
(1966) 02 BOM CK 0001
In the Bombay High Court

Nanavati and Co. Private Ltd.

APPELLANT

Vs

R.C. Dutt and Others

RESPONDENT

Date of Decision : 10-02-1966

Acts Referred:

Companies Act, 1956 — Section 2(50), 294, 294(5), 294(6), 397
Constitution of India, 1950 — Article 14

Citation : (1967) 37 CompCas 171

Hon'ble Judges : V.D. Tulzapurkar, J

Bench : Single Bench

Advocate : S.S. Shukla and A.M. Setalwad, for the Appellant; N.C. Chatterjee and A.B. Diwan, for the Respondent

Judgement

1. This petition has been filed by M/s.Nanavati & Co. Pvt. Ltd. (hereinafter referred to as the petitioner-company) under article 226 of the Constitution challenging the validity of the Order No.12(41)- CL.VI/63 dated 20th April, 1964 (as amended by an order of even number dated 13th May, 1965), being Ex. F to the petition passed by the Company Law Board constituted by the Government of India whereby certain terms and conditions of the sole distributorship agreement dated 28th November, 1961, and entered into by J.K.Chemicals Ltd. (5th respondent) with the petitioner-company have been varied u/s 294(5)(c) of the Companies Act, 1956.

2. The facts giving rise to the passing of the impugned order mentioned above may be stated : The 5th respondent-company (J.K.Chemicals Ltd.) is a public limited company manufacturing certain chemical products including sodium hydro-sulphite, caustic soda lye, chlorine and its by-products, etc. the petitioner-company, which is a private limited company, has been carrying on business, inter alia, of dealing in and selling chemicals since 1931. By a sole distributorship agreement dated 28th November, 1961, the 5th respondent-company appointed the petitioner-company as their sole distributor for the entire territory of the Republic of India for marketing sodium hydro-sulphite, caustic soda lye and

chlorine and its by-products (excluding Hydrochloric acid) for a period of 5 years commencing from 1st July, 1961. A copy of this agreement has been annexed as Ex. A to the petition for the purposes of the present petition; the relevant terms and conditions are to be found in clauses 6, 8, 11 and 12. Under the said agreement the petitioner-company as the sole distributors were to arrange for the sale to customers in the territory of the Republic of India of the aforesaid products of the 5th respondent-company at prices from time to time fixed for the same by the 5th respondent-company and under clause 6 thereof the petitioner-company was entitled to receive 5% of the sale price of the said products by way of rebate. Under clause 8 of the agreement the petitioner-company was to receive credit of 60 days from the date of supply of the said products by the 5th respondent-company. By clause 11 of the agreement the petitioner-company and its directors undertook not to deal in similar products manufactured in India for any other manufacturer during the currency of the agreement. Under clause 12 it was provided that the 5th respondent-company should refer all inquiries for the aforesaid products of the petitioner-company and the 5th respondent-company was not to make any direct sales of the said products to any person or concern in the agreed territory except in exceptional circumstances and that, even on such direct sales, the petitioner-company was to receive within 1 month of such sales a sum equivalent of 5% of the sale price of such sales. This sole distributorship agreement was approved by the 5th respondent-company in its general meeting held on 29th December, 1961.

3. It appears that while the aforesaid agreement was in operation and was being worked out by the parties thereto, on 30th May, 1964, some shareholders of the 5th respondent-company addressed a letter to the Registrar of Companies, Bombay, complaining that the said agreement and the terms and conditions thereof were highly prejudicial to the interest of the 5th respondent-company and its shareholders and an investigation into the appointment of the petitioner-company as the sole selling agents of the 5th respondent-company was invited. In fact, it was pointed out by these shareholders that the chemicals in question (sodium hydro-sulphite, caustic soda and chlorine, etc.) were always in short supply and a sellers' market had been prevailing in those chemicals and as such there was no necessity for the 5th respondent-company to have appointed nay sole selling agent for marketing the said products. It was further pointed out that, though the appointment of the petitioner-company as the sole selling agents was duly approved in the general meeting, the 5th respondent-company had not set out all the material facts in the explanatory statement and the shareholders had no detailed particulars before them for their examination and, therefore, in good faith, the appointment was approved, but the terms and conditions on which the appointment was made were highly prejudicial to the interest of the 5th respondent-company and its shareholders. It further appears that the Registrar of Companies, Bombay, called for information from the 5th respondent-company on several aspects of the matter, which was furnished by the 5th respondent-company by its letter dated 6th July, 1964. While furnishing

the information, the 5th respondent-company admitted the position that there was a sellers' market. In or about September, 1964, the complaint of the shareholders as also the contents of the 5th respondent-company's letter dated 6th July, 1964, were brought to the notice of the Company Law Board by the Registrar of Companies, Bombay. After considering the materials placed before it, the Company Law Board, it appears felt that there was good reason to call upon the 5th respondent-company to furnish to it certain information regarding the terms and conditions of the appointment of the petitioner-company as the sole distributors. In exercise of the powers vested in the Central Government u/s 294(5)(a) of the companies Act, 1956, read with the Government of India, Ministry of finance Notification No.178 dated 1st February, 1964, Shri T.S.Kannan, Under-Secretary to the Company Law Board (3rd respondent herein), by his letter dated 17th November, 1964, called upon the 5th respondent-company to furnish information regarding the terms and conditions of the appointment of the petitioner-company as its sole selling agents. About a dozen specific items or points were set out in this letter dated 17th November, 1964, on which information was called for from the 5th respondent-company. Besides the aforesaid information sought, certain documents were also called for. Since certain terms on which information was sought pertained to the working of the petitioner- company and since audited accounts for the years 1961-62, 1962-63 and 1963-64 of the petitioner-company were also called for, the 5th respondent-company by its letter dated 21st November, 1964, informed the petitioner-company about the aforesaid letter received from the Under-Secretary to the Company Law Board and also annexed extracts thereof for the perusal of the petitioner-company and further requested the petitioner-company to supply the requisite information as also the documents to it for being forwarded to the Company Law Board. The 5th respondent-company by its letter dated 10th December, 1964, furnished all the information called for seriatim to the Company Law Board. The petitioner-company also by its letter dated 9/15th December, 1964, after referring to the relevant extracts of the Company Law Board's letter dated 17th November, 1964, furnished all the information that was sought from them directly to the Company Law Board. Along with its said letter the petitioner-company enclosed copies of balance-sheet and statements of profit and loss accounts for the relevant three years. After considering the information that was furnished by the 5th respondent-company as well as by the petitioner- company, the Company Law Board took the view that the terms and conditions on which the petitioner-company had been appointed as sole distributor of the 5th respondent-company were prima facie prejudicial to the interest of the 5th respondent-company. therefore, the Company Law Board issued a show cause notice addressed to the 5th respondent- company on 16th February, 1965, and called upon the 5th respondent- company to shoe cause why the terms and conditions of the appointment of the petitioner-company as the sole distributor should not be varied to the extent indicated in the said notice. the variations in the terms and conditions proposed by the Company Law Board related to three material terms. In the first place, the rebate of 5% payable to the petitioner-

company was sought to be reduced to 3 1/2%, secondly, the terms with regard to 60 days credit available to the petitioner- company was sought to be altered and, lastly it was proposed that the petitioner-company should not receive any rebate on direct sales effected by the 5th respondent-company. It may be stated that, apart from directing the 5th respondent-company to send its written representations, the show cause notice also informed the 5th respondent-company that, if any personal hearing or representation was desired in the matter, the officers of the Company Law Board would be glad to meet its representatives on a suitable date. By its letter dated 13th March, 1965, the 5th respondent-company made representations to the Company Law Board against the proposed variations. It appears that the petitioner-company also made written representations to the Company Law Board by its letter dated 12th March, 1965, against the proposed variations and also sought an appointment for personal interview and discussion in the matter. ON 9th April, 1965, a personal hearing was given by the members of the Company Law Board to the representative of the 5th respondent-company as also of the petitioner-company.

4. On a consideration of the matters that were placed before it in the above manner, the Company Law Board, it appears, was fully satisfied that the terms and conditions of the appointment of the petitioner- company as the sole distributor were prejudicial to the interest of the 5th respondent-company and, accordingly, by its order dated 20th April, 1965, the Board varied the terms and conditions of the agreement to the extent indicated therein. A copy of this order dated 20th April, 1965, is annexed as Ex.F to the petition. It appears that a small amendment was made by a subsequent order dated 13th May, 1965, whereby the word "payment" was substituted for the word "despatched" in the amended clause 8 of the agreement. In effect, the original agreement of sole distributorship dated 28th November, 1961, has been materially altered in the following particulars :

(i) Instead of 5% rebate that was payable to the petitioner-company, 3 1/2% rebate has been allowed (variation in clause 6 and 7 of the original agreement);

(ii) Instead of 60 days" credit that was allowed to the petitioner- company it has been provided that the petitioner-company shall pay the sale proceeds to the 5th respondent-company immediately on realization and in any case within 60 days from the date of despatch of goods by the 5th respondent-company whether or not such proceeds have been realised by the petitioner-company and in case payments are made by the petitioner-company within 30 days from the date of despatch without realising them from the buyers, the petitioner-company shall receive interest at the rate of 8% per annum for the period from the date of payment to the 60th day or the date of realization from the buyer, whichever is earlier (variations in original clause 8);

(iii) Under the amended clause 12, the 5th respondent-company is free to sell any of its said products to any dealer, consumer, Government and semi-Government institutions without reference to the petitioner- company and on

such direct sales the petitioner-company was not entitled to receive any rebate, commission or any other remuneration. It is this order passed by the Company Law Board on 20th April 1965, u/s 294(5)(a) of the Companies Act, 1956, that is being challenged in the present petition by the petitioner-company.

5. On behalf of the petitioner-company Mr.Setalwad challenged the validity of the impugned order passed by the Company Law Board on several grounds. In the first place, the vires of section 294(5)(a) under which the order is question has been passed was challenged on the ground that the relevant provision violated article 14 of the Constitution. I may mention that, though in the petition that provision is also challenged on the grounds that the same violates the fundamental rights of the petitioner-company guaranteed by article 19 and article 31 of the Constitution, Mr.Setalwad did not press those grounds of attack inasmuch as those fundamental rights have been suspended by the President during the emergency that is in operation. He, therefore, confined his ground of attack to the point that the power conferred upon the Central Government, and upon the Company Law Board under the relevant notification, u/s 294(5)(a) to vary the terms and conditions of appointment of sole selling agents is violative of equality before law and equal protection of laws guaranteed by article 14. Under this ground of attack a three-fold contention was urged. First it was urged that the said section conferred an arbitrary, unfettered and uncanalized power on the executive to interfere with the rights of contracting parties without laying down any principle for the guidance of the exercise of such power by the executive in the matter of selection of companies and the provision enables the Central Government or the Companies Law Board to pick and choose any company having a sole selling agent and order a variation in the terms and conditions of the appointment of the sole selling agent if they are found prejudicial to the interests of the company. In other words, the provision of section 294(5)(a), suffers from the vice of excessive delegation. Secondly, it was urged that section 294(5)(a), which permits interference with not merely a duly executed and concluded contract but also a party performed contract, enables the Central Government or the Company Law Board to discriminate between the two contracting parties and empowers the Central Government or the Company Law Board to vary the terms and conditions thereof only after considering the interest of the principal company and without reference to the interests of the sole selling agent and, such distinction and classification between the two contracting parties being unreasonable, the same offends against the equal protection of law guaranteed by article 14. Thirdly, it was urged that the Company Law Board (respondents Nos. 1 and 2) did not follow any definite policy whatever in selecting companies for varying sole selling agency agreement u/s 294 and its decision to call for information regarding such agreement between the 5th respondent-company and the petitioner-company and subsequently to vary the same has been arbitrary and discriminated against the 5th respondent-company and the petitioner-company, inasmuch as similar agreements entered into by several other companies have not been investigated or varied. It was thus urged

that this singling out of the 5th respondent-company and varying the terms and conditions of its agreement with the petitioner-company amounts to a denial to the petitioner-company of equal protection of law and constitutes gross act of discrimination. On these grounds the constitutionality of section 294(5) of the Companies Act as also the validity of the order issued thereunder was challenged under article 14. The order passed by the Company Law Board was also challenged on a couple of other grounds. In the first place, it was contended that, on a proper construction of section 294(5), it is not open to the Central Government or the Company Law Board under the garb of varying the terms and conditions of appointment to convert a sole selling agent into an ordinary selling agent and, in the present case, by substituting the amended clause 12 in place of original clause 12 of the agreement, the Company Law Board has virtually abrogated the petitioner-company's character as a sole selling agent (sole distributor) and, since this is not permissible, the impugned order is liable to be set aside. Secondly, Mr.Setalwad contended that, in passing the order in question, the Company Law Board was performing a judicial or quasi-judicial function and, as such, it was obligatory upon the Company Law Board to follow the rules of natural justice, and since in the present case no notice was issued to the petitioner- company calling upon it to show cause against the proposed variations and since all the material which the Company Law Board had before it was not made available to the petitioner-company to enable it to make effective representations, the order deserved to be set aside. Incidentally, I may observe that, on merits, Mr.Setalwad was unable to show that the original terms and conditions of appointment of the petitioner-company as the sole distributor were not prejudicial to the interest of the 5th respondent-company or its shareholders, nor did he make any attempt to contend that the action on the part of the Company Law Board in varying the said terms and conditions was uncalled for.

6. On the other hand, Mr. Khambatta for respondents Nos.1 to 4 urged that the provisions of section 294(5) of the Companies Act were perfectly constitutional and the same did not suffer from the vice of excessive delegation, inasmuch as the section itself contained guidelines on the basis of which the executive could select the companies and after investigating into the terms and conditions of appointment of their sole selling agents could direct variations in those terms and conditions, the guideline or the guiding principle being that the original terms and conditions of appointment should be prejudicial to the interests of the company. He urged that it was only when the terms and conditions of the appointment of the sole selling agents were prejudicial to the interest of the company that the Central Government or the Company Law Board could exercise the power vested in it under the said section. As regards the alleged discrimination between the contracting parties to the contract of sole selling agency, Mr.Khambatta urged that, since the 5th respondent-company and the petitioner-company (the two parties to the contract) were not similarly circumstanced, there was no question of section 294(5)(c) offending the equal protection clause contained in article 14. As regards the allegations that the 5th

respondent-company and the petitioner-company having been singled out and discriminated against, Mr. Khambatta contended that, in the absence of relevant averments in the petition in that behalf and in the absence of any specific or particular instances having been cited, it was not open to the petitioner-company to challenge the order in question on that ground. In this behalf, he relied upon the decision of the Supreme Court in Ajoy Kumar Mukherjee Vs. Local Board of Barpeta, . I may state that, having regard to this decision of the Supreme Court and having regard to the fact that the petitioner-company had not made the requisite averments in their petition and had not given specific or particular instances of similar agreements of other companies not having been investigated into or varied, Mr. Setalwad conceded that it would not be open to the petitioner-company to challenge the order on this ground and he did not press this ground at the hearing.

7. On the construction of section 294(5) of the Companies Act, Mr. Khambatta's argument was that, having regard to the definition of the expression "variation" given in section 2(50) of the Companies Act, it would be open to the Central Government or the Company Law Board to entirely abrogate the sole selling agency agreement or terminate it altogether and, as such, there was no substance in the petitioner-company's contention in that behalf. He further contended that the order which the Central Government or the Company Law Board is empowered to issue u/s 294(5) should be regarded as an administrative order and not a judicial or a quasijudicial order, but even if it were held that the Central Government or the Company Law Board were performing a judicial or quasi-judicial function, the petitioner-company was given ample opportunity to make representations against the proposed variation and was fully heard before the order in question was passed and therefore the petitioner-company was not entitled to have the said order set aside.

8. Since the impugned order dated 28th April, 1965, was passed by the Company Law Board u/s 294(5)(c) of the Companies Act, the constitutional validity of which has been challenged by Mr. Setalwad, it would be desirable to set out the relevant provisions thereof. It is a section which deals with appointments of sole selling agents and provides for approval of such appointments by the company in its general meeting. Sub-section (5), which consists of four sub-clauses, runs as follows :

"(5)(a) Where a Company has a sole selling agent (by whatever name called) for an area and it appears to the Central Government that there is good reason so to do, the Central Government may require the company to furnish to it such information regarding the terms and conditions of the appointment of the sole selling agent as it considers necessary for the purpose of determining whether or not such terms and conditions are prejudicial to the interests of the company;

(b) if the company refuses or neglects to furnish any such information, the Central Government may appoint a suitable person to investigate and report on the terms and conditions of appointment of the sole selling agent;

(c) if after perusal of the information furnished by the company, or, as the case may be, the report submitted by the person appointed under clause (b), the Central Government is of the opinion that the terms and conditions of appointment of the sole selling agent are prejudicial to the interests of the company, the Central Government may, by order, make such variations in those terms and conditions as would in its opinion make them no longer prejudicial to the interests of the company;

(d) as from such date as may be specified by the Central Government in the order aforesaid, the appointment of the sole selling agent shall be regulated by the terms and conditions as varied by the Central Government."

9. It will thus appear that, in the first place, under clause(a), the Central Government has to call for information from the company regarding the terms and conditions of the appointment of its sole selling agent and under clause(c), on a perusal of such information, if the Central Government comes to the conclusion that the terms and conditions of appointment of the sole selling agent are prejudicial to the interests of the company, then the Central Government has been empowered to issue an order making such variations in those terms and conditions as would, in its opinion, make them no longer prejudicial to the interests of the company and, under clause (d), it has been provided that, as from such date as may be specified in the order, the appointment of the sole selling agent shall be regulated by the terms and conditions as varied by the Central Government. There is, therefore, no doubt that the power to vary the terms and conditions of appointment of a sole selling agent of a company has been delegated to the Central Government and under the relevant notification to the Company Law Board and the section leaves it to the discretion of the Central Government or the Company Law Board to select companies in whose cases the power should be invoked and, therefore, the question arises whether the section has laid down any principle or policy for the guidance of the exercise of the discretion by the Central Government or the Company Law Board in the matter of selection of the companies, for it is well settled that if it does not lay down any principle or policy for guiding the exercise of the discretion by the Central Government or the Company Law Board in the matter of such selection, the section will have to be struck down on the ground that it provides for delegation of arbitrary and uncanalised power to the Central Government or the Company Law Board so as to enable it to discriminate between companies similarly situate, and in such a case the section as well as the order passed under it will have to be struck down; but, if on the other hand, the section contains some principle or guideline for the exercise of discretion by the Central Government or the Company Law Board in the matter of such selection of companies, the section will have to be upheld as constitutional and not violative of article 14 of the Constitution. In this behalf I may refer to the decision of the Supreme Court in *Ram Krishna Dalmia v. Justice Tendolkar* (1959) S.C.R.297. In that case the validity of section 3 of the Commissions of Inquiry Act, 1952, as also of the notification issued by the Central Government appointing the Inquiry Commission

were challenged on the ground of violation of article 14. While upholding the validity of the statute as also of the relevant notification, Chief Justice S.R.Das observed that, in order that the impugned statute should pass the test of permissible classification, two conditions must be fulfilled, viz., (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. Further in paragraph 12 of his judgment the learned Chief Justice has indicated 5 classes of cases in which a statute which may come up for consideration on the question of its validity under article 14 of the Constitution may be placed and the two classes or categories relevant to the point at issue in the present case are category No.(iii) and category No. (iv). It would be clear that if section 294(5)(c) falls within category No.(iii) it will have to be struck down, but if it falls under category No.(iv), the provisions will have to be upheld as constitutional.

10. Mr. Setalwad on behalf of the petitioner-company contended that having regard to the language used in the section and having regard to the manner in which the discretion had been left with the Central Government or the Company Law Board, it should be clear that the power conferred by section 294 upon the Central Government or the Company Law Board to interfere with and vary the terms and conditions of appointment of a sole selling agent will have to be regarded as arbitrary. He pointed out that the section itself has not made any classification by specifying that the power is to be exercised only in the case of large public companies or companies engaged in producing commodities of national importance, but, in the exercise of the discretion conferred upon the Central Government or the Company Law Board, it is open to the Central Government or the Company Law Board to pick and choose any company which it likes at random and after calling for the requisite information to interfere with and vary the terms and conditions of the appointment of its sole selling agent. He stated that undoubtedly the section is applicable only to such companies who had appointed sole selling agents but he contended that within its said scope and ambit the section confers unfettered and uncanalised power upon the Central Government or the Company Law Board to interfere with and vary the terms and conditions of sole selling agency agreements and no guiding principles whatever have been laid down providing as to when the said power should be exercised. Mr. Setalwad emphasised two aspects of the said power which were indicative of the power being arbitrary. In the first place, he urged that both under clause (a) and (c) it is for the Central Government to decide whether there is good reason to call for information or not and it is for the Central Government to form its opinion that the terms and conditions of appointment are prejudicial to the interests of the company and, as such, the power is to be subjectively exercised and he pointed out that in fact the respondents in their affidavits have claimed that the said power has to be subjectively exercised. Secondly, he urged that under clause (c), the Central Government or the Company Law Board is under no

obligation to take into consideration the interest of the sole selling agent, but it has merely to consider whether the terms and conditions of the appointment are prejudicial to the company or not. According to Mr. Setalwad, these two aspects indicated that the power conferred under the section upon the Central Government or the Company Law Board would be arbitrary. He, therefore, urged that, since no principle or policy was indicated in the section itself affording any guidance to the Central Government or the Company Law Board for the exercise of the said power, the section suffered from the vice of excessive delegation and violated article 14 of the Constitution and was liable to be struck down as ultra vires. He relied upon the decision of the Supreme Court in *The State of West Bengal Vs. Anwar Ali Sarkar*, where by a majority judgment the provisions of section 5(1) of the West Bengal Special Courts Act, 1950, which empowered the State Government to direct by general or special order in writing such offences or classes of offences or cases or classes of cases to be tried by the Special Court were held to be ultra vires the Constitution by reason of their being in conflict with article 14 of the Constitution. He pointed out that section 5 of the West Bengal Special Courts Act was held to have been hit by article 14 of the Constitution, inasmuch as it mentioned no basis for differential treatment prescribed in the Act for trial of criminals in certain cases and for certain offences. Mr. Setalwad pointed out that in that case reliance was placed upon the title of the Act as well as its preamble for contending that the same contained the principle or policy affording guidance to the State Government for the exercise of its discretion in the matter of selection the offences or classes of offences or cases or classes of cases to be referred to the Special Court. The Act was intitled "An ACT to provide for speedier trial of certain offences" and the preamble declared "It is expedient to provide for the speedier trial of certain offences" and it was urged that the title and preamble laid down the principle on the basis of which the State Government could classify offences or cases to which the Act should apply. Mr. Justice Mahajan (as he then was) rejected this argument by observing "speedier trial of offences may be the reason and motive for the legislation." Mr. Setalwad, therefore, urged that section 294(5) did not itself classify the companies to which the provisions thereof should be made applicable, but the section has delegated the power to the Central Government or the Company Law Board to select companies and, in making the selection, unfettered and uncanalised discretion has been left with the Central Government or the Company Law Board to pick and choose any company it likes and after calling for the requisite information to vary the terms and conditions of the appointment of the sole selling agents without there being any principle or guideline having been indicated in the section. He urged that the condition, namely, the terms and conditions of appointment of a sole selling agent, must be prejudicial to the interests of the company was merely a motive or reason for the legislation.

11. It is not possible to accept Mr. Setalwad's submission that unfettered and uncanalised power or discretion has been conferred upon the Central

Government or the Company Law Board in the matter of selecting companies in whose cases the power under the section should be invoked. It is no doubt true that under clause (a) of section 294(5) it is for the Central Government or the Company Law Board to decide whether there is good reason to call for information or not and it is also true that under clause (c) it is for the Central Government or the Company Law Board to form its opinion on the point as to whether the terms and conditions of the appointment of a sole selling agent are prejudicial to the interests of the company or not, but that does not mean that it is open to the Central Government or the Company Law Board to pick and choose any company it likes at random. The discretion to select a company is undoubtedly with the Central Government or the Company Law Board, but, in my view, the section itself lays down a policy or principle for the guidance of the exercise of such discretion by the Central Government or the Company Law Board in the matter of such selection and that guiding principle is that the terms and conditions of appointment of the sole selling agent under the original contract must be prejudicial to the interests of the company. The section undoubtedly is applicable only to such companies who have appointed sole selling agents, but within its scope and ambit the Central Government or the Company Law Board has been empowered to apply the provisions of the section only to such companies - and all such companies, the terms and conditions of the appointment of whose sole selling agents are prejudicial to the interests of the company. In other words, the section lays down a condition that, unless the terms and conditions of appointment of a sole selling agent of a company are prejudicial to the interests of the company, the Central Government or the Company Law Board cannot invoke the power conferred upon it by the section. This condition, which has been laid down in the section, cannot be regarded as a mere motive or reason for the legislation. Obviously the motive or the reason for enacting this legislation, viz., section 294(5), is to safeguard and protect the interests of a company and its shareholders and the aforesaid condition indicated in the section itself affords the requisite guidance for the exercise of the discretion by the Central Government or the Company Law Board in the matter of selection of companies. Of course, no standard or yardstick could be laid down by the legislature as to what would be prejudicial to the interest of a company; but in the very nature of things that will depend upon the facts and circumstances of each case and under clause (c) it is for the Central Government or the Company Law Board to come to the conclusion that the terms and conditions of appointment of a sole selling agent in a particular case are prejudicial to the interest of the company; but, in my view, this does not render the guiding principle laid down in the section indefinite or uncertain. In my view, the section clearly lays down a policy or a guiding principle following which the Central Government or the Company Law Board has to make its selection of companies in whose cases power should be invoked. It may be that in a given case in making the selection of Central Government or the Company Law Board may not follow the aforesaid guiding principle, but in that case the executive action of the Central Government or the Company Law Board and not the statute

that will have to be struck down or condemned as unconstitutional. In this view of the matter, the first contention of Mr. Setalwad must fail.

12. It was next contended by Mr. Setalwad that section 294(5)(c), which occupies a unique position in the entire scheme of the Companies Act, inasmuch as it permits interference with not merely a concluded contract but also a partly performed contract, enables the Central Government or the Company Law Board to discriminate between the two contracting parties to a sole selling agency agreement and further empowers that authority to vary the terms and conditions of the appointment only after considering the interests of the principal company. He pointed out that before altering the terms and conditions of appointment under the contract the Central Government or the Company Law Board is under no obligation to take into account the interests of the sole selling agent, who, as it happens, in the present case, may be a company. He, therefore, urged that inasmuch as the section permits the Central Government or the Company Law Board to discriminate one party to a contract against the other in the aforesaid manner, the section should be struck down as offending the fundamental right of equal protection of law guaranteed under article 14. In my view, there is no substance in this contention. Section 294(5)(c) has been enacted with the avowed object of safeguarding or protecting the interests of the principal company and its shareholders against a contract that may be prejudicial to their interests, and to achieve that object the section confers power upon the Central Government or the Company Law Board to interfere with and vary the terms and conditions thereof so as to make them (contracts) no longer prejudicial to the company, notwithstanding the fact that such contracts may have been approved by the company in its general meeting. Implicit in this scheme is the fact that the parties to such a contract are not similarly situated or circumstanced. The sole selling agent, if I may say so, is regarded as the aggressor party and the principal company is regarded as the party who is the victim of the aggression and it is to relieve the principal company of the onerous or prejudicial terms and conditions in the contract that the section has conferred requisite power upon the Central Government or the Company Law Board. It is well settled that in order that a statute should offend against the equal protection clause contained in article 14, it must make a distinction or discrimination between two parties, who are equally situated or in equal circumstances. As I have indicated above, the parties to a sole selling agency agreement which comes within the mischief of section 294(5)(c) cannot be said to be similarly circumstanced and, therefore, there is no question of the said section offending the equal protection clause contained in article 14.

13. Mr. Setalwad then urged that the order passed by the Company Law Board on 20th April, 1965, is liable to be set aside on the ground that the Company Law Board has by its said order virtually converted the petitioner-company, who were sole selling agents, into ordinary selling agents, and u/s 294(5) it is not open to the Company Law Board to do so. In this behalf Mr. Setalwad pointed out that by substituting a fresh clause 12 in place of the original clause 12 of the sole

distributorship agreement, the Company Law Board has virtually abrogated the petitioner-company's character as the sole selling agent. He stated that under the original clause 12 of the agreement the 5th respondent-company was under an obligation to refer all inquiries of the products covered by the agreement to the petitioner-company during the continuance of the agreement and the 5th respondent-company was not permitted to effect direct sale except in exceptional circumstances and, even while effecting direct sales in exceptional circumstances, approval of the petitioner-company was required to be obtained. It was also provided by the original clause 12 that, even in respect of such direct sales effected in the above manner, the 5th respondent-company was to pay to the petitioner-company rebate or commission at the rate of 5% of the sale price. He further pointed out that, in place of the aforesaid original clause 12, the following altered clause 12 has been substituted by the impugned order :

"12. The manufacturer shall be free to sell any of the said products direct to any dealer, consumer, Government and semi-Government institutions without reference to the sole distributors. the sole distributors shall not be entitled to any rebate, commission or any other remuneration on such direct sales."

14. Mr. Setalwad pointed out that if the original clause 12 and the substituted clause 12 were read side by side, it would appear clear that by the impugned order the petitioner-company's character and the sole distributor or the sole selling agent has been virtually abrogated and under the amended clause 12 the petitioner-company will have to work as a ordinary selling agent of the 5th respondent-company. He also pointed out that while effecting this change in the petitioner-company's character the Company Law Board has failed to relieve the petitioner-company from its obligations under the original clause 11 of the agreement, whereunder the petitioner-company has undertaken not to deal in products similar to those covered by the agreement but manufactured by any other manufacturer during the continuance of the agreement. However, apart from this latter aspect of the matter, Mr. Setalwad urged that on a true construction of section 294(5) it was not open to the Company Law Board under the garb of varying the terms and conditions of the appointment to covert a sole selling agent into an ordinary selling agent, as has been done in the present case. for this purpose he relied upon the language employed in clause (d) of section 294(5). Clause (d) provides that if the Central Government or the Company Law Board passes an order directing variations in the terms and conditions of the original contract the, "as from such date as may be specified by the Central Government in the order aforesaid, the appointment of the sole selling agent shall be regulated by the terms and conditions as varied by the Central Government." He thus urged that clause (d) indicates that even after variations in the original terms and conditions of appointment have been ordered by the Central Government, the appointment remains the appointment of the sole selling agent, subject to the variations ordered. In similar strain, reliance was placed by Mr. SEtalwad on the similar language contained in sub-section (6) of section 294. Mr. Khambatta, on the other hand, contended that it is not only

open to the Central Government or the Company Law Board, as the case may be, to vary the terms and conditions of appointment of a sole selling agent in such a manner that, even after the variations were made, the agent may remain the sole selling agent but also to vary the terms and conditions in such a manner that he may not remain a sole selling agent and may become an ordinary agent. In fact, he urged, the power conferred upon the Central Government or the Company Law Board u/s 294(5) even extended to determining completely any sole selling agency agreement and in this behalf he invited my attention to the definition of the expressions "variation" and "vary" as given in section 2(50) of the Companies Act. Section 2(50) defines these expressions as follows :

"(50) "variation" shall include abrogation; and "vary" shall include abrogate."

15. It will thus appear clear that the ordinary dictionary meanings of the expressions "variation" and "vary" have been given a go-bye and artificial definitions have been introduced by section 2(50) so as to include the concept of "abrogation" within the expression "variation". In my view, having regard to the aforesaid definitions of the expressions "variation" and "vary" given in section 2(50), those expressions occurring in section 294(5) and section 294(6) will have to be construed accordingly. It is, therefore, clear that the power conferred upon the Central Government or the Company Law Board u/s 294(5)(c) includes even power to completely abrogate a sole selling agency contract and if that is the power conferred upon the Central Government or the Company Law Board, it is difficult to accept Mr. Setalwad's contention that under the garb of varying the terms and conditions of appointment of a sole selling agent, the Company Law Board has no power to convert the sole selling agent into an ordinary sole selling agent. The argument based on the language employed in clause (d) of section 294(5) and sub-section (6) of section 294 will have to be rejected.

16. The last contention of Mr. Setalwad has been that in passing the impugned order the Company Law Board was performing a quasi-judicial function and as such the Company Law Board ought to have followed the rules of natural justice and, since the rules of natural justice were not followed, the order is liable to be set aside. In support of his contention that the Company Law Board was performing a quasi-judicial function, Mr. Setalwad relied upon several decisions, viz., *Reg. v. Manchester Legal Aid Committee* (1952) 2 Q.B.413. , *Radeshym Khare and Another Vs. The State of Madhya Pradesh and Others*, , *Shivji Nathubhai Vs. Union of India (UOI) and Others*, , *Board of High School and Intermediate Education, U.P., Allahabad Vs. Ghanshyam Das Gupta and Others*, , *Ridge v. Baldwin* (1964) A.C. 40 and *Associated Cement Companies Ltd. Vs. P.N. Sharma and Another*, . On the other hand, Mr. Khambatta contended that the impugned order issued by the Company Law Board u/s 294(5)(c) should be regarded as an administrative order and not a judicial or a quasi-judicial order and as such there was no question of the Company Law Board being under an obligation to follow strictly the rules of natural justice. In support of this contention, he relied upon the decision of the House of Lords in *Nakkuda Ali v.*

Jayarathne (1951) A.C.66 and Khushal Rao Vs. The State of Bombay, . He, however, urged that even if it were assumed for the purpose of argument that the Company Law Board was performing a judicial or quasi-judicial function while issuing the impugned order, ample opportunity was given to the petitioner-company to make representations against the proposed variations and it was only after the petitioner-company was fully heard that the order in question was passed and, therefore, the order was not liable to be set aside. In my view, it is really unnecessary for me to go into the question as to whether the Central Government or the Company Law Board performs a judicial or quasi-judicial function while issuing an order u/s 294(5)(c), for, as I shall indicate presently, the petitioner-company's grievances that the rules of natural justice were not followed by the Company Law Board before issuing the order in question is not well founded. I shall, therefore, proceed to consider Mr. Setalwad's contention on the assumption that the impugned order is a quasi-judicial order and the question is whether the rules of natural justice have been followed by the Company Law Board before issuing that order.

17. In the first place, Mr. Setalwad pointed out that no communication whatsoever was addressed by the company Law Board to the petitioner-company in the matter of the proposed variations in the terms and conditions of their appoint. the initial letter dated 17th November, 1964, calling for information regarding the terms and conditions of appointment was addressed by the Company Law Board to the 5th respondent-company. Similarly, the show cause notice that was issued by the Company Law Board on 16th February, 1965, was also addressed to the 5th respondent-company and it was on account of information that was received by the petitioner-company from the 5th respondent-company in the matter that the petitioner-company furnished information to the Company Law Board and also made it representations to the Company Law Board against the proposed variations. He further pointed out that the Company Law Board, as would be clear from the affidavit in reply, took up the stand that it was not obligatory upon it to give any opportunity to the petitioner-company to make any representation or to give a personal hearing. Mr. Setalwad invited my attention to the further position taken up by the Company Law Board that the impugned order having been directed against the 5th respondent-company and not against the petitioner-company, the petitioner-company has no locus standi to present this petition (vide paragraph 3 of the affidavit in reply). He, therefore, urged that whatever personal hearing was given to the petitioner-company by the Company Law Board and whatever consideration was given by the Company Law Board to its written representations, the same should be viewed with the aforesaid background. In other words, he has contended that it was with this mental reservation that the petitioner-company was not entitled to be heard that the Company Law Board must have considered the representations of the petitioner-company against the proposed variations. In any event, Mr. Setalwad pointed out that no copy of the letter dated 30th May, 1964, addressed by the shareholders to the Registrar of

Companies, on the basis of which the whole proceedings were initiated, was made available to the petitioner-company and further whatever information was supplied by the 5th respondent- company to the Company Law Board and the representations made by the 5th respondent-company to the Company Law Board were not made available to the petitioner-company to enable the petitioner-company to make effective representations against the proposed variations. He, therefore, urged that the Company Law Board could not be said to have followed the rules of natural justice while issuing the impugned order, which has vitally affected its interests and, therefore, the order must be set aside. The other aspect of Mr. Setalwad's contention is that, in any event substitution of a fresh clause 12 in place and stead of the original clause 12 in the sole distributorship agreement has been in violation of the principles of natural justice, inasmuch as in the show cause notice dated 16th February, 1965, the alteration in the original clause 12 of the agreement that was proposed was to the effect "M/s. Nanavati & Co. (petitioner) shall not be entitled to any rebate on sales made directly by the principal company". While by the fresh amended clause 12, as substituted, it has been provided that not only the petitioner-company will not be entitled to any rebate on sales made directly by the principal company, but further that the principal company shall be free to make direct sales of the products in question to any dealer, consumer, Government or semi-Government institutions without reference to the petitioner-company. Mr. Setalwad urged that under the original clause 12, the 5th respondent- company was not entitled to effect direct sales freely but the 5th respondent-company could effect direct sales only in "exceptional circumstances" and that too with the approval of the petitioner- company and, even in respect of such direct sales so effected, the petitioner-company was entitled to receive their rebate or commission at the rate of 5% of the sale price. Under the substituted clause 12, the 5th respondent-company has been given the right to effect direct sales freely to all and sundry and that too without making any reference to the petitioner-company and in respect of such direct sales the petitioner-company has been deprived of its commission or rebate. Mr. Setalwad emphasised the fact that whereas the show cause notice merely notified the proposed variation about depriving the petitioner-company of its rebate or commission on direct sales effected by the 5th respondent-company, the actual variation effected goes far beyond the variation indicated in the show cause notice, inasmuch as the 5th respondent-company has been given freedom to effect direct sales to all and sundry without reference to the petitioner-company. He, therefore, urged that in so far as amended clause 12 makes variations, which go beyond the proposed variation of which notice was given, the order in question will have to be stuck down as having been passed without following the principles of natural justice.

18. So far as the first aspect of Mr. Setalwad's contention is concerned, it is no doubt true that the Company Law Board seems to have taken up the stand that it was not obligatory upon it to give any personal hearing to the petitioner-company or consider any representations made by the petitioner-company. it

must be mentioned in this context that section 294(5) of the Act nowhere provides for any hearing to be given to the sole selling agent or taking into consideration any representations that might be made by the sole selling agent. Probably because of this position the Company Law Board has rightly or wrongly taken up that stand, but that by itself does not mean that, while giving personal hearing to the petitioner-company and while considering the written representations made by the petitioner-company, the Company Law Board approached the matter with any mental reservation. In the correspondence, no such stand is indicated on the part of the Company Law Board, but it is only while filing the affidavit in reply to the petition that this legal contention has been taken up. The question, therefore, that really falls to be considered is whether the petitioner-company was in fact given an opportunity of being fully heard and effectively heard against the proposed variations in the terms and conditions of the appointment. It may also be stated that technically no show cause notice has been given by the Company Law Board to the petitioner-company, as has been done in the case of the 5th respondent-company, but, here again, the question that falls to be considered is whether the petitioner-company was fully heard in the matter or not before issuing the impugned order. In this context certain facts which appear clear on record may be stated : To start with, though no copy of the shareholders' complaint dated 30th May, 1964, was forwarded to the petitioner-company, it is not disputed that a copy of the said complaint of the shareholders was forwarded to the 5th respondent-company. Similarly, though a complete copy of the letter dated 17th November, 1964, was not made available to the petitioner-company, the 5th respondent-company after receiving the said letter from the Company Law Board forwarded the relevant extracts therefrom to the petitioner-company and requested the petitioner-company to furnish the required information. It may be stated that, instead of furnishing the information to the 5th respondent-company to enable the latter to forward the same to the Company Law Board, the petitioner-company by its letter dated 9/15th December, 1964, furnished all the information to the Company Law Board. Further, though the show cause notice was addressed to the 5th respondent-company calling upon the latter to submit their written representations against the proposed variations, it appears clear that a copy of that show cause notice must have been made available to the petitioner-company by the 5th respondent-company, inasmuch as the petitioner-company sent its written representations against the proposed variations to the Company Law Board by its letter dated 12th March, 1965. In other words, though the Company Law Board every time dealt with the 5th respondent-company, it appears clear that the petitioner-company was kept apprised by the 5th respondent-company of all that was transpiring in the matter and not only has the 5th respondent-company furnished the required information and also made written representations to the Company Law Board, but the petitioner-company also furnished the required information to the Company Law Board and also made written representations to the Company Law Board against the proposed variations. It is also an admitted position that at the personal hearing that was granted on 9th April, 1965, by the

members of the Company Law Board, the representatives of not only the 5th respondent-company but also of the petitioner-company were present and it is after taking into consideration all these materials, viz., the information furnished by both, the written representations made by both and the oral representation made by both at the personal hearing that the Company Law Board issued its order in question. Apart from these facts, which appear clear on the record, a couple of other circumstances must be mentioned in this context. after all the 5th respondent-company was the principal company and the petitioner- company was the sole selling agent of the 5th respondent-company. Besides, as will appear clear from the written representations made by both of them, both of them were interested in seeing that the terms and conditions of the appointment were not varied at all and the appointment of the petitioner-company was allowed to be worked out for the full period of 5 years mentioned in the agreement without any change. In other words, both the 5th respondent-company and the petitioner-company were motivated by common interest of avoiding as far as possible any variations in the original terms and conditions of appointment. It was but natural, therefore, on the part of both to act in concert with one another in the matter of making their representations against the proposed variations and if one closely scrutinises the information supplied by both to the Company Law Board and the written representations made by both to the Company Law Board, the inference becomes irresistible that the 5th respondent-company and the petitioner-company had compared notes before making their representations against the proposed variations and acted in concert with one another. In the circumstances, it is almost impossible to believe that the materials placed before the Company Law Board in the form of the shareholders' complaint, the 5th respondent-company's reply thereto, the information supplied by the 5th respondent-company to the Company Law Board and the written representations made by the 5th respondent-company. The manner in which the petitioner-company has made its written representations to the Company Law Board clearly indicates that the said representations were made after taking into account all the aforesaid materials. It is true that the Company Law Board has not made this material available to the petitioner-company but all the same the petitioner-company got it through the 5th respondent-company. In my view, therefore, there is no substance in the contention that opportunity was not given to the petitioner- company to make effective representations to the Company Law Board against the proposed variations. The rules of natural justice in such matters are not to be observed in the technical sense, but if it is shown that they have been substantially observed, I do not think that the order in that case is liable to be set aside.

19. As regards the further contention of Mr. Setalwad that the actual variation made in the terms and conditions of the appointment of the petitioner-company goes far beyond the proposed variation in the original clause 12 of which notice was given, it may be stated that the show cause notice does not indicate that the full impact of the variations contemplated in clause 12 was brought home to the

5th respondent-company or to the petitioner-company through the 5th respondent-company. The show cause notice gave intimation of the proposed variation in the following manner : "M/s. Nanavati & Co. shall not be entitled to any rebate on sales made directly by the principal company." Unquestionably the manner in which the proposed variation is worded in the show-cause notice contemplates direct sales to be made by the principal company, but the grievance of Mr. Setalwad has been that the notice did not indicate that what was intended to be done was that the principal company would be given a free hand in effecting direct sales without reference to the petitioner-company. There is undoubtedly some force in this connection of Mr. Setalwad. However, if one turns to the written representations made by the 5th respondent-company as well as by the petitioner-company, it will appear clear that if not the 5th respondent-company, at least the petitioner-company fully understood what was intended to be done by the Company Law Board. This proposed item of variation is item No. (ii) in the show cause notice and this is how the 5th respondent- company has reacted to it while making its representations. after inviting specific attention to original clause No.12 of the sole distributorship agreement, the 5th respondent-company stated as follows :

"It is the intention of the Company Law Board that, notwithstanding the above clause 12, the company can sell directly and that on such sales and on sales effected to the sub-distributors, the sole distributors are not entitled for any rebate ? This matter may please be clarified. However, we are against the proposed variation and the same is uncalled for."

20. The petitioner-company has gone a step further and has assumed that the Company Law Board by the proposed variation wanted to give a free hand to the 5th respondent-company to effect direct sales and it is on this basis that it has made its representations to the Company Law Board. In its written representations dated 12th March, 1962, in regard to the proposed variation at item No.(ii) this is what the petitioner-company has stated :

"Item NO.(iii) : It is proposed by you that we shall not be entitled to any rebate on sales made directly by M/s.J.K.Chemicals Limited, Bombay.

The sole distributorship agreement between the parties provide that we are entitled to rebate on the direct sales made by the principals and accordingly we have been receiving such rebate for these years. We may here point out that, as per the terms of the agreement, our principals have reserved their right to sell directly and pay us the commission due to us, but such sales have to be effected under exceptional circumstances and with the approval of ourselves.

In principle, a sole-distributor is generally paid rebate on direct sales, if any, made by their principals. this practice is being followed by foreign as well as Indian principals, wherever territory covered by the agreement is all-India. During the preliminary period of our agreement, we appointed reliable sole-distributors and otherwise we established healthy relations with consumers all

over India. All this was done with great stress and strain, care and attention, in having to regularise consumption of their products by yearly contracts.

Now, under your scheme of proposal, if the manufacturers are allowed to deal directly with our clients at their option and as and when they choose, it would break the sanctity of our contracts and establish unhealthy practice. It is natural that manufacturers may be induced to do this on a wide scale which is bound to create conflict and confusion, besides rendering the agreement for the sole distributorship, a document without any validity."

21. The last paragraph of the representations quoted above will clearly indicate that the petitioner-company understood that the proposed variation was that the manufacturers were to be allowed to deal directly with the petitioner-company's clients and that too as and when they chose and it is against such variation that the petitioner-company has put forward its contention that such variation would break the sanctity of the contract and establish an unhealthy practice. The petitioner-company further pointed out that, if the manufacturers were allowed to effect free sales as proposed, they would indulge in doing this on a wide scale and that would create conflict and confusion and also render the original agreement for sole distributorship invalid. It will thus appear clear that the petitioner-company, at any rate, understood the proposed variations of which intimation was given in the show cause notice to mean that the Company Law Board wanted to give a right to the 5th respondent-company to effect direct sales freely without reference to the petitioner-company. In this view of the matter, Mr. Setalwad's contention must fail.

22. In the result, the petition is liable to be dismissed. I accordingly