pleas of fact and public interest mentioned in sub-section (1) and (2) of Section 31 respectively. We are thus satisfied that no hearing is necessary before the Central Government at that stage and the grievance on account of denial of natural justice is misplaced and without merit.

(14) The next alternative argument by the petitioners was that even if it be held that the Commission could go into the matter and give a finding with respect to the undertaking being an M.U. and also whether it was indulging in M.T.P., still it

was necessary for the central government to give some kind of hearing before making the reference u/s 31(1). As we have indicated there are no fixed rules of natural justice. The question in each case is whether fairness in action demands reading into the provision the requirement of a hearing. We are aware that the requirement of natural justice must be read into any provision of the Act so as to supply to deficiency of the legislature. But this requirement can only be implied if the order of reference to Commission was an order affecting the civil rights of the undertaking and was thus prejudicial. Counsel for the petitioner contended that the very order of reference to the Commission is a prejudicial act as it will entail a lot of publicity, inconvenience and harm. We cannot agree. The order of reference decides nothing; it only sets the investigative machinery of the Commission into motion. This is a preliminary stage where on a prima facie view of the matter the Central Government makes a reference u/s 31(1) of the Act. Law does not require any hearing at this preliminary stage. Another reason why it is not possible to hold that the commission has no jurisdiction to give a finding about the existence of M.U. is available by a reference to section 37(4), which says that if the Commission during the course of enquiry finds that M.U. is indulging in M.T.P., it will submit the case along with its finding to the Central Government with regard to M.T.P. for taking any such action as the Central Government may think fit u/s 31(1). Evidently this can only be done after giving a finding regarding M.U. This will show that the finding about the M.U. is within the competence of the Commission. If during the course of enquiry u/s 37 any M.T.P. is found it is open to the Commission to find out whether M.U. exists or not, it does not stand to reason as to how on a specific reference being made u/s 31(1) the competence of the Commission to determine whether the M.U. exists or M.T.P. are indulged into is excluded from its purview.

(15) The procedure for enquiry before the Commission is a very detailed one. Regulations have been framed by the Commission dealing with the procedure for reference received u/s 31(1). Regulation 36 provides for the Commission to inform the undertaking the substance of reference and permit such undertaking to submit its written statement, and be represented by the counsel. The Commission may call the undertaking for such discussion as it may consider necessary. The Commission may visit the establishment of the undertaking. Thus not only the procedure of full fledged trial before the court is contemplated but there is in addition the informality of mutual discussion even more informal than arbitration proceedings. Section 31(2) provides that an order can be passed by the Central Government in terms of sub-section (3) only on receipt of a report from the Commission that the practices operate or are likely to operate against the public interest. Thus notwithstanding the reference of the matter u/s 31(1) to the Commission the Central Government cannot on its own pass any order as contemplated by sub-section (3) unless it receives an unfavorable report against undertaking from the Commission. The role of the Central Government at the stage of making reference to the Commission u/s 31(1) of the Act is really not even that of an investigating agency, because the investigation of facts and other

matters is to be done by the Commission. Law is well settled that where an authority is to act if in its opinion certain situation appears to exist, the formation of opinion is subjective and permits only a limited scrutiny by the court on the ground that such opinion was not formed on relevant material and that as Lord Reid called it in 1964 *Ac 40 Ridge v. Baldwin* (3), the restraints of statute act as an alternative safeguard to rules of natural justice where the function is administrative *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, (4). That case dealt with Section 237(b) of the Companies Act which empowers the Central Government to appoint one or more competent persons to investigate the affairs of the company and to report thereon if in the opinion of the Central Government there are circumstances suggesting, that the business of the company is being conducted with intent to defraud its creditors, or otherwise for a fraudulent or unlawful purpose. The order ultimately was held to be bad by the majority because the court did not find any material on the basis of which this opinion could have been formed. But it is important to note that the argument. that the order u/s 237(b) of the Companies Act was vitiated for non-compliance with rules of natural justice and on the ground that no notice was given to the company before passing such an order was not even urged obviously because it was an untenable contention, not only in this case but in subsequent case *Rohtas Industries Vs. S.D. Agarwal and Others*, (5). However, the question of hearing in such a situation came up for decision in England in a case reported in 1978 (3) *Wlr 73 Norwest Hoist Ltd. v. Secretary of State for Trade* (6), where an inspector was appointed u/s 165 (of the English Companies Act, 1967) which is equivalent to Sec. 237 (of the Indian Companies A.:t). Lord Denning while rejecting the plea of violation of natural justice observed:

" SO also with the appointment of Inspectors, under sec. 165(b)(ii). The inspectors are not to investigate and report. This enquiry is a good administrative arrangement for the good conduct of companies and their affairs. It is not a case to which the rules of natural justice apply. There is no need for them to be given notice of a charge, or a fair opportunity of meeting it."

He further observed, "So long as the minister acts in good faith, it is not incumbent upon him to disclose the material he has before him, or the reasons for the inquiry," and he held that it is sufficient that there arc circumstances suggesting misconduct within section 165(b)(ii)" We can see no reason to imply a hearing, where the same is not contemplated u/s 237(b) of Companies Act. where order is made on the formation of opinion of business being carved on for fraudulent purpose. The reputation if any may be more seriously damaged and yet hearing was not implied. In the enquiry u/s 31(1) there is no such damage to the reputation of the undertaking as to call for any prior hearing. In all countries dealing with monopoly legislation it is inevitable duty of the government to .keep a watchful eye on the commission of monopolistic practices which are damaging to the consumer interest. Satisfactory method has been evolved in our country by asking the commission; an independent body, to investigate the matter, However; if every time the Central Government wants to make a reference it

must first give a prior hearing and determine the facts even when the same matter will have to be enquired into by the Commission, the whole exercise would appear to be futile and a time consuming one. This would result in delay and thus frustrate the object of the Act. The argument of reputation being harmed merely because the matter is to be enquired into is too facile and unconvincing and we may quote the observation of Lord Denning in the above case: (Norvest Holst case Supra)

" WE know that, when these inquiries are held. those persons who are the subject of them often complain about them. They say that the machinery operates unfairly against them. Such complaints are usually unfounded. They are made so as to delay the inquiry, or to lessen the effect of the report of the inspectors. But, whether well founded or unfounded, it is no reason for abandoning this machinery. It is the only means given to the public by which the conduct of companies can be investigated Parliament has clearly enacted that there should be power under the control of the Board of Trade, on behalf of the public at large for an inquiry to be made into the conduct of the affairs of a company. if there are circumstances which appear to the minister to suggest "fraud, misfeasance or other misconduct do not think we should encourage or support any attempt to delay or hold up the inquiry. To my mind the action is without foundation."

(16) In *Wiseman and another v. Borneman and others* 1971 AC 297; a provision was made that if the Commissioner of Revenue found that as a consequence of transaction in securities, a person has obtained tax advantage he may issue notice to the said person who may give statutory declaration that the provision does not apply to him: if after the receipt of declaration the Commissioner wants to proceed further he shall send to the tribunal a certificate to that effect and ".hereafter the Tribunal shall determine whether there is or is not a prima facie case for proceeding in the matter. If the Commissioner of inland Revenue decides to nullify an alleged tax advantage by adjustment pursuant to sec. 28(3) the tax payer has ample right, to challenge this by requiring a re-hearing before the Tribunal and thereafter to the High Court on a case stated on a point of law. The grievance that the person was not given right to see the documents and opportunity for a hearing at this preliminary stage was rejected. Lord Reid observed at page 308 as follows:

"It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be a judicial determination of the question, whether there is a prima facie case. Every public officer who has to decide whether to prosecute or raise proceedings, ought first to decide whether there is a prima facie case. but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reach such a decision in the absence of the other party."

Dr. Singhvi, however, referred us to the observation of Lord Donovan at page 316 "that simply because the proceedings before the tribunal at this stage are merely

turn the purpose of deciding whether there is a prima facie case or not does not mean that the rules of natural justice do not apply." .In our opinion the reference must be read in the context in which they were made, because Lord Donovan went on to caution that otherwise it would be permissible for a member of the tribunal to sit even though he had advised the taxpayer in the particular transaction under scrutiny. As is well known two fundamental Rules are comprised in the legal concept of natural justice (1) man may not be a judge on his own case, (2) and that man's defense may always be fairly heard, vide Administrative Law by Wade, 4th Edition page 394. It is the above first rule of natural justice i.e. namely bias which was referred to by Lord Donovan in the broad generalisation that the principle of natural justice cannot be said to be inapplicable simply because the determination is to be whether there is prima facie case or not. It was for similar reason that plea to ignore the infirmity on account of bias of one of the members of selection board on the ground that it was only a recommendatory body, and the decision was to be made by the Union Public Service Commission. was rejected in A.K. Kraipak and Others Vs. Union of India (UOI) and Others, , as the court held that the recommendation of the selection committee cannot be dis-associated from the decision of the Union Public Service Commission. Mrs. Maneka Gandhi v. Union of India and another (1978(1) Sc 248 is distinguishable. Passport had been impounded without a prior hearing. It was recognised that the passport may be impounded without a prior hearing but as soon. as the impounding has been made an opportunity of hearing should be given. It would be apparent that in that case no sooner the passport had been impounded, the effect on the person concerned was immediate and the exercise of his right to go abroad was impaired and put in suspense, and yet prior hearing was not implied, and post decisional hearing considered sufficient safeguard, In the present case no final order is passed till after the report is received from the Commission. No rights are affected at the stage of reference being made by the Central Government, 1978 (1) Sc 405 M S Gill and Another v. Chief Election Commissioner and Ors. (9), is also distinguishable. In that case the Chief Election Commissioner in the exercise of his power u/s 153 of the Representation of People Act cancelled the poll which had taken place in the Ferozepur Parliamentary Constituency. The Supreme Court held that though because of the bar under Article 329 of the Constitution no relief could be given but nevertheless held that a hearing should have been given by the Chief Election Commissioner before ordering the re-poll. The Court was duly impressed with the argument that the whole re-poll is not a joke and it is irreparable punishment to the constituency and the candidates. The only remedy that was available to candidate was to file an election petition and then seek his remedy. A wrong order of re-poll would have deprived the petitioner of the fruits of his victory even if ultimately the election petition is found in his favor. The right to sit. in the Parliament would be delayed for a number of years. Obviously the effect of order of re-poll was immediate and definite and not of prima facie nature. The Court was inclined to accept Lord Reid's observation in Wiseman case ("supra) if the order could be characterised as of prima facie

character as is clear when it observed that the "Indian parallel would be an argument for notice and hearing from a police officer when he investigated and proceeded to lay a charge sheet because he thought that a case to be tried by the Court had been made out. The present case stands on totally different footing. What the Election Commission does is not to ascertain whether a prima facie case exists or an ex parte order, subject to modification by him is to be made. If that were so Pearlberg would have been an effective answer." That case does not assist the petitioner.

(17) In *Pearberg v. Varity* 1972 (2) All Er 6(.10) the Income tax Management Act provided that if some tax has been lost due to the "willful default or neglect of the taxpayer, assessment may be made but could only be done with the leave of the Commissioner given on being satisfied by an Inspector that there are reasonable grounds for believing that the tax has or may have been lost to the Crown owing to the willful default of any person. When in pursuance of leave, the assessment is made, the taxpayer had a right of appeal and may raise any question relevant to the assessment being made. The taxpayer claimed assessments to be invalid on the ground that leave had been granted without giving him an opportunity to appear and be heard. This plea was rejected. Viscount Lillburn after having held that the granting of leave is an administrative act proceeded on to consider the matter on the assumption that it was judicial or quasi judicial function but still held that no hearing was to be given at the stage when leave was being granted because the Commissioner at the time of granting leave had to be satisfied only that there was prima facie case. The learned Judge though observing that it cannot be said that the rule of natural justice do not apply to a judicial determination of the question, whether there is a prima facie case, observed that I do not think they apply with the same force or as much force as they do to decisions which determine the rights of persons... ..Where the person affected can be heard at a later stage and can then put forward all the objections he could have preferred if he had been heard on the making of the application, it by no means follows that he suffers an injustice is not being heard on that application." Though he recognised that Parliament is not to be presumed to act unfairly and the courts may be able in suitable case to imply an obligation to act with fairness: he nevertheless cautioned "Fairness however does not necessarily require a plurality of hearings or representations and counter-representations. If there were too much elaboration of procedural safeguards, nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be look readily sacrificed." (page 16-17).

(18) Lord Salmon observed, "A decision under S. 6 of the 1964 Act, is in the class of purely administrative preliminary decisions, taking away no rights and in respect of which neither reason nor justice requires the persons concerned to be heard before the decision is made." (page 21) .This is a clear authority for the proposition that at the preliminary stage plea of natural justice in the sense of requiring a prior hearing is not the requirement of law. We may also refer to a

decision of D.B. of this court in Lpa 52il978 decided on 23-1.1-1978 in which it was held that no hearing is necessary to be given by the Central Government when giving an authorisation to any person u/s 399(2) of the Companies Act, for the purpose of filing an application u/s 397 and 398 of the Companies Act.

(19) Reliance was sought to be placed strongly on Regina vs Criminal Injuries Compensation Board 1967(2) Q.B. 864 In that case a criminal Injuries Compensation Board was constituted to award compensation to persons who were injured and were victims of violence. In that case the board made certain deductions and the widow of a police officer being dissatisfied applied for an order of certiorari ,Objection was taken that the Board was not constituted by the Statue and the determination gave no legally enforceable rights. This plea was accepted because the scheme had been made by the executive Government and the money with the Board was held in a fiduciary capacity, that even if payment was bounty, the publication of scheme would constitute limitation upon board's power and an error of law could be corrected by certiorari in that case no such question of giving a hearing at the preliminary stage arose. The determination by the Board was final and payment could only be made in pursuance of determination by the Board, which was held to be quasi judicial. That case only de

(20) Reliance was sought to be placed by the Counsel for the petitioners on The State of Madhya Pradesh and Another Vs. Baldeo Prasad, . In that case the validity of the Central Provinces and Berar Goondas Act, 1946 was challenged which provided that. on. the District Magistrate being satisfied that the person concerned was likely to act prejudicially to public peace and that the person concerned was a Goonda, he could pass an order directing such goonda that he shall not remain in any such area or place as may be specified in the order. The District Magisistrate was required to give an opportunity to the Goonda to be heard and then to report to the State Government. The court found that the safeguard in the Section did not provide that the District Magistrate must come to a decision that a person against whom he proposed To take action is a Goonda and gave him no guidance in that matter, and also the inquiry by him did not contemplate an investigation into the question as to whether a person is a goonda or not. The court thus found that out of the two conditions precedent no opportunity was given, to the person concerned to show that he was not a goonda and that an order should not be passed against him. This was held to be a fatal infirmity and not saved by Article 19(5) of the Constitution. This case is obviously distinguishable. In that case a final order was to be passed by the District Magistrate and no opportunity was provided to person concerned to show that he was not a goonda and thus not covered within the Act. There was no question of a preliminary order which was to be tested by some other tribunal as is the case in the present case. That case Therefore has no applicability.

(21) In a case decided by the Calcutta High Court the Commission had directed the Director of Investigations to hold an enquiry in exercise of its power u/s 10(a)

(4) read with section 137 of the Act. The Director of Investigation who had asked the company to supply him some information was asked to send a copy of the complaint which was not sent and the action of the commission was challenged on the ground that the Director of Investigation had violated the principles of natural justice as it failed to supply the copy of the complaint to the Company. The grievance was rejected by the Calcutta High Court which held that the Director of Investigation was only holding the enquiry for the purpose of informing the mind of the Commission and at the stage of investigation there was no lis between the company and the Director of Investigation and the report of the Director of Investigations does not prejudicially affect the rights of the petitioner. It was even held that the report of the investigation would not affect the reputation and goodwill of the petitioner company because unless there is a decision by the Commission u/s 37 of the Act the petitioner's goodwill and reputation are not likely to be affected. Thus the mere reference to hold an enquiry by the Commission cannot be held to cast a stigma on the undertaking, (vide law of Restrictive Trade Practices S.M. Duggar, P. 465 at -1-73).

(22) Even in America where the due process clause is applied quite strictly the courts have proceeded on the basis that even if an order is passed at a preliminary stage and even put into effect but an opportunity is given soon thereafter to test the validity of that order before another tribunal or by way of an appeal, the due process guarantee is not violated. A statute vesting administrative agencies with summary powers or powers of compulsions need not necessarily provide for notice and hearing prior to the exercise of such powers (vide Art. 406 p. 215. American Jurisprudence, IIInd Vol.).

(23) In *S. M. Nickey v. State of Mississippi* 78 Law Ed. 1323, a State Act was held not to violate constitutional mandate of due process of law even if the tax was assessed without notice and it was enough that an opportunity was given to make the available defenses before the Competent Tribunal before the command to pay the tax becomes final and irrevocable. The procedure under the Act was for the State to realise the tax due from the person by filing the suit, the determination of the assessment was considered a prima facie evidence and it was open to the defendant to assail the validity and legal consequence of the assessment. In that case also, the prima facie assessment was not held to be bad and subsequent opportunity to challenge the assessment was held to be good. As a matter of fact the American Courts have gone so far as to observe that "where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate". [vide *Annie G. P. Phillips v. Commissioner of Internal Revenue* 75 Law Ed. 1280 283 Us 589. (14).

(24) The scheme of Section 31 of the Act contemplate a report and finding to be given by the Commission before the Central Government can pass any order to remedy the mischief. The exercise of power by the Central Government is thus dependant on the Commission's report. The real impact of effect on the

undertaking will only be in pursuance of the finding by the Commission. But no finding can be given by the Commission unless full opportunity of hearing has been given, to the undertaking. In that asking for hearing before the Central Government can only delay the proceedings and is thus not warranted.

(25) It was at one time urged that some sort of enquiry must be made by the Central Government even though not an one. We fail to see the purpose of it. If an enquiry has to be made and opportunity given it must be a reasonable one and not merely a show of it. If Therefore proper opportunity is given it would mean an opportunity to place all the material relevant to the enquiry before the Central Government. This will be nothing but duplication. The Central Government does not have the necessary expertise on its administrative side to go into all the details. It would defeat the objective of the Act if even when the legislature has created such a high powered body like the Commission, the Central Government should still be expected to decide these questions of fact and complexity.

(26) Section 10(1) of the Industrial Disputes Act provides that where the appropriate government is of the opinion that any industrial dispute exists or is apprehended it may at any time refer the dispute to the industrial tribunal. It is apparent that any such reference necessarily would entail lot of expense and energy for the employer. The management may have a grievance that Industrial dispute does not exist and no reference should have been made. But it has never been urged that reference was illegal because no hearing had been given by the appropriate government before making the reference. Such a contention if urged would be negated because of the opportunity to urge this point before the industrial tribunal. In the present case all the aspects of fact as well as law in all its aspects are open for the being canvassed before the Commission and the demand of hearing before the government is even more inappropriate and untenable.

(27) It is obvious that all sorts of information will be received by the government from different sources indicating that certain undertaking is indulging in M.T.P. It is a very big responsibility but the information has to be processed and analysed. The government can at the most form a prima facie view. More than that is not to be expected, for as aptly said in 1958 S.C. 538 Ram Kishan Dalmia & Others v. Sh. Justice S. R. Tendolkar & Others (15) :

" THE appropriate government cannot in such matters be expected to sit down and hold a judicial inquiry into the truth of materials brought before it, and example the informants on oath in the presence of the parties who are or may be likely to be affected by its decision. In matters of this kind the appropriate government has of necessity to act upon the information available to it. It is the best judge of the reliability of its source of information and if it acts in good faith on the materials brought to its notice and honestly comes to the conclusion that the act and conduct of the petitioners and the affairs of their companies constitute a definite matter of public importance calling for an inquiry with a view

to devise measure for preventing the recurrence of such evil, this court, not being in possession of all the facts, will be apprehend, be slow to adjudge the executive action to be bad and illegal".

Another reason why we feel that the opinion of the Central Government about there being a M.U. or it indulging in M.T.P. is of prima facie nature is shown by reference to Section 55 which permits any person aggrieved by an order made by the Central Government under Chapter Iii or Chapter Iv to file an appeal to the Supreme Court. Now u/s 31(1) there is a reference by the Central Government to the Commission. An order is passed by the Central Government under subsection (3). If order is passed under sub-section (3) and an appeal is filed in the Supreme Court the opinion of the Central Government about the existence of M.U. or M.T.P. would not be open to be canvassed before the Supreme Court if the determination by the Central Government was final. This would seriously curtail the right and ambit of the appeal. If however, an order u/s 31(1) is of prima facie nature and after the report from the Commission an order is passed by the Central Government and then an appeal is filed before the Supreme Court the whole matter including the determination of M.U. or M.T.P. will be at large for decision by the Supreme Court. This course will obviously give greater rights and satisfaction to the undertaking to have the aspect of the existence of M.U. or M.T.P. in the appeal- This interpretation would give greater assurance to the citizen and is Therefore to be preferred.

(28) We are, Therefore, satisfied that there is no requirement of law or justice which demands the giving of any hearing before the Central Government makes a reference to the Commission u/s 31(1) of the Act, and Therefore the question of violation of natural justice does not arise. The complaint of the petitioners that no hearing was given by the Central Government has thus no merit and must be repelled.

(29) Material to support the reference ; Though we hold that it is not necessary for the Central Government to have given any hearing to the petitioner before making an order of reference u/s 31(1) of the Act it does not mean that the order can be passed on any whimsical ground and will be immune from challenge. Section 31(1) requires the Central Government to pass an order of reference only if it appears to it that one more monopolistic undertakings are indulging in monopolistic trade practice. If Therefore it can be shown that there was no material before the Central Government on the basic of which any reasonable person could have formed such as opinion the order would suffer from. It was this aspect that was next emphasised by Mr. Dewan and Dr. Singhvi who contended that the reference was bad because of complete non-application of mind by the Central Government inasmuch as the relevant consideration had not been taken into account and irrelevant consideration had been relied upon. A reference to impugned order shows that it has been passed because it appeared to the Central Government that the petitioner is indulging in M.T.P. as a result of which the cost relating to the production, supply and distribution of the products

manufactured by them has unreasonably increased. The impugned order of 28-3-1974 mentions that the petitioners are earning a very high gross profit rate on sales around 31% and a gross profit rate of 42 per cent to 44 per cent on cost of sales as against a reasonable return of 5% on cost of sales. It also discloses the petitioner earning exorbitant rate of profit at the rate of nearly 118 per cent in 1970 and over 158 per cent 1971 on capital employed and earning unreasonable net profit after paying taxes of over 50 per cent .in 1970 and 46 per cent 1971 on the average capital employed by the company to the detriment of the consumer.. It is also pointed out that large profit are made without making, any investment in the country and without incurring any expenditure on research, .and. development in India, It is also pointed out that the company products an only itself but gets its products . manufactured from other units and allowing such products to be sold under its own brand-name while these products are manufactured for by outside agencies with indigenous raw materials and how the company is earning unreasonable profits to the of the consumer and the smaller units who produce sue products. The petition made a general challenge to the reference but laid main stress on the fact that the goods manufactured the petitioner are classified in group 314. and under sub-group 314.1, 314.3 to 5 of the Schedule to the Monopolies and Restrictive Trade Practices (Classification of Goods) Rules, 1971 (hereinafter to be called the Classification Rules). It is maintained that the petitioner is not manufacturing anywhere near one third of total goods falling within the said "sub-group, and it cannot be described as dominant undertaking and hence cannot be a M.U. and Therefore the reference is bad. The counter affidavit maintains that the petitioner is M.U. and is indulging in M.T.P. It also details various facts about the goods produced by the petitioner in support of its averments. Thus we are told that it produces in respect of the tooth paste 53% of the total annual production,, tooth powder (89%) and 73 per cent in respect of shaving cream. Production of the items of powders and hair dressing is also said to be sizable. The company"s capital is alleged to be 1.5 lakhs while its sale is more than 12 crores. The gross profit rate said to have been earned by it on sales is stated to be around 31 % and a gross profit rate of 42 per cent to 44 percent on cost of sales. The net profit after paying the taxes is said to have amounted to 50% in 1970 and 46.4% in 1971. The rate of profit repatriated is also said to be exorbitant. In the rejoinder there was a general denial that the petitioners are monopolistic in respect of tooth paste and tooth powder, or that it was earning unreasonable profit or that its profit is very high. The figures of total sales, gross profit and rate of profit on capital employed was said to be not relevant or germane to the question. The allegation that the petitioner was not spending anything on research was not denied. However, an Explanation was given that the parent company of the petitioners provided the technical know how and research development without any charge, apparently suggesting that that was the reason why it was not necessary to make any substantial investment for the purpose of research in the country An amount of over 1.4 crore was said to have been ploughed back into petitioners business on 31-12-1971.

(30) We may in this connection note that in the counter affidavit it had been maintained .that action was based on the report and other material available with the Central Government. It appears that the background and the other information is the report which was prepared by Research wing of the Commission, regarding the petitioners. A copy of the report was sent to Department of Company Affairs for its information and action in May, 1973. A" further note was sent on 5th September, 1973. The details mentioned in the counter affidavit have been culled from that report. A copy of that note was placed before us during the hearing and copy supplied to the petitioners. The report is a very detailed one giving the capital base of the company and the production of the various products and the position of the market share in regard to different goods. Further information mentioned shows that in the case of hair dressing the share of the company Along with that of Tata Oil Mills Co. Ltd. Bombay and Dahat Pvt. Ltd. comes to 73 percent of the total production in 1971- In Talcum powder the share of the petitioner Along with the Hindustan Levers Ltd. and Godrej Soaps Pvt- Ltd. accounted for 68% of the total production, in 1971. Apparently the total annual production was taken excluding the figures in the small scale sector but according to the report even if that was taken into account it will still be monopolistic .There is an allegation of tying up with the sale of tooth paste a fast moving item with slow moving item, which practice leads to various other practices leading to the dominance of the Colgate. It is said that its prices keep on increasing every year by 3% The dividend policy and the repatriation policy is also commented upon. A complaint is made that the government were convinced that the company is charging unreasonably high price and inspire of efforts it has not been possible to force the company to reduce their prices. The Colgate is said to be increasing its prices almost every year by 3%- It appears the rate of discount given by the petitioner has also an effect on the high price. Report also mentions that the petitioner had entered into an agreement with M/s. Tata Oil Mills Ltd. for the manufacture of Palmolive Soap, Shaving Soap and hair oils arid the later are precluded from manufacturing similar competitive items for themselves or for any other party.

(31) MR". Dewan had objected to any reliance being placed by the respondent on the report and urged that statutory orders made by statutory authority have to be construed as they stand and not by subsequent Explanations or additions given later on and sought to rely on 1952 S.C. 16 Commissioner of Police, Bombay v. Gordhandas Bhanji (16), and Gills" case (Supra).

(32) In, Gordhandass case cinema license was cancelled by the Commissioner of Police who said in communication that .he was directed by the government to do so. In the affidavit, in reply, during .the hearing attempt was made to show that it was the Commissioner"s order. It was in this context that it was said that statutory: orders cannot be construed in the light of Explanations given later on. Similarly in Gill"s case the reference was to the elucidation by affidavit of the reasons for passing the order. The report in the instant case relied on by the respondents is not to explain the reasons made in the referring order. The

reference order has given reasons why the Central Government passed the order. Challenge has been made in the petition that there were no materials on the basis of which the Central Government could have formed the opinion. When such a challenge is made it is the duty of the State in terms of *Barium Chemicals* case (supra) to disclose circumstances which led to the formation of the opinion by the Central Government. The counter affidavit had given the survey and details culled out from the report. Placing the full report cannot be said to be in any manner prohibited. The report is being relied upon to show the bonafide of the Central Government in having arrived at its opinion that this was a case which should be referred for enquiry u/s 31(1) of the Act. The report is meant to show that the Central Government has not acted arbitrarily. Whether all the facts and figures given in the report are true or not or whether the unreasonableness of price or profit on a particular figure is acceptable or not are questions which have not to be examined by this court but by the Commission when it holds an enquiry. All that this court has to see at this stage is whether the opinion of the Central Government was based on relevant material.

(33) Now the report clearly shows that a genuine honest effort was made by the authorities to collect the various figures and details to arrive at some prima facie reasonable conclusion with regard to the position of production of the goods being produced by the petitioner company, its share in the annual production, the rate of repatriation and other practices which prevent or lessen the competition and amount to M.T.P. Whether on such a material the Central Government should have formed this opinion or whether these various details were sufficient or not are outside the purview of examination under Article 226 of the Constitution. Once this court is satisfied that there are materials on the basis of which Central Government as a reasonable person could have come to the conclusion that it is necessary to refer matter for enquiry u/s 31(1) of the Act, the order is valid, the sufficiency of the material cannot be the subject matter of examination by us. The non-application of mind of the Central Government cannot be established by urging that on the material on record the court could have come to a different conclusion. In the present case the report mentions that the company is having a high gross profit rate on sales around 31% and that the net profit to average capital employed is, 41.7 to 46-4%. It also points out the agreement which the petitioner company has made with Tata Oil Mills by which the latter are precluded from manufacturing similar competitive items for themselves or for any other party. This practice obviously has the result of unreasonably preventing or lessening competition in the production of goods and also helps the petitioner in maintaining prices at an unreasonable level. Prima facie, Therefore, the facts if established do prove material which is relevant for the purpose of formation of opinion by the Central Government whether to refer the matter or not. It will be seen that the report mentions that the petitioner company gets its goods manufactured from smaller firms and then sells them under its brand name. M.T.P. is defined as a practice which has or is likely to have effect of unreasonably preventing or lessening the competition in the

production, supply or distribution of any goods. The trade practices of getting the goods manufactured by others will certainly have the effect of preventing, distorting or restricting competition- This is because by this arrangement the market share of the petitioner company is increased with the result that the competition will be restricted. That such reason is not extraneous or collateral to the purpose of the Act was held by Calcutta High Court (case mentioned at page 465 of Law of Restrictive Trade Practices by S. M. Dugar).

(34) Reference was made to 1967 S. C. 1981 Raja Anand Brahma Shah v. The State of Uttar Pradesh and Ors, (17). In that case the State Government notification directed the Collector to take possession of the land in "terms of Section 17(4) of the Act. Now such a declaration could only be made in case of land which was waste and arable. It was found that as the land was not waste and arable and Therefore the notification was held illegal. We do not see how this advances the petitioner's case. Here the material exists. The petitioner's grievance is only to the sufficiency of the material which can not be examined here. We are quite satisfied that there are relevant facts on the basis of which opinion could have been formed by the Central Government. , These various details would also show the untenability of the argument of the petitioner that it is for the Central Government to determine both that the petitioner was M.U. or that it was indulging in M.T.P. It is apparent that in order to decide fairly and properly, a detailed enquiry would be" necessary into the various facets and facts and figures. If all this is to be done at the Central Government level it would virtually amount to converting the Central Government into a tribunal for decision on facts. If that view was to be accepted the efficacy of Constituting the commission with high powered body would be defeated and would appear to be useless exercise. Having constituted a high powered body with experts and Judicial experience it is only natural to hold that the legislation intended that in these matters which are of such grave economic consequence a body quasi Judicial in nature should alone examine the matter in detail.

(35) Another objection was that irrelevant matters had been taken into account by Central Government. The argument was that the report as well as the reference order mentions about the unreasonableness of price and profit but that these have no relevancy to the M.T.P. The argument in short is that any prices can be charged, profits may be unreasonably high for a variety of reasons, but that has no connection with the undertaking being a monopoly. Now this argument is totally unacceptable as being contrary to the well settled definition of Monopolisation. M.T.P. being indulged in by an undertaking is an aspect of monopolisation, the effective control of which is the first priority of any effective economic legislation.

(36) Monopolistic Trade Practice has been defined as a trade practice which has been or is likely to have the effect of maintaining the prices at an unreasonable level by limiting, reducing or otherwise controlling the production or supply or in any other manner. Thus if the prices are found to be at an unreasonable

level a prima facie case of M.T.P. being indulged in by an undertaking would "be a reasonable inference. Thus the action of an undertaking in maintaining prices at an unreasonable level will immediately bring such a practice within the definition of an M.T.P. The biggest danger that the consumer faces and from which all legislation dealing with the subject matter seeks to protect him is from undertaking monopolising or attempting to monopolise. As a matter of fact such an attempt to monopolise is considered misdemeanors u/s 2 of the Sherman Act (U.S.A.) and is indictable. In all Antitrust laws all over the world the same principles apply. A firm's intent may be made manifest by its particular acts or by its general course of action. When a firm in a position of power has exploited the public by charging excessive prices, or has driven small competitors out of business, there is no need to look further for its intent to monopolize. Even without particular identifiable acts of exploitation or predation, a firm's general course of policy and behavior may be such as to give rise to an inference of monopolistic intent, (Neale's Antitrust laws of the U.S.A. IInd Edition, page 94). A study of historical theory would show that certain activities of individual firms that had the same harmful results as restraint of trade, particularly the raising of prices, had come to be equated with restraint of trade. (Neale's supra page 98). "Monopolising" is said to occur when a dominant firm raises prices or excludes competitors (page 93 Neale's supra). Judge Hand in the case of *Aicco* has pointed out, "the mere fact that a producer having command of the domestic market has not been able to make more than a "Fair" profit is not evidence that "fair" profit could not have been made at lower prices". In the case of a monopoly as in that of an agreement, it is the creation of market power that constitutes the restraint of trade, regardless of whether the power is subsequently found to have been used reasonably or unreasonably. (page 108 and 109 of Neale's supra). In fact, so strong is the feeling of a more than normal market share being captured by one single undertaking that in effect" the test propounded by Judge Hand puts the onus on the defendant to show that he simply cannot help having monopoly power; to any extent that he reaches out to grasp or strives actively to hold his leading place, he is denied the right to claim that he has no unlawful intent. (Neale's supra page III). According to Justice Burton the rule is established that proof of actual exercise of monopoly power to exclude competitors or charge excessive prices is not required for a showing of monopolisation, (page 112 Neale's supra). Also unnecessary and big percentage of expenses on advertising and high power salesmanship in order to keep the position of undertaking in monopoly situation could come within the purview of M.T.P.

(37) Monopoly makes high profits rates possible just how high depends on a variety of circumstances. The general hypothesis is that there is a relationship between market share and profitability. (William G. Shepherd's *The Treatment of market Power*, page 40). The term "Monopolistic" may be best reserved for a firm with the power to earn profits in excess of the minimum that it would require to enter the business, or acting as if it had this power, indefinitely or at

least for a long period of time (Peter M. Holmes Industrial Pricing behavior and Devaluation page 29, 30).

(38) That a high market share of commodities is one of the bench marks considered for action for dissolution or diversion of the undertaking is now a commonly accepted thing in the United States. Also the firms' profits and market share are some of the combination of the bench marks relevant for action being taken for dissolution of the undertaking.

(39) A business with an extraordinarily high return on assets employed will be exposed to charges that it is gouging the public (Vide Fundamentals of Management accounting Anthony and Welsch page 42).

(40) Thus it is no longer open to argument that if unreasonable prices are maintained or a high rate of profit is made by an undertaking, it would be a prima facie conclusion that undertaking was indulging in M.I.P. In most of the cases It will be no answer for the high prices charged that because of the demand and supply mechanism the market is tolerating such a phenomenon. In our economy which is committed to prevent the concentration of economic power and also frowns on existence of few islands of vulgar affluence amidst a vast arid desert of want and poverty, maintaining prices at an unreasonable level and a showing of excessive profits would inevitably invite the comment of undertaking indulging in M.T.P., thus requiring the government to carry out its mandate under the Act to refer the matter to the Commission u/s 31(1) of the Act. The order of reference has detailed the reasons for the opinion of the Government. No doubt all these matters and details need to be examined in depth and a firm finding given. This is the task of the Commission. But admittedly various details given do raise a prima facie case and it would be sheer exercise in evasion to hold that notwithstanding all these details, mentioned in the report there was no material before the Central Government to form the opinion that a situation had arisen where the petitioner was indulging in M.T.P. and it called for a reference to be made to the Commission. Re : Applicability of M.R.T.P. (Classification of Goods) Rules 1971.

(41) Another criticism made by. both Mr. Dewan and Mr. Singhvi was that the apparent assumption of Central government that the petitioner companies were M.U were vitiated by a serious error of law. Now M.U. is defined u/s 2(j) to mean a dominant undertaking which produces, supplies, distributes or otherwise controls not less than one half of the total goods of any description that are produced supplied or distributed in India or any substantial part thereof. In the case of the Palmolive the Company is said to enjoy the monopolistic position because it produces more than 112 of the total annual production in the case of tooth past,, tooth powder, dominant ill case of shaving cream while in the case of Cadbury i"s production is 90 per cent of the total production of chocolate. Now there is no doubt that the petitioners are not dominant with respect to each of the products produced by it. Thus the argument, is that as the reference related to all products of the petitioner, company without staling the market share in

respect of each product and lineless that was known the petitioner company could not be said to be a monopolistic undertaking in respect of each product. The report gives figures with respect to 4-5 items showing the percentage of market share to be more than 50 per cent but with regard to the other products manufactured by the petitioner company, the figure does not go beyond 50 per cent, and Therefore it is urged that it cannot be deemed to a monopolistic undertaking. It is in this connection that a reference is invited to M.R.T.P. (Classification of Goods) Rules 1971. (to be called the Classification Rules 1971). Rule 2(1) says that for the purpose of Chapter Iii (this was inserted by M.R.T.P. (Classification of Goods) Amendment Rules 1972), of the Act, goods shall be classified in the manner specified in the schedule to the rules. In the schedule to the Classification. Rules 1971 group No. 314 dealing with toiletries -soaps has a sub-group 314.4 which consists of tooth pastes, tooth powder, dentifrices, shaving cream, shaving sticks etc., and group 2G9 includes Cocoa, Chocolate and sugar confectionary (including sweetmeats). The argument is that in terms of Rule 2 of Classification Rules 1971 it is clearly provided that the goods falling within the group specified in the schedule and not falling within a sub-group, shall be classified as goods one description, while goods falling within a group but also fall Within a sub-group, goods falling within that group shall be classified as goods of one description. Thus it is maintained that as group 209 mentions cocoa, chocolate and sugar confectionery (including sweetmeats) they form goods of one description whereas all that is said in the report is that Cadbury has 90 per cent of the production of the chocolate but that does not mean that it produces more than 50 per cent of all the products mentioned in group 209. Similarly in group 314.4 the fact that the palmolive produced more than 50 per cent in the case of tooth paste and tooth powder or a few other products does not make it a monopolistic undertaking unless it was shown that it was producing more than half in all the products mentioned in the sub-group 314.4. So stated the argument comes to that before fliers can be a M.U. it must be producing more than half of each of the products mentioned in a particular sub-group or group, as the case may be. We cannot agree. Because of the amendment made to the Classification Rules. they can only be invoked for the purpose or chapter Iii of the Act which deals with concentration of economic power and consist of Section 20 to 30. Reference has been made u/s 31 which is to be found in Chapter Iv of the Act. The Central Government Therefore when it has to form its opinion whether monopolistie undertaking is indulging in any monopolistic trade practice has only to see the production, supply or distribution of each identifiable and specific goods and has not to lump that product with all the products mentioned under a group or sub-group. We are here considering the reference made under Chapter Iv of the Act and in terms the Classification Rules are inapplicable and no argument can be founded on the basis of their applicability. In our view even without the amendment made in 1972, Classification Rules would have been inapplicable. It was contended by the counsel for the petitioners that it would be anomalous if for the purposes of finding out whether an undertaking was dominant, Classification Rules, were applied for the purpose

of Chapter III of the Act, but were excluded for the purpose of Chapter IV. We find no such anomaly. It must be appreciated that the purpose of Chapter III and Chapter IV are totally different. Chapter III of the Act deals with evil of concentration of economic power. Chapter III subserves the main object of the Act namely that the operation of the economy system does not result in the concentration of economic power to the common detriment while Chapter IV serves to carry out the other mandate under the preamble of the Act for control of monopolies and for the prohibition of the monopolistic and restrictive trade practices. The impact of Chapter III and Chapter IV of the Act impinge in different situations. It will be seen that where as for Chapter III to be applicable not only must it be a dominant undertaking but further the sum total of value of its asset; should not be less than one crore of rupees, while the definition of M.U., may be a dominant undertaking or even any undertaking but lays emphasis on it producing or supplying not less than one half of total goods of any description. Thus it is the market share of the product that is the real consideration under Chapter IV of the Act. The purpose and object of Chapter IV Therefore may get frustrated if the classification rules were to be applied under Chapter IV. To take the present illustration,, if on the assumption that M.T.P. is being indulged in by the petitioner company with respect to Chocolate or with respect to tooth paste and tooth powder, it does not stand to reason or logic that law should not permit any action to be taken under Chapter IV. because if classification rules are applicable, the petitioner company would not be dominant, and hence not M.U. within the meaning of the Act. As a matter of fact Classification Rules in a-way dilute the rigour of Chapter III, because an undertaking would have to be dominant in all products in a sub-group, and because there are large number of products, it may escape the applicability of Section 21, 22, relating to the expansion and setting up of new undertaking. In fact this lacuna has been recognised and that is why new Classification Rules are being proposed making it more rational. It is one of the" major objects of the Act that monopolistic or restrictive trade practices which are contrary to the consumer interests are not allowed to prevail. For the purpose of restrictive trade practice it is nowhere provided that no action can be taken unless an undertaking was indulging in restrictive trade practice with respect to all the products which are classified under one subgroup or group under Classification Rules. Thus if the petitioner company was to indulge in restrictive trade practice with respect to distribution and sale of chocolate or with respect to the production or sale of the tooth paste or tooth powder action can be taken by the Commission. What justification then is to urge that if these petitioner companies were to indulge in the illegality of monopolistic trade practice which has a more serious effect on the consumer interest, Central Government is powerless to take any action because the undertaking is not dominant in all the products. The similarity or otherwise of the goods must have reference to the market for the goods as far as consumer is concerned for the market for the goods can be determined only with reference to the end use to which the goods may be put by the consumer. To accept the argument of the petitioners would be to frustrate the whole objective and functioning of the

legislation like M.R.T.P- Act. In our view Therefore the mere fact that the petitioner companies are not dominant and monopolistic in all the products mentioned in the group 209 and sub-group 314.4 of Schedule to Classification Rules is no justification for holding that the essential requirement of being monopoly undertaking are lacking and the reference Therefore suffers from this infirmity. In our view it is a sufficient compliance of law if the undertaking is producing not less than half of products or goods which are identifiable recognised consumer commodity in the market. The whole purpose is to prevent the market share in the goods reaching a level which will be injurious to the consumer interest, by resulting in maintaining prices at an unreasonable level- Goods are defined in the Act as goods produced in India, and must as such be so construed for purposes of Chapter Iii of the Act.

(42) In America there is no statutory connotation of "dominant" under the Anti Trust Laws. In usual parlance "dominant" position is used as synonymous with monopoly power of varying degrees depending upon the circumstances of each case. There in order to decide with respect to horizontal and vertical aspects of the merger, the test that has been evolved is whether each of these product lines was recognised as distinct by the public and has characteristics rendering it generally non-competitive with the others and was directed towards a distinct class of customer ; (vide Neale page 195 Supra). Thus in the merger guidelines issued by the U.S.A. department of justice of America a market is defined both in terms of its product dimension (Line of commerce) and its geographic dimension (section of the country). The sales of any product or service which is distinguishable as a matter of commercial practice from other products or services will ordinarily constitute a relevant product market, even though from the stand point of most purchasers, other products may be reasonably, but not perfectly, interchangeable with it in terms of prices quality and use. (vide A.D. Neale supra page 495).

(43) In America to prove monopolisation there need be no showing of absolutism and monopolisation does not require proof of power to exclude all competition. A market in which 8 or fewer, firms supply over 50 per cent of the market with largest firm supplying over 20 per cent, has been described as a light or highly concentrated oligopoly. Size is itself an earmark of monopoly power because size carries with it an opportunity for abuse . (See America Jurisprudence, IInd Edition. Vol 54 page 688-689). The relevant product market includes those commodities which are reasonably interchangeable by consumers for the same purpose i.e. price, use, and qualities considered. If a product is controlled by one interest, without substitutes available in the market, there is monopoly power. The product market does not include the infinite range of substitutes for a product. The circle must be drawn narrowly to exclude any other product which within reasonable price variations only a limited number of buyers will turn (American Jurisprudence supra page 690).

(44) In the European Common Market a dominant position has not yet been

clearly defined. Probably the best one can accept at the moment is that given by the court of Justice in the Continental Can Case : "Undertakings are in a dominant position when they have the power to behave independently..... without taking into account their competitors, purchasers or -suppliers.... the position when, because of their share of the market... .they have the power to determine prices or to control production or distribution for a significant part of the product in question". (Crotti Trading under EEC & US Antitrust Laws, p. 187).

(45) It will thus be seen that the tests which are to be applied to prevent the concentration of economic power and tests which are to be applied to safeguard consumers interest against monopolistic trade practices can be different. Chapter III of the Act is aimed at preventing strangulation of economy by an undertaking by its very size. In that context the power is the enormity of its size in capital, employment and impact on economy. While under Chapter IV market domination in some definite product is the target. Even if the overall size of the undertaking is not too big, it may be in a position to control the market in any particular product. That is why Chapter IV must concern itself with specific use of a product. To seek to find dominance in any product by applying Classification Rules would pervert the whole picture because by this process different and distinct products were put in one category which products are not substitutable but have distinct uses. with the result that there is no countervailing pressure on the excessive price of one product by comparing with the price of another distinct product. The reason is that if a producer charges excessive price for a product, he may suffer in competition if there is available in the relevant market a near substitute, because then market forces may operate- So naturally Therefore in order to" put curbs on M.T.P- the query with regard to a product and its substitutability is the important consideration, automatic applicability of Classification Rules is not called for nor the requirement of law. So far as the consumer is concerned he is suffering by the M.T.P. being indulged in a particular product. Thus a consumer of tooth paste can derive no satisfaction that though M.T.P. is being indulged in this product by an undertaking and even though it has dominant share in this item, but no action can be taken against the undertaking because it is not dominant and monopolistic at the same time in combined products mentioned in sub-group 314.4 of Schedule to Classification Rules, which includes dentifrices, shaving cream, and shaving sticks. A moment's consideration would show the absurdity of treating shaving stick and tooth powder as substitutable products. Similarly even though the petitioner company. Cadbury is producing 20 per cent of chocolate, can it avoid even an enquiry being made into M.T.P. on the specious plea that it is not dominant in all the other products like the cocoa, sweetmeats mentioned in group 209. The two are distinct products and cannot in logic be combined. To take another illustration as is well known vitamin C amongst the various vitamins is very important and is used almost exclusively for digestive purposes. The use of vitamin C is very different from other vitamins like A, B etc. In the schedule of the Classification Rules under the Group drugs and medicines sub-group 313.9 is Vitamins. if the argument of the

petitioner was to be accepted that the Classification Rules apply then even if the manufacturer was producing more than half the vitamins C the undertaking could not be declared to be monopolistic undertaking unless it was also producing not less than half of all the vitamins A, B. C. This would in practical effect be an impossibility with the result that the very vital product vitamin C which is separately identifiable and used for separate purpose, the manufacturer of "it could not be proceeded under the Act on the specious plea that it was not monopolistic in the production of all the vitamins- This would show how unnatural, against the economy and practical reality it is to urge that the classification rules apply to Chapter IV. Thus we are fortified in our view that for the purpose of reference u/s 31 of the Act the dominance of the undertaking has to be seen with respect to goods of description as understood in the market and as a commercial identifiable product and not with reference to the Classification Rules which do not apply under Chapter IV of the Act.

(46) One of the objections raised against reference was that as no figures had been published by the Central Government with regard to the total production during the relevant year as required by Explanation II of Section 2(j) of the Act there was no way of finding out whether an undertaking is M.U. or not. The argument is misconceived. All that Explanation II to Section 2(j) says is that in determining the question as to whether an undertaking is or is not a monopolistic undertaking, regard shall be had to the figures published by the Central Government with regard to the total production made or services rendered in India or any substantial part thereof during the relevant year- Though the figures published by the Central Government may not be available in as much a detail as would be desirable it does not mean that the determination of M.U. is to await till the publication of the figures. Whenever a question arises whether any undertaking is M.U. or not the figures published by the Central Government with regard to the total production have to be taken into account. But it does not mean that if the figures are not published there can be no finding whether an undertaking is M.U. or not- It is true that the lacuna arising out of non-publication of data and figures which create uncertainty and makes the working of the Act more difficult was noticed by the High Powered Expert Committee in its report in para 19.7 where it stated, "We strongly recommend that the Government should make necessary arrangements in this regard immediately". But this does not mean that because the figures are not fully collected there is a bar to the reference being made. The details of figures and others are to be proved independently before the Commission and any evidence from all sources is admissible before the Commission. The instrument of consumer protection cannot be reduced to a nullity because of slowness of official machinery.

(47) The next contention was that the order of reference in terms restricted the enquiry by the Commission only to enquiring into as to whether the trade practice alleged to be indulged operate against the public interest. Mr. Singhvi sought to make much of use of phrase "as to whether" and contended that only the public interest angle could be enquired into and the Commission cannot

enquire into the factum of the undertaking being a monopolistic undertaking or if indulging in M.T.P. In our view the language does not support such a construction. The reference order clearly mentions that an undertaking is indulging in the trade practices by which the costs have been unreasonably increased and Therefore the matter is being referred to the Commission for enquiry. We have already shown that u/s 31(1) the reference that can be made to the Commission is both on the factual aspects of the existence of M.U. and indulging in M.T.P. and to report whether in view of the economic conditions prevailing in the country the trade practice operate or is likely to operate against the public interest. In our view the whole scheme of the Act and Section 31 requires the matter on factual as well as public interest to be referred to the Commission and permits the Central Government to pass an order u/s 31(3) only after the receipt of the report from the Commission- It is not Therefore permissible to urge that the Central Government can make a reference to the Commission relating to the public interest angle only . The reason is that reference has to be made to the Commission in terms of Section 31. The Central Government cannot on its own seek to restrict the scope of enquiry. The jurisdiction of the Central Government is to make a reference on a prima facie opinion of the existence of the M.U. and its indulging in M.T.P. But as reference is made on prima facie view all these questions are necessarily at large before the Commission which has to finally decide them. The argument of the reference being restricted to public interest must be rejected, because to allow such power to be exercised will" be against the mandate of the Act. The reference order must of necessity be read to be in accordance with and in harmony with Section 31 and the scope of reference and enquiry cannot be whittled down by the Central Government at its whim" and fancy. This plea fails. As a result of the above the Writ Petition is dismissed with costs. Counsel fee Rs. 1000. Re : Cadbury's Case : (C.W. 574/74)

(48) We have dealt with points which were common to the Writ Petitions. The only aspect to be dealt with reference to the petition is the contention of Dr. Singhvi that there was no material on the basis of which a decision could have been taken by the respondent to refer the matter u/s 31(1) to the Commission- A reference to the impugned order shows that the Central Government decided to refer the matter to the Commission because in its opinion it was indulging in M.T.P. as a result of which the cost relating to the production supply and distribution of chocolate products manufactured by the petitioner has unreasonably been increased. Some of the instances mentioned as contributing to the cost of the price are stated to be (a) paying high rate of royalty at the rate of 5 per cent of gross price of chocolate products to its parent holding company; (b) excessive payment of retailers" margin up to 18 to 20 per cent of the trade price of such products; (c) earning profits of about 40 per cent on the total capital employed by the said company; (d) unreasonably increasing the price so as to earn unreasonable profits; (e) not reducing the incidence of the administrative over heads of the company, particularly their advertisement

expenses.

(49) In the Writ Petition challenge has been made to the figures given in the order of impugned reference. The petitioners maintained that the average margin on the retailer varies from 5 to 15 per cent. The Explanation given is that considering the perishable nature of the products manufactured by the petitioner the margin cannot be said to be high. The objection is taken to the figures of 40 per cent as profit earned by the petitioners. It is maintained that the total capital is of Rs. 4.63 crores. The profit earned after taxes are said to work out to be less than 15 per cent. This figure of course is worked out on the basis of capital employed by including the revaluation of reserve and long term borrowing. It is however conceded that if the profits are calculated on the paid up capital plus free reserve, the profit of the company would be 29 per cent of the capital and 12 per cent after taxes. The advertisement expenses are again stated to be approximately the same as incurred by other petitioner's competitors such as M/s. Sathe Biscuits and Chocolate Co. Ltd. which has also spent at 5 per cent of the total turn over on advertisement. Similar is said to be the situation with regard to the administrative over-head expenses. In short the conclusion under various heads is challenged. In the counter affidavit of course the respondents have chosen to give their own Explanation. It is reiterated by reference to various figures that the company had earned unreasonable profit and that the claim for earning foreign exchange is not justified. The company is said to be producing 90 per cent of the Chocolate products marketed in the country. The company is said to be taking advantage of the restricted production by maintaining the price at higher level.

(50) Mr. Singhvi made a serious grievance to alleged no application of the mind by the government by pointing out that averment of 5 per cent royalty being paid by the company to its collaborators in England was factually non-existent since December, 1973 and the mention for that in the impugned order of reference of 28-3-1974 made the order bad in law.

(51) Now the position with regard to the royalty is that undoubtedly there is an agreement between the Indian Company and the parent company by which the Indian company was paying royalty at the rate of 5 per cent of the gross price of the chocolate products as royalty. The Reserve Bank of India however, by its letter dated 23-3-73 informed the petitioner company that the continuance of this technical agreement cannot be allowed to be renewed beyond 31-12-1973 and that no remittance beyond that period would be permitted. The petitioner company in reply informed the Reserve Bank of India on 25-2-1974 that the agreement being a mutual one the same can be terminated by mutual agreement and that they had recommended to their technical consultant and though they had agreed to terminate the agreement, they have still desired that they should be compensated in some other acceptable form of the service and the Reserve Bank was asked to look into this matter. The impugned order of reference is dated 22-3-1974- Mr. Singhvi's suggestion is that in view of the

25-2-1974 letter the grievance cannot be made that 5 per cent royalty was paid; this argument however, ignores certain important facts. The position is that the Government of India by its order dated 3-9-1973 had appointed inspectors u/s 44 of the Act to hold an investigation into the affairs of the company. In the said investigation a report was submitted on 24-1-1974 in which the existence of the agreement for payment of 5 per cent royalty was mentioned. As a matter of fact it was this detailed report which was the basis for the formation of the opinion by the Central Government to make a reference to the commission. Most of the facts with regard to the production, the unreasonable prices, high profits, the expenses on advertisement, the dealer's margin and other monopolistic trade practices and their undesirable effects are to be found in this detailed report, (some extracts of which were mentioned in the counter affidavit, while the full report was produced before us with a copy to the petitioners). The mere fact the letter has been written by the company on 25-2-1974 to the Assistant Controller. Reserve Bank of India cannot really bring the knowledge of the termination of this agreement of payment of 5 per cent royalty to the notice of the Ministry of Law Justice and Company Affairs which is a separate Department.

(52) We may also dispose of the argument which seems to suggest that because the Reserve Bank of India could have permitted the 5 per cent royalty to be sent to the parent company the Central Government or the Monopoly Commission is debarred from looking into whether this may not be a monopolistic trade practice operating against the public interest. The Reserve Bank of India is concerned with foreign remittance and has to look at the matter from different angle than the Commission under the Act. The two are independent and the Commission cannot be debarred from enquiring into any practice solely on the ground that the Central Government or the Reserve Bank of India has permitted a particular practice, if in its opinion it will operate against public interest. One can understand the grievance if a final order had been made determining the rights of the petitioner company basing itself on some facts which did not exist. Here however, what has happened is that the Inspector has given a detailed report. During the enquiry the inspectors sought the association of the company though the report makes grievance that the company which was to supply certain information and other details did not do so. We are not concerned with this aspect. All that we need notice is that in the preparation of the report, the inspectors at least had for obtaining information from the company associated it with itself and then submitted the report. It is not claimed that the inspectors made a report without any relevant material and facts. The details and in depth material given in the report shows the untenability of the contention by Dr. Singhvi that there was total absence of any material before the Centre Government when it formed its opinion. We think it unnecessary to refer to minute details of various data mentioned in the report, though Dr. Singhvi made an attempt to show that the statements in the order of reference about the percentage of profit, or the percentage of expenses on advertisement or percentage of dealers' margin were highly inflated and not correct. The reason is

that it is not the function of this court to go into the sufficiency of the material, and this argument of Mr. Singhvi is precisely on this score. All these matters of details, their correctness, various Explanations etc. are obviously matters which will have to be gone into when the Commission holds an enquiry in pursuance of the reference. All that this court has to be satisfied is that there was relevant material. on the basis of which the opinion could be formed, and that the Central Government had not acted arbitrarily and whimsically without any data.

(53) It may be noticed that the report of the inspector categorically comes to the conclusion that the petitioners have unreasonably increased the cost of chocolate and other products by paying high rate of royalty, by making excessive profit of 40 per cent of the total capital employed, the report has also commented upon the price policy by pointing out that the groups achievement in U.K. is only 7.4 per cent to 8 per cent of the sale whereas the figures in India are much more. The comment is also made that it has not invested anything on research in India and also the company is charging the maximum price because of the lack of competition and thus it has the advantage of monopolistic position. The comment is also made on the high cost of advertisement. All these matters are obviously such which prima facie certainly enable the Central Government to form the opinion that the matter requires further detailed consideration and hence the reference to the commission. One Therefore cannot say that in spite of the different aspects of the matter having been pointed out in the report the Central Government did not have relevant material to take action u/s 31 of the Act. Whether the various facts mentioned in the order of reference and which have been culled out from the report submitted by the inspector are established or not, or whether the government will be able to prove it before the Commission has no relevancy to determine the question of validity of the reference. This is because unless the material which has been considered by the Central Government- irrelevant and non-existent (which is not the case) it is not possible to contend with any plausibility that the government did not apply its mind and the reference was Therefore voided. We are thus satisfied that there was relevant data to enable the Central Government to form its opinion so as to make its order of reference to the Commission.

(54) As a result of the above the petition fails and is dismissed with costs. Counsels' fee Rs. 1000. Re : Coca Cola Export Corporation : (CW 1309/73)

(55) The counsel for the petitioner had at first contended that the reference has become infructuous and should be withdrawn by the Central Government because the petitioner company had intimated to the Controller, Reserve Bank: of India that it had ceased the operation of the branch in India, and it sought permission to maintain the branch office in India to enable the petitioner company to close down the business in an orderly and proper manner. It has further been stated in an affidavit filed by one Mr. Bipin Patel; the Resident Manager, of the Company that by letter dated 12-6-1978 the petitioner company was permitted to maintain an office in India solely for the purpose of winding up

its affairs in India and that the branch office is being maintained for the sole purpose of winding up and that the petitioner company has ceased all business operations in India.

(56) We had Therefore directed the Union of India to intimate to us the position and an affidavit in reply was filed by Mr. Inder Lal Nagpal, Under Secretary to the Government of India, Ministry of Law, Justice and Company Affairs. In the said affidavit in reply it has been stated that u/s 597(3) of the Companies Act any foreign company having a place of business in India has to give a notice in a prescribed manner in case it ceases to have a place of business in India and no such notice has been given by the company and that it is Therefore presumed that the company is continuing its business in India. It is maintained that the order of reference dated 28-7-1973 was made on the basis of the then prevailing facts as known to the Central Government. Mr. Malik had also pointed out that the Central Government was unable to take any action because it is not within its power to withdraw the reference.

(57) As for the Central Government withdrawing the reference we feel that the position taken up by Mr. Malik has been correctly taken. It is true that normally u/s 21 of the General Clauses Act where there is a power to issue notification or order there is also the power to amend or rescind any such order but it is also well settled that Section 21 of the General Clauses Act embodies a rule of construction, and the question whether or not it applies to the provisions of a particular statute would depend on the subject-matter, context and the effect, of the relevant provisions of the said statute (vide *The State of Bihar Vs. D.N. Ganguly and Others*,). In that case it was held that once a reference has been made under the Industrial Disputes Act to the Tribunal during the continuance of reference proceedings it is the tribunal which is seized of the dispute and which can exercise jurisdiction in respect of it and that once the Central Government has made a reference u/s 10(1) there appears to be no reason to support the contention that it has an implied power to cancel its order and put an end to the reference proceedings initiated by itself. We feel that these Statutory principles also apply to a reference made u/s 31 of the Act. The power u/s 31 is to be wisely used and if the Central Government has in the circumstances mentioned therein made a reference the matter must be allowed to be proceeded on before the Commission which alone can deal with various aspects of the reference. To permit the power of withdrawal to the Central Government would be destructive of the independence and derogatory to the high standing of the Commission. Of course it is open to the petitioner, if so, advised to bring these facts to the notice of the commission for passing any appropriate order that it deems proper. This aspect need not detain us.

(58) It is next contended that the petitioner is not a monopolistic undertaking. Reliance for this is sought to be placed on the averment made in the petition that the petitioner carries out the process of manufacturing at its plant located at Faridabad and at all times the number of workers employed has been less than

50. In the courier affidavit it is stated that the number of workers employed is not within the knowledge of the deponent. The counsel seeks to contend that the undertaking which has less than 50 workers cannot be a monopolistic undertaking. In our view this is a mis-interpretation of the definition clause in Section 2(j). Monopolistic undertaking is defined to mean a dominant undertaking or an undertaking which together with not more than two other undertakings produced not more than half of the total goods that are produced. Proviso A to this clause lays down that for the purpose of this clause the goods produced by an undertaking which does not employ more than 50 workers shall not be taken into account. This proviso A is only to be used for the purpose of production figures, so that the production figures of such an undertaking are not included to calculate the total production of any goods. The Act contemplates that if an undertaking employing less than 50 workers produces not less than one half of any goods it will be Mtp would be clear from a reference to Explanation I to Section 2(j) which says that if any undertaking which either by itself produces half of any goods shall be deemed to be a monopolistic undertaking.

(59) In the petition it is also alleged that the petitioner is not a dominant undertaking as no figures were available nor are any known to the Central Government. This is denied in the return and it is maintained that the figures with regard to the total production of the goods known as concentrates and essence are available with the Central Government. The production of beverage concentrates by the petitioner during the years 1969 to 1972 have also been mentioned in the reply. It is important to note that the reference has been made because the petitioner company is considered to be a monopolistic undertaking in the production of concentrates. Figures have been given in the return. As to whether those figures amount to more than half are matters obviously which are examinable by the Commission. We have already explained that at the stage of reference it is only prima facie view of the matter that has to be formed by the Central Government. The Central Government has figures of the production by the petitioner company showed its market dominance and Therefore it is not possible to hold that the reference has been made without any material. The sufficient and otherwise of the material can only be canvassed before the Commission during the enquiry.

(60) The result is this writ petition is dismissed with costs. Counsel's fee Rs. 1000. The consequence is that all the three writ petitions are dismissed with costs as above.