FUNDAMENTAL RIGHT TO PRACTISE ANY PROFESSION OR TO CARRY ON ANY OCCUPATION, TRADE OR BUSINESS

The relevant portion of Article 19 of the Constitution of India guaranteeing freedom of profession, occupation, trade or business reads as follows:

19. ***Protection of certain rights regarding freedom of speech, etc***.- (1) All citizens shall have the right, -

(a) to (e) * * * * [Not relevant here].

(g) to practise any profession, or to carry on any occupation, trade or business.

(6) Nothing in sub-clause (*g*) of the said clause shall affect the operation of any existing law in so for as it imposes; or prevent the State from making any law imposing; in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall effect the operation of any existing law in so for as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation trade or business, or

(ii) the carrying on by the State or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

CONCEPT OF TRADE AND BUSINESS

IS SALE OF LIQUOR TRADE/BUSINESS?

KHODAY DISTILLERIES LTD. v. *STATE OF KARNATAKA*

(1995) 1 SCC 574

PART IV : Directive Principles of the State Policy

47. ***Duty of the State to raise the level of nutrition and the standard of living and to improve public health***.— The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

Article 298 of the Constitution of India

298. ***Power to carry on trade, etc***.— The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose:

Provided that—

(*a*) the said executive power of the Union shall, insofar as such trade or business or such purpose is not one with respect to which Parliament may make laws, be subject in each State to legislation by the State; and

(*b*) the said executive power of each State shall, insofar as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament.

Article 300A of the Constitution of India

300A. ***Persons not to be deprived of property save by authority of law***.- No person shall be deprived of his property save by authority of law.

Article 301 of the Constitution of India

301. ***Freedom of trade, commerce and intercourse***.—Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

[The right given by this article to freely carry on trade, commerce and intercourse throughout the territory of India is subject to certain restrictions as the right under Article 19(1)(*g*)].

P.B. SAWANT, J. - This is a bunch of appeals, special leave petitions and writ petitions. The first group consists of CA Nos. 4708-12 of 1989, 4718-27 of 1989, WP (C) Nos. 666, 667, 693, 694, 774, and 910 of 1990 wherein constitutional validity of the (*i*) Karnataka Excise (Distillery and Warehouse) (Amendment) Rules, 1989, (*ii*) Karnataka Excise (Manufacture of Wine from Grapes) (Amendment) Rules, 1989, (*iii*) Karnataka Excise (Brewery) (Amendment) Rules, 1989, (*iv*) Karnataka Excise (Sale of Indian and Foreign Liquors) (Amendment) Rules, 1989 and (*v*) Karnataka Excise (Bottling of Liquor) (Amendment) Rules, 1989 was unsuccessfully challenged by various parties before the Karnataka High Court, inter alia on the ground that the Rules in question affected adversely the fundamental right of the parties to carry on trade or business in liquor and that the said Rules were violative of Articles 14, 19(1)(*g*), 47, 300-A, 301, and 304 of the Constitution of India. A Bench of three learned Judges of this Court which heard this group of matters has referred them to the Constitution Bench.

8. Two incidental questions which, therefore, arise are (*i*) whether a monopoly for the manufacture, trade or business in liquor can be created in favour of the State and (*ii*) whether reasonable restrictions under Article 19(6) of the Constitution can be placed only by Act of Legislature or by a subordinate legislation as well.

9. It is contended that the State cannot carry on trade in liquor under Article 47 of the Constitution. If the law on the subject is considered to be law under Article 19(6), it has to be on the basis that a citizen had got a fundamental right to trade in liquor. If the law is that a citizen has no fundamental right, then Article 19(6) cannot be applied because the said article applies only to those rights which a citizen possesses. What a citizen cannot do under Article 19(1), the State cannot do under Article 19(6). Secondly, it is submitted that assuming that the State has got the power to carry on trade in liquor dehors Article 19(6) and under Article 298 of the Constitution, the power under Article 298 cannot extend to trade in liquor. This is so because the Union Government has no executive power to trade in a commodity which under Article 47 it is enjoined to prohibit.

10. In support of the contention that the appellants/petitioners have a fundamental right to trade in liquor, it is argued firstly, that Entry 51 of List II specifically accepts the fact that the manufacture of alcohol can be for human consumption. The said entry, among others, provides as follows: "Duty of Excise on intoxicating liquor for human consumption." Entry 8 of List II specifically provides for production, manufacture, purchase and sale of intoxicating liquor. The implication of this entry is that till prohibition is introduced by applying Article 47, there is no prohibition on consumption of liquor, and hence there is no prohibition for manufacture and sale of liquor. Secondly, it is submitted that there are other substances like tobacco which are more harmful to health than alcohol and they are being sold freely. A majority of the States did not introduce prohibition and some States which purported to do it, failed and reverted to the earlier pre-prohibition condition. On the other hand, the revenue from the auction of excise, vend fees, liquor and other levies forms a major source of the revenue of the State. Hence the trade in liquor cannot be looked upon as an obnoxious trade. Thirdly, the Union Government itself has recognised under its Industrial Policy Resolution as early as in 1956 that the production of potable alcohol as an industry has to be recognised though regulated and the licences have to be freely granted for the manufacture of potable liquor. During the last several years, a large number of distillery, brewery and winery licences have been granted all over the country. For all these reasons, it is submitted that there is no warrant for excluding liquor from the ambit of the words "any occupation, trade or business" under Article 19(1)(*g*) of the Constitution.

11. We will first refer to the relevant provisions of the Constitution which have a bearing on the subject. [Article 19(1)(g) and (6) was re-produced by the court]. Thus Article 19(1)(*g*) read with Article 19(6) spells out a fundamental right of the citizens to practise any profession or to carry on any occupation, trade or business so long as it is not prohibited or is within the framework of the regulation, if any, if such prohibition or regulation has been imposed by the State by enacting a law in the interests of the general public. It cannot be disputed that certain professions, occupations, trades or businesses which are not in the interests of the general public may be completely prohibited while others may be permitted with reasonable restrictions on them. For the same purpose, viz., to subserve the interests of general public, the reasonable restrictions on the carrying on of any profession, occupation, trade, etc., may provide that such trade, business etc., may be carried on exclusively by the State or by a Corporation owned or controlled by it. The right conferred upon the citizens under Article 19(1)(*g*) is thus subject to the complete or partial prohibition or to regulation, by the State. However, under the provisions of Article 19(6) the prohibition, partial or complete, or the regulation, has to be in the interests of the general public.

17. Apart from the restrictions placed on the right under Article 301, by the provisions of Articles 19(6), 47, 302 and 303, the provisions of Article 304 also place such restrictions on the said right. So do the provisions of Article 305, so far as they protect existing laws and laws creating State monopolies. The provisions of the aforesaid articles, so far as they are relevant for our purpose, read together, therefore, make the position clear that the right conferred by Article 19(1)(*g*) is not absolute. It is subject to restrictions imposed by the other provisions of the Constitution. Those provisions are contained in Articles 19(6), 47, 302, 303, 304 and 305.

18. We may now refer to the relevant entries of List II of the Seventh Schedule to the Constitution which give power to the State Governments to make the laws in question. Entry 8 reads as follows:

> "8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors."

Entry 51 reads as follows:

> "51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:
>
> (*a*) alcoholic liquors for human consumption;
>
> (*b*) opium, Indian hemp and other narcotic drugs and narcotics;
>
> but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (*b*) of this entry."

Thus a State has legislative competence to make laws in respect of the above subjects.

19. The relevant entry in List I which has a bearing on the subject is Entry 52 which reads as follows:

> "52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest."

Under this entry, Parliament has enacted the Industries (Development and Regulation) Act, 1951 ('IDR Act') and Item 26 of Schedule I of that Act reads as "Fermentation Industries - (1) Alcohol, (2) Other products of Fermentation and Distillery". Read with Section 2 of the IDR Act, the said entry would mean that the alcohol industry dealing in potable or non-potable alcohol is a controlled industry within the meaning of the said Act. We are not in this reference concerned with the question as to whether there is any conflict between the relevant Acts of the respective State Legislatures and the Rules, Regulations, Notifications and Orders issued under the said Acts and the provisions of the IDR Act. It cannot further be denied that the pith and substance of the IDR Act is to provide the Central Government with the means of implementing their industrial policy which was announced in their resolution of 6-4-1948 and approved by the Central Legislature. That brings under Central control the development and regulation of a number of important industries, the activities of which affect the country as a whole and the development of which must be governed by economic factors of all-India import. The development of the industries on sound and balanced lines is sought to be secured by the licensing of all new undertakings. Hence the IDR Act confers on the Central Government power to make rules for the registration of existing undertakings and for regulating the production and development of the industries mentioned in the Schedule and also for consultation with the Provincial (now State) Governments in these matters. The Act does not in any way denude the power of the State Governments to make laws regulating and prohibiting the production, manufacture, possession, transport, purchase and sale of intoxicating liquors meant for human consumption (but not for medicinal or toilet preparations) and levying excise on them under Entries 8 and 51 of List II. If there is any incidental encroachment by the relevant State Acts on the area occupied by the IDR Act, that will not invalidate the State Acts. The impugned judgments of the High Courts also mention that the State Acts have received the assent of the President.

26. In ***Narendra Kumar* v. *Union of India*** [AIR 1960 SC 430] which is a decision of the Constitution Bench of five learned Judges, the question whether restriction on fundamental rights includes their prohibition, fell for consideration squarely. On different dates prior to 3-4-1958, the petitioners in that case had entered into contracts of purchase of copper with importers at Bombay and Calcutta, but before they could take delivery from the importers, the Government of India in exercise of its powers under Section 3 of the Essential Commodities Act, 1955, issued on 2-4-1958 Non-ferrous Metal Control Order, 1958. Clause (3) of the Order provided that no person shall sell or purchase any non-ferrous metal at a price which exceeded the amount represented by an addition of 3.5 per cent to its landed cost, while clause (4) prohibited any person from acquiring any non-ferrous metal except under and in accordance with the permit issued in that behalf by the Controller in accordance with such principles as the Central Government may from time to time specify. No such principles were, however, published in the Gazette nor laid before the Houses of Parliament. The Court held that the word 'restriction' in Article 19(5) and (6) of the Constitution includes cases of prohibition also. Where the restriction reaches the stage of total restraint of rights, special care has to be taken by the courts to see that the test of reasonableness is satisfied by considering the question in the background of the facts and circumstances under which the Order was made, taking into account the nature of the evil that was sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy, the beneficial effect reasonably expected to result to the general public, and whether the restraint caused by the law was more than what was necessary in the interests of the general public. The prohibition, according to the Court, has to be treated as only a kind of restriction.

47. We may now deal with the decisions relating to trade or business in industrial alcohol. In ***Indian Mica Micanite Industries* v. *State of Bihar*** [(1971) 2 SCC 236], a Constitution Bench of five learned Judges was concerned only with the question whether the fee levied under Rule 111 of the Bihar and Orissa Excise Rules on denatured spirit used and possessed by the appellant had sufficient *quid pro quo* for that levy. The question whether the citizen had a fundamental right to carry on trade or business in industrial alcohol was neither raised nor answered. Dealing with the question raised before it, the Court held, among other things, that before a levy can be upheld as a fee, it must be shown that the levy has a reasonable correlationship with the services rendered by the Government. The correlationship is essentially a question of fact. On the facts of that case, the Court found that the only service rendered by the Government to the appellant and to other similar licensees was that the Excise Department had to maintain an elaborate staff not only for the purposes of ensuring that denaturing is done properly by the manufacturer but also to see that the subsequent possession of denatured spirit in the hands either of a wholesale dealer or retail seller or any other licensee or permit-holder was not misused by converting the denatured spirit into alcohol fit for human consumption. Since the State in that case, had not chosen to place before the Court the material in its possession from which the correlationship between the levy and the services rendered could be established at least in a general way, the Court held that the levy under the impugned rule could not be justified.

49. In ***State of U.P.* v. *Synthetics and Chemicals Ltd.*** [(1980) 2 SCC 441] which is a decision of two learned Judges of this Court, the facts were that the State Legislature had enacted the U.P. Excise (Amendment, Act 1972 (30 of 1972). Under notification dated 3-11-

1972, the Government was authorised to sell by auction the right of retail or wholesale vend of foreign liquor. The new rules were accordingly framed, the effect of which was that a vend-fee of Rs 1.10 per bulk litre was imposed. The Allahabad High Court, however, held the notification to be ultra vires. However, after the decision of this Court in ***Nashirwar*** case and ***Har Shankar*** case where the State's power to auction the right to vend, by retail or wholesale, foreign liquor was upheld, the State Legislature enacted the U.P. Excise (Amendment) Act, 1972 by U.P. Excise (Amendment) (Re-enactment and Validation) Act, 1976 (5 of 1976). Thereafter the High Court upheld the validity of the re-enacted Act and against that appeals were preferred here. The vend fee was made payable in advance on denatured spirit issued for industrial purposes. In that case, the Court held that the expression "intoxicating liquor" in Entry 8 of List II of Seventh Schedule of the Constitution is not confined to potable liquor alone but would include all kinds of liquor which contain alcohol. Hence the expression covered alcohol manufactured for the purpose of industries such as industrial alcohol. The Court also held that the words "foreign liquor" in Section 24-A of the State Act included the denatured spirit and the said words could not be given a restricted meaning for the word 'consumption' cannot be confined to consumption of beverages alone. When the liquor is put to any use such as manufacture of any articles, liquor is all the same consumed. Further, Section 4(2) of the Act provides that the State may declare what shall be deemed to be country liquor or foreign liquor and the State had under the rules issued the notification defining "foreign liquor" as meaning all rectified, perfumed, medicated and denatured spirit wherever made. The Court further held that "specially denatured spirit" for industrial purposes is not different from denatured spirit. The denatured spirit mentioned in the rules in question was treated as including "specially denatured spirit" for industrial purposes. The denatured spirit has ethyl alcohol as one of its constituents. The specially denatured spirit for industrial purposes is different from denatured spirit only because of the difference in the quality and quantity of the denaturants. Specially denatured spirit and ordinary denatured spirits are classified according to the use and the denaturants used. Hence the definition of 'alcohol' in the rules in question included both ordinary as well as specially denatured spirit.

50. The Court further held that although it was true that the stand taken by the State Government in the earlier proceedings in the High Court was that the levy was in the nature of excise duty or a fee and the present stand was that it was neither a duty nor a fee but only a levy for the conferment of the exclusive privilege, that would not make any difference so long as the Government has the right to impose the levy. The levy was imposed for permission granted in favour of the licensees and allotment orders of denatured spirits issued to them from the various distilleries. The parties having paid the fee, had taken possession of denatured spirit from the distilleries and the re-enacted legislation, viz., Act 5 of 1976 had only restored the status quo enabling the State to collect the levy validly made under the earlier Act 30 of 1972 which was found to be illegal by the High Court.

51. Since the State had exclusive right of manufacturing and selling of intoxicating liquors, the imposition of vend fee on denatured spirit and the grant of licences to wholesale vend of denatured spirit was within the legislative competence of the State under Entry 8 of List II. The Court further held that the Ethyl Alcohol (Price Control) Order issued by the Central Government in exercise of power conferred under Section 18-G of the IDR Act did

not explicitly or impliedly take away the power of the State Government to regulate the distribution of intoxicating liquor by collecting a levy for parting away with its exclusive rights. The power of the State under Entry 24 of List II is subject to the provisions of Entry 52 of List I. Therefore, the power of Parliament and the State Legislature were confined to Entry 52 of List I and Entry 24 of List II respectively. Parliament would have had exclusive power to legislate in respect of industry notified by Parliament but the provisions of Entry 26 of List II and Entry 33 of List III would also have to be taken into account for determining the scope of legislative power of Parliament and the State. Entry 33 of List III enables a law to be made regarding the production, supply and distribution of products of a notified industry. Thus a fair scrutiny of the relevant entries made it clear that the power to regulate notified industries is not exclusively within the jurisdiction of Parliament. Hence, it cannot be contended that after passing of the Industries (Development and Regulation) Act, 1951, the claim by the State to monopoly with regard to the production and manufacture and the sale of the denatured spirit or the industrial alcohol was unsustainable.

52. In ***Synthetics and Chemicals Ltd.*** **v.** ***State of U.P.*** [(1990) 1 SCC 109] which is a decision of Constitution Bench of seven learned Judges, the question was with regard to the validity of levy on industrial alcohol. The Court held that it must accept the decision that the States have the power to regulate the use of alcohol and that power must include power to make provisions to prevent and/or check industrial alcohol being used as intoxicating or drinkable alcohol. The question, according to the Court, was whether in the garb of regulations, the legislation which is in pith and substance fee or levy which has no connection with the cost or expenses administering the regulations can be imposed purely as a regulatory measure. Judged by the pith and substance of the impugned legislation, the Court held that the levies in question could not be treated as part of regulatory measures. The Court further held that the State had power to regulate though not as emanation of police power but as an expression of the sovereign power of the State. But that power has its limitations. The Court then observed that only in two cases the question of industrial alcohol had come up for consideration before this Court. One in ***Synthetics and Chemicals Ltd.*** *case* and the other in ***Indian Mica and Micanite Industries***. The latter cases starting with ***F.N. Balsara*** case are of potable liquor. The Court then referred to ***K.K. Narula*** case and observed as follows:

> (T)here was no right to do business even in potable liquor. It is not necessary to say whether it is a good law or not. But this must be held that the reasoning therein would apply with greater force to industrial alcohol.

The Court then observed in paragraphs 77, and 80 to 85 as under:

> 77. Article 47 of the Constitution imposes upon the State the duty to endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and products which are injurious to health. If the meaning of the expression 'intoxicating liquor' is taken in the wide sense adopted in Balsara case, it would lead to an anomalous result. Does Article 47 oblige the State to prohibit even such industries as are licensed under the IDR Act but which manufacture industrial alcohol? This was never intended by the above judgments or the Constitution. It appears to us that the decision in the Synthetics and Chemicals Ltd. case was not correct on this aspect. * * *

80. It was submitted that the activity in potable liquor which was regarded safe and exclusive right of the State in the earlier judgments dealing with the potable liquor were sought to be justifiable under the police power of the State, that is, the power to preserve public health, morals, etc. This reasoning can never apply to industrial alcohol manufactured by industries which are to be developed in the public interest and which are being encouraged by the State. In a situation of this nature, it is essential to strike a balance and in striking the balance, it is difficult to find any justification for any theory of any exclusive right of a State to deal with industrial alcohol. Restriction valid under one circumstance may become invalid in changing circumstances. ...

81. It is not necessary for us here to say anything on the imposts on potable alcohol as commonly understood. These are justified by the lists of our legislature practised in this country.

82. In that view of the matter, it appears to us that the relevant provisions of the U.P. Act, A.P. Act, Tamil Nadu Act, Bombay Prohibition Act, as mentioned hereinbefore, are unconstitutional insofar as these purport to levy a tax or charge imposts upon industrial alcohol, namely alcohol used and usable for industrial purposes.

83. Having regard to the principles of interpretation and the constitutional provisions, in the light of the language used and having considered the impost and the composition of industrial alcohol, and the legislative practice of this country, we are of the opinion that the impost in question cannot be justified as State imposts as these have been done. We have examined the different provisions. These are not merely regulatory. These are much more than that. These seek to levy imposition in their pith and substance not as incidental or as merely disincentives but as attempts to raise revenue for States' purposes. There is no taxing provision permitting these in the lists in the field of industrial alcohol for the State to legislate.

84. Furthermore, in view of the occupation of the field by the IDR Act, it was not possible to levy this impost.

85. After the 1956 amendment to the IDR Act bringing alcohol industries (under fermentation industries) as Item 26 of the First Schedule to IDR Act the control of this industry has vested exclusively in the Union. Thereafter, licences to manufacture both potable and non-potable alcohol is vested in the Central Government. Distilleries are manufacturing alcohol under the central licences under IDR Act. No privilege for manufacture even if one existed, has been transferred to the distilleries by the State. The State cannot itself manufacture industrial alcohol without the permission of the Central Government. The States cannot claim to pass a right which they do not possess. Nor can the State claim exclusive right to produce and manufacture industrial alcohol which are manufactured under the grant of licence from the Central Government. Industrial alcohol cannot upon coming into existence under such grant be amenable to States' claim of exclusive possession of privilege.

53. The aforesaid decisions pertaining to the trade or business in denatured spirit or industrial alcohol, not only do not take the view that the citizen has a fundamental right to carry on trade or business in potable alcohol but on the contrary, hold that he has no such right. This is reiterated in the two ***Synthetics & Chemicals*** cases.

54. It will thus be obvious that all the decisions except the decision in ***K.K. Narula*** case have unanimously held as shown above that there is no fundamental right to carry on trade or

business in potable liquor sold as a beverage. As pointed out above, the proposition of law which is put in a different language in ***K.K. Narula*** case has been explained by the subsequent decisions of this Court including those of the Constitution Benches. The proposition of law laid down there has to be read in conformity with the proposition laid down in that respect by the other decisions of this Court not only to bring comity in the judicial decisions but also to bring the law in conformity with the provisions of the Constitution. The fundamental rights conferred by our Constitution are not absolute. Article 19 has to be read as a whole. The fundamental rights enumerated under Article 19(1) are subject to the restrictions mentioned in clauses (2) to (6) of the said article. Hence, the correct way to describe the fundamental rights under Article 19(1) is to call them qualified fundamental rights. To explain this position in law, we may take the same illustration as is given in ***K.K. Narula*** case. The citizen has undoubtedly a fundamental right to carry on business in ghee. But he has no fundamental right to do business in adulterated ghee. To expound the theme further, a citizen has no right to trafficking in women or in slaves or in counterfeit coins or to carry on business of exhibiting and publishing pornographic or obscene films and literature. The illustrations can be multiplied. This is so because there are certain activities which are inherently vicious and pernicious and are condemned by all civilised communities. So also, there are goods, articles and services which are obnoxious and injurious to the health, morals, safety and welfare of the general public. To contend that merely because some activities and trafficking in some goods can be organised as a trade or business, right to carry on trade or business in the same should be considered a fundamental right is to beg the question. The correct interpretation to be placed on the expression "the right to practise any profession, or to carry on any occupation, trade or business" is to interpret it to mean the right to practise any profession or to carry on any occupation, trade or business which can be legitimately pursued in a civilised society being not abhorrent to the generally accepted standards of its morality. Human perversity knows no limits and it is not possible to enumerate all professions, occupations, trades and businesses which may be obnoxious to decency, morals, health, safety and welfare of the society. This is apart from the fact that under our Constitution the implied restrictions on the right to practise any profession or to carry on any occupation, trade or business are made explicit in clauses (2) to (6) of Article 19 of the Constitution and the State is permitted to make law for imposing the said restrictions. In the present case, it will be clause (6) of Article 19 which places restrictions on the fundamental right to do business under Article 19(1)(*g*). These restrictions and limitations on fundamental right are implicit and inherent even in the fundamental rights spelt out in the American Constitution, although they are not explicitly stated as in our Constitution by clauses (2) to (6) of Article 19. That is how the American Supreme Court has read and interpreted the rights in the American Constitution as pointed out above by the excerpts from the relevant decisions. It will have, therefore, to be held that even under the American Constitution, there is no absolute fundamental right to do business or trade in any commodity or service. The correct way, therefore, to read the fundamental rights enumerated under Article 19(1) of our Constitution is to hold that the citizens do not possess the said rights absolutely. They have the said rights as qualified by the respective clauses (2) to (6) of Article 19. That is apart from the fact that Article 47 of the Constitution enjoins upon the State to prohibit consumption of intoxicating drink like liquor, which falls for consideration in the present case and, therefore, the right to trade or business in

potable liquor is subject also to the provisions of the said article. Whether one states as in ***K.K. Narula*** case that the citizen has a fundamental right to do business but subject to the State's powers to impose valid restrictions under clause (6) of Article 19 or one takes the view that a citizen has no fundamental right to do business but he has only a qualified fundamental right to do business, the practical consequence is the same so long as the former view does not deny the State the power to completely prohibit, trade or business in articles and products like liquor as a beverage, or such trafficking as in women and slaves. This Court in ***K.K. Narula*** case has not taken such view.

55. The contention that if a citizen has no fundamental right to carry on trade or business in potable liquor, the State is also injuncted from carrying on such trade, particularly in view of the provisions of Article 47, though apparently attractive, is fallacious. The State's power to regulate and to restrict the business in potable liquor impliedly includes the power to carry on such trade to the exclusion of others. Prohibition is not the only way to restrict and regulate the consumption of intoxicating liquor. The abuse of drinking intoxicants can be prevented also by limiting and controlling its production, supply and consumption. The State can do so also by creating in itself the monopoly of the production and supply of the liquor. When the State does so, it does not carry on business in illegal products. It carries on business in products which are not declared illegal by completely prohibiting their production but in products the manufacture, possession and supply of which is regulated in the interests of the health, morals and welfare of the people. It does so also in the interests of the general public under Article 19(6) of the Constitution.

56. The contention further that till prohibition is introduced, a citizen has a fundamental right to carry on trade or business in potable liquor has also no merit. All that the citizen can claim in such a situation is an equal right to carry on trade or business in potable liquor as against the other citizens. He cannot claim equal right to carry on the business against the State when the State reserves to itself the exclusive right to carry on such trade or business. When the State neither prohibits nor monopolises the said business, the citizens cannot be discriminated against while granting licences to carry on such business. But the said equal right cannot be elevated to the status of a fundamental right.

57. It is no answer against complete or partial prohibition of the production, possession, sale and consumption etc. of potable liquor to contend that the prohibition where it was introduced earlier and where it is in operation at present, has failed. The failure of measures permitted by law does not detract from the power of the State to introduce such measures and implement them as best as they can.

58. We also do not see any merit in the argument that there are more harmful substances like tobacco, the consumption of which is not prohibited and hence there is no justification for prohibiting the business in potable alcohol. What articles and goods should be allowed to be produced, possessed, sold and consumed is to be left to the judgment of the legislative and the executive wisdom. Things which are not considered harmful today, may be considered so tomorrow in the light of the fresh medical evidence. It requires research and education to convince the society of the harmful effects of the products before a consensus is reached to ban its consumption. Alcohol has since long been known all over the world to have had harmful effects on the health of the individual and the welfare of the society. Even long

before the Constitution was framed, it was one of the major items on the agenda of the society to ban or at least to regulate, its consumption. That is why it found place in Article 47 of the Constitution. It is only in recent years that medical research has brought to the fore the fatal link between smoking and consumption of tobacco and cancer, cardiac diseases and deterioration and tuberculosis. There is a sizeable movement all over the world including in this country to educate people about the dangerous effect of tobacco on individual's health. The society may, in course of time, think of prohibiting its production and consumption as in the case of alcohol. There may be more such dangerous products, the harmful effects of which are today unknown. But merely because their production and consumption is not today banned, does not mean that products like alcohol which are proved harmful, should not be banned.

59. The 1956 Resolution of Industrial Policy adopted by the Central Government also does not help the petitioners/appellants in their contention that the production of industrial alcohol as an industry has to be recognised and all that can be done is to regulate the said production but not to prohibit it. Apart from the fact that the said resolution has no legal efficacy, and cannot have the effect of limiting the powers of the State to prohibit or restrict the production of potable alcohol, the resolution itself nowhere speaks against such prohibition or limitation. The licences granted to the distilleries, breweries and wineries of potable liquor are valid only so long as their production, possession, transport, sale, consumption etc. are not completely prohibited in the States concerned.

60. We may now summarise the law on the subject as culled from the aforesaid decisions.

(*a*) The rights protected by Article 19(1) are not absolute but qualified. The qualifications are stated in clauses (2) to (6) of Article 19. The fundamental rights guaranteed in Article 19(1)(*a*) to (*g*) are, therefore, to be read along with the said qualifications. Even the rights guaranteed under the Constitutions of the other civilized countries are not absolute but are read subject to the implied limitations on them. Those implied limitations are made explicit by clauses (2) to (6) of Article 19 of our Constitution.

(*b*) The right to practise any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i.e., *res extra commercium*, (outside commerce). There cannot be business in crime.

(*c*) Potable liquor as a beverage is an intoxicating and depressant drink which is dangerous and injurious to health and is, therefore, an article which is *res extra commercium* being inherently harmful. A citizen has, therefore, no fundamental right to do trade or business in liquor. Hence the trade or business in liquor can be completely prohibited.

(*d*) Article 47 of the Constitution considers intoxicating drinks and drugs as injurious to health and impeding the raising of level of nutrition and the standard of living of the people and improvement of the public health. It, therefore, ordains the State to bring about

prohibition of the consumption of intoxicating drinks which obviously include liquor, except for medicinal purposes. Article 47 is one of the directive principles which is fundamental in the governance of the country. The State has, therefore, the power to completely prohibit the manufacture, sale, possession, distribution and consumption of potable liquor as a beverage, both because it is inherently a dangerous article of consumption and also because of the directive principle contained in Article 47, except when it is used and consumed for medicinal purposes.

(*e*) For the same reason, the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of the liquor as a beverage and also sell the licences to the citizens for the said purpose by charging fees. This can be done under Article 19(6) or even otherwise.

(*f*) For the same reason, again, the State can impose limitations and restrictions on the trade or business in potable liquor as a beverage which restrictions are in nature different from those imposed on the trade or business in legitimate activities and goods and articles which are *res commercium*. The restrictions and limitations on the trade or business in potable liquor can again be both under Article 19(6) or otherwise. The restrictions and limitations can extend to the State carrying on the trade or business itself to the exclusion of and elimination of others and/or to preserving to itself the right to sell licences to do trade or business in the same, to others.

(*g*) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business.

(*h*) The State can adopt any mode of selling the licences for trade or business with a view to maximise its revenue so long as the method adopted is not discriminatory.

(*i*) The State can carry on trade or business in potable liquor notwithstanding that it is an intoxicating drink and Article 47 enjoins it to prohibit its consumption. When the State carries on such business, it does so to restrict and regulate production, supply and consumption of liquor which is also an aspect of reasonable restriction in the interest of general public. The State cannot on that account be said to be carrying on an illegitimate business.

(*j*) The mere fact that the State levies taxes or fees on the production, sale and income derived from potable liquor whether the production, sale or income is legitimate or illegitimate, does not make the State a party to the said activities. The power of the State to raise revenue by levying taxes and fees should not be confused with the power of the State to prohibit or regulate the trade or business in question. The State exercises its two different powers on such occasions. Hence the mere fact that the State levies taxes and fees on trade or business in liquor or income derived from it, does not make the right to carry on trade or business in liquor a fundamental right, or even a legal right when such trade or business is completely prohibited.

(*k*) The State cannot prohibit trade or business in medicinal and toilet preparations containing liquor or alcohol. The State can, however, under Article 19(6) place reasonable restrictions on the right to trade or business in the same in the interests of general public.

(*l*) Likewise, the State cannot prohibit trade or business in industrial alcohol which is not used as a beverage but used legitimately for industrial purposes. The State, however, can place reasonable restrictions on the said trade or business in the interests of the general public under Article 19(6) of the Constitution.

(*m*) The restrictions placed on the trade or business in industrial alcohol or in medicinal and toilet preparations containing liquor or alcohol may also be for the purposes of preventing their abuse or diversion for use as or in beverage.

61. This Court neither in ***K.K. Narula*** case nor in the second ***Synthetics and Chemicals Ltd.*** case has held that the State cannot prohibit trade or business in potable liquor. The observations made in ***K.K. Narula*** case that a citizen has a fundamental right to trade or business in liquor are to be understood, as explained above, to mean only that when the State does not prohibit the trade or business in liquor, a citizen has the right to do business in it subject to the restrictions and limitations placed upon it. Those observations cannot be read to mean that a citizen has an unqualified and an absolute right to trade or business in potable liquor. This position in law is explained by this Court also in ***Har Shankar*** case. The decision in the second ***Synthetics and Chemicals Ltd.*** case also cannot be read to mean that the Court in that case has taken the view that a citizen has a right to trade or business in potable liquor. That decision is confined to trade or business in industrial alcohol which is legitimately used for industrial purpose and not for consumption as an intoxicating drink. The Court has also there not taken any exception to the right of the State to place reasonable restrictions on the trade or business even of industrial alcohol to prevent its diversion for the use in or as intoxicating beverage.

62. We, therefore, hold that a citizen has no fundamental right to trade or business in liquor as beverage. The State can prohibit completely the trade or business in potable liquor since liquor as beverage is *res extra commercium*. The State may also create a monopoly in itself for trade or business in such liquor. The State can further place restrictions and limitations on such trade or business which may be in nature different from those on trade or business in articles *res commercium*. The view taken by this Court in ***K.K. Narula*** case as well as in the second ***Synthetics and Chemicals Ltd.*** case is not contrary to the aforesaid view which has been consistently taken by this Court so far.

* * * * *

B R Enterprises v. *State of Up*

(1999) 9 SCC 700

[Legality of certain provisions of the Lotteries (Regulation) Act,1998-whether lotteries organized by the state is gambling in nature- whether it is trade and business within the meaning of Articles 301-303 of the Constitution of India]

In this background, now we proceed to consider first, what is the nature and character of the lotteries? What changes, if any, is brought in when lottery becomes State lottery? So far as lotteries are concerned, it can neither be denied nor has been denied that lotteries are form of gambling. The question next is, whether a lottery, which is not a State lottery, if it is gambling, does it loose its character as such when it becomes a State lottery? The lotteries as such are pernicious in nature cannot be denied. However, the submission is, when it cloaks itself with the linen of State authority and is presented as State organised lottery, it looses its pernicious character and what could be said before he puts on the cloak to be res extra commercium becomes commercium. Hence, for this we have to understand what is trade and business, and what is lottery? Unless their true nature and character is understood, submissions could not be properly appreciated. We are also conscious, the resultant conclusion of it would not be proper if based on views of one or two individual judges but has to be based on what was and is understood at the common law. For this, we have to turn our pages to the ancient history to gather wholesome view as to what was understood then and what is understood now, which is revealed through the ancient texts and various decisions of our courts and courts of other countries.

In this context, we may first refer-to the Constitution Bench decision of this court in the RMDC case (supra), which is a leading case, which has truly dwelled on this subject at some length. It holds that gambling activities are in its very nature and essence extra commercium. They were considered to be a sinful and pernicious vice by the ancient seers and law givers of India. It also records that it has been deprecated even by the laws of England, Scotland, United States of America and Australia, In support, it quoted what seers and law givers of India in (he ancient time looked upon gambling. A reference was made of Hymn XXXIV of the Rigveda which proclaims the demerits of gambling and quoted verses 7, 10 and 13. It referred to Mahabharata which deprecates gambling by depicting the woeful conditions of the Pandavas who had gambled away their kingdom. Manu in verse 221 advises the king to exclude from his realm gambling and betting, since these two vices cause the destruction of the kingdom of princes. Verse 226 describes a gambler as secret thieves who constantly harass the good subjects by their forbidden practices. Verse 227 referred to the gambling as a vice causing great enmity and advises wise men not to practice it even for amusement. As is the present case, even in the ancient time, inspite of condemnation of gambling, Yajnavalkya permitted it is under State control. Vrihaspati on this subject records that gambling had been totally prohibited by Manu because it destroys truth, honesty and wealth while some other law givers permitted it when conducted under the control of the State so as to allow the king a share of every stake. However, the Supreme Court of America as far back as in 1850 considered this issue as recorded in Phalen v. Virginia, case (1850) 49 U.S. 163; 12L Ed. 1030, 1033, for useful appreciating its adjudication is quoted hereunder:-

> "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with widespread pestilence of lotteries, the former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and the simple."

The observations were quoted, with approval in Douglas V. Kentucky. After quoting the passage from Phalen case (supra) judgment proceeded:

> "Is the state forbidden by the supreme law of the land from protecting its people at all times from practices which it conceives to be attended by such ruinous results. Can the Legislature of a State contract away its power to establish such regulations as are reasonably necessary from time to time to protect the public morals against the evils of lotteries?"

In die said decisions, a reference was made to the decision of Australian High court in The King v. Connare, [1939] 5I CLR 596 Evatt, J. did not think that lottery tickets can be regarded as goods or commodities entitled for protection of Section 21 of the common wealth of Australian Constitution Act. He held at page 628:

"If they are goods or commodities they belong to a very special category, so special in the interests of its citizens the state may legitimately exile them from the realm of tirade, commerce of business. The indiscriminate sale of such tickets may be regarded as causing business disturbance and loss which, on general grounds of policy, the State is entitled to prevent or at least minimize."

In the same decision, McTiernan J. held :

"Some trades are more adventurous or speculative than others, but trade or commerce as a branch of human activity belongs to an order entirely different from gaming or gambling. Whether a particular activity falls within the one or the other order is a matter of social opinion rather than jurisprudence..... It is gambling to buy a ticket or share in a lottery. Such a transaction does not belong to the commercial business of the country. The purchaser stakes money in a scheme for distributing prizes by chance. He is a gamester."Mc Tiernan J. reiterated his view in another case in King v. Connare (1938) 61 CLR 59

"It is important to observe the distinction that gambling is not trade, commerce and intercourse within the meaning of S. 92 otherwise the control of gambling in Australia would be attended with constitutional difficulties."

In the same decision the view of Taylor J.. is also quoted hereunder:

"No simple legislative expedient purporting to transmutes trade and commerce: into something else will remove it from the ambit of S. 92. But whilst asserting the width of the field in which S.92 may operate it is

necessary to observe that not every transaction which employs the forms of trade and commerce will, as trade and commerce, invoke its protection,"

With reference to the history of lotteries in England, the learned judge quoted:

"The foregoing observations give some indication of the attitude of the law for over two and a half centuries towards the carrying on of lotteries. But they show also that, in this country, lotteries were, from the moment of its first settlement, common and public nuisances and that, in general, it was impossible to conduct them except in violation of the law. Indeed it was

impracticable for any person to conduct a lottery without achieving the status of a rogue and a vagabond."

It is significant that American congress faced with the difficulty to include gambling activity within the commerce clause of Article 1, Section 8 sub-section 3 of the Constitution of the United States in the interests of controlling its activity including ban or penalising a person, interpreted the commerce clause to include gambling activity. The relevant portion as recorded in RMDC case is quoted hereunder :

> "Congress having made law regulating gambling activities which extended across the State borders, the question arose whether the making of the law was within the legislative competence of the Congress, that is to say whether it could be brought within the commerce clause. The question depended for its answer on the further question whether the gambling activities could be said to be commerce amongst the States. If it could, then it was open to congress to make the law in exercise of its Legislative powers under the commerce clause. More often than not gambling activities extend from State to State and in view of the commerce clause, no State Legislature can make a law for regulating inter-state activities in the nature of trade. If betting and gambling does not fall within the ambit of the commerce clause, then neither the Congress nor the State Legislature can in any way control the same. In such circumstances, the Supreme Court of America thought it right to give a wide meaning to the word ` commerce' so as to include gambling within the commerce clause and thereby enable the Congress to regulate and control the same. Thus in Champion v.Ames, (1903) 188 US 321;47 L, Ed. 492 the carriage of lottery tickets from one State to another by an express company was held to be inter-State commerce and the court upheld the law made by Congress which made such carriage an offence."

We have summarised the relevant portions of the various decisions given by the Australian, American and English Courts to show how they have received the lotteries in their countries, its nature, impact on public at large, their concern about its regulation and control. There can be no doubt, on the perusal of the said decisions that these courts considered lottery as gambling and even where such lotteries were permitted under the regulating power of the state but were not given the status of `trade and commerce" as understood at common parlance. It is significant, within the fertile arid exclusive zone of interpretation, when situation arose, to interpret the word `commerce' which normally would not have included `gambling' within it, in the wider public interest as to bring jurisdiction to the legislature to control or restrict `betting and gambling1 interpreted this also to come within commerce clause. This wider definition to the commerce clause was given by the American Court with an objective to control such lotteries rather giving absolute freedom to trade in it. Thus, the law in Champion case (supra) penalising even carriage of lottery tickets from one State to another was upheld. In cases United States v. Kahriger (1953)345 U.S.22; 97 L, Ed. 754 and lewis v. United States, (1955) 348 U.S.419; 99 L Ed. 475, the Supreme Court Of United states held that there is no constitutional right to gambling.

From the references from Dharamshastra, opinions of distinguished authors, references in the Encyclopedia of Britannica and Boston Law Review and others, we find that each concludes, as we have observed, lottery remains in the realm of gambling. Even where it is state

sponsored still it was looked down as an evil. Right from ancient time till the day all expressed concern to eliminate this, even where it was legalised for raising revenue either by the king or in me modern times by the State. Even this legitimisation was for the sole purpose of raising revenue, was also for a limited period, since this received condemnation even for this limited purpose. All this gives clear picture of the nature arid character of lottery as perceived through the consciences of the people, as revealed through ancient scriptures, also by various courts of the countries. It is in this background now we proceed to examine, if lotteries are goods, could a contract for sale of such goods be conferred the status of trade and commerce as used in Chapter XIII of our Constitution.

Thus, now we proceed to examine what are lottery tickets? What are the ingredients of a contract of sale of lottery tickets? Whether its ingredients constitute it to be trade and to be such trade as to receive protection under our Constitution? In other words, could such trade qualify to be fundamental right or a right conferred by a Statute? If it is a right out of creature of a Statute could it not be regulated, curtailed or banned by the same Statute? Whether a right spoken of "free trade" under Article 301 speaks about fundamental right or does it include trade of the nature we are concerned? Whether mere legalisation of a transaction by itself becomes `commercium' of the nature as to qualify to be a trade as understood under Article 301.

Learned counsel for the States challenging the validity of the Act submits, since there is marked difference between our Constitution and the Australian Constitution and Constitution of the United States of America, hence we should not apply the principles of the decision of those Courts. It was pointed out, there is nothing in the American Constitution correspoding to Article 19(l)(g) or Article 301 as in our Constitution.

Similarly, in the Australian Constitution there is no provision as we have in our Articles 19(6) or Articles 302, 304 in contrast Section 92 of the Australian Constitution is free without any such limitations. This submission was taken note by our Court in the case of KMDC (supra). The reference Of these judgments of these foreign Courts were only to take the stock of the view as to with what vision they judged and what they meant and understood while dealing with the sale of lottery tickets. Neverthless this apart, if reasoning of these decisions are to be tested, qua, our constitutional provisions, they should of course, be tested with circumspection. As said, we have referred to these decisions, not for interpreting the provisions of our Constitution but only to know the nature and character of lotteries as understood in those countries to which we find there is no difference than what is understood in our country. It is in this background, this Court in RMPC (supra), after recording the activities of lotteries which is condemned in this country from the ancient times and also taking note of views of the courts of other countries, found that they equally condemned, discouraged and looked it down with disfavour, viz.,, in England, Scotland, the Unites of America and in Australia So this decision concludes that our constitutional makers could never have intended, with reference to the transaction of lottery tickets, to raise it to the Status of trade, commerce or intercourse. The purpose of Articles l9(l)(g) and 301 could not possibly have been to guarantee freedom of gambling. To dissolve principle laid down in RMDC case (supra), on behalf of such States challenging the validity of the Act, it is submitted that the RMDC case was concerned with the lotteries covered by Entry 34, List II and not the lotteries organised by the State which is covered by Entry 40, List I, hence it would have no

application. In addition, they referred to the case of Gherulal Parekh (supra) to submit that what is recorded in RMDC case (supra) was narrowly interpreted in this case. The question in Gherulal case was, whether an agreement of partnership with the object of entering into wagering transactions was illegal within the meaning of Section 23 of the Indian Contract Act? It was held that although a wagering contract was void and unenforceable under Section 30 of the Contract Act, it was not forbidden by law and an agreement collateral to such a contract was not unlawful within the meaning of Section 23 of the Contract Act. What is narrowed down, if at all, was with reference to morality aspect based on ancient scriptures. It holds after referring the RMDC case:

> "The moral prohibitions in Hindu Law texts against gambling were not legally enforced but were allowed to fall into desuetude and it was not possible to hold that there was any definite head or principle of public policy evolved by courts or laid down by precedents directly applicable to wagering contracts."

This decision has not diluted the law laid down with respect to the finding that gambling would not fall within the meaning of word `trade' under Article 301 of the Constitution or to have diluted that such transaction would not get protection under Article 19(1)(g). What is said is that moral prohibitions in Hindu Law text against gambling were not legally enforced. It is true, within the moral format, in a strict sense, if it was to be legally enforced there could hot have been any legalised gambling. But it cannot be doubted and it is recognised by all the countries that gambling by its very nature promises to make poor man a rich man, to quench the thirst of a man in dire economic distress or to a man with bursting desire to become wealthy overnight draws them into the magnetic field of lotteries with crippling effect. More often than not, such hopes with very remote chance encourages the spirit of reckless prosperity in him, ruining him and his family. This encouraging hope with the magnitude of prize money never dwindles. Losses and failures hi lotteries instead of discouragement increases the craze with intoxicating hope, not only to erase the losses but to fill his imaginative coffer. When this chance mixes with this Utopian hope, he is repeatedly drawn back into the circle of lottery like drug addicts. Inevitably, the happiness of his family is lost. He goes into a chronic state of indebtedness. In this context, it is said that how the Constitution makers could ever have conceived to give protection to gambling under Article 19(l)(g) or Article 301 of our Constitution.

Before considering the submission, the difference between the lottery organised by the State and other lotteries, on which basis the applicability of the principle of RMDC case (supra) is sought to be distinguished, we would like to refer to another realm of State activity, the transaction which is in the nature of trade, viz., the manufacture and sale of potable liquor, but still this Court held it to be res extra commercium. In the Krishan Kumar Narula v. The State of Jammu & Kashmir & Ors., [1967] 3 SCR 50 at p. 54, the submission was that potable liquor is noxious and dangerous to the community and subversive of its morals. With reference to potable liquor a challenge was made, the Court held;

> "...that dealing in noxious and dangerous goods like liquor was dangerous to the community and subversive of its morals..,. Such an approach leads to incoherence in thought and expressions: Standards of morality can offer guidance to impose restrictions, but cannot limit the scope of the right."

The Court held that right to trade in liquor was business. However, in Khoday Distilleries (supra) it reversed the decision of Krishan Kumar case (supra) by holding that right to trade in liquor was not constitutionally protected. However, the Court in this case clearly made three exceptions,

(a) trade in alcohol is not per se prohibited for medicinal and industrial uses;

(b) even though trade in potable alcohol was res extra commercium the State itself may sell potable alcohol, set up a monopoly business for that purpose and maximise its revenue by any mode of sale; and

(c) the state may on a non-discriminatory bases permit sale of alcohol through private parties.

In Khoday Distilleries (supra) this Court held:

> "The right to practice any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious, and is condemend by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i,e., res extra commercium, (outside commerce). There cannot be business in crime.

Potable liquor as a beverage is an intoxicating and depressant drink which is dangerous and injurious to health and is, therefore, an article which is res extra commercium being inherently harmful. A citizen has, therefore, no fundamental right to do trade or business in liquor. Hence the trade or business in liquor can be completely prohibited. For the same reason, again, the State can impose limitations and restrictions on the trade or business in potable liquor as a beverage which restrictions are in nature different from those imposed on the trade or business in legitimate activities and goods arid articles which are res commercium. The restrictions and limitations on the trade and business in potable liquor can again be both under Article 19(6) or otherwise. The restrictions and limitations can extend to the State carrying on the trade or business itself to the exclusion of and elimination of others and/or to preserving to -'itself the right to sell licences to do trade or business in the same, to others.

The State can carry on trade or business in potable liquor notwithstanding that it is an intoxicating drink and Article 47 enjoins it to prohibit its consumption. When the State carries on such business, it does so to restrict and regulate production, supply and consumption of liquor which is also an aspect of reasonable restriction in the interest of general public. The State cannot on that account be said to be carrying on an illegitimate business. It carries on business in products which are not declared illegal by ply of which is regulated in the interests of the health.; morals and welfare of the people. It does so also in the interests of the general public under Article 19(6).

The mere fact that the State levies taxes or fees on the production, sale and income derived from potable liquor whether the production, sale or income is legitimate or illegitimate, does not make the State a party to the said activities. The power of the State to raise revenue by levying taxes and fees should not be confused with the power of the State to prohibit or regulate the trade or business in question. The State exercise its two different powers on such occasions. Hence the mere fact that the State levies taxes and fees oft trade or business in liquor or derives income from it, does not make the right to carry on trade or business in liquor a fundamental right, or even a legal right when such trade or business is completely

prohibited," This decision clearly lays down and demonstrates that manufacture, sale, purchase of potable liquor, which State carries on at common parlance is trade and is a good still held to be an article different from goods and article which are res commercium. This holds further that transactions in potable liquor by sale and in spite of levy of taxes, fees on this trade or business, it is held to be res extra commercium. Such transactions are also not prohibited, rather authorised by law. Hence merely there is sanction in law for a transaction or is legalised not prohibited, it would not by itself make it to be commercium. Entry 62 of List II of the Seventh Schedule refers to taxes on betting and gambling which inherently permits gambling. Thus, it could be said that gambling is recognised and authorized by law, may be through regulations, licences etc.. Thus, imposition of tax on gambling conceives of gambling, of course has to be legal to impose tax on it In this background, we proceed to examine State lotteries (gambling), whether could it still qualifies to be `trade of commerce' within the meaning of Chapter XIII of our Constitution or could `trade' or such transactions seek protection under the protective umbrella of constitutional provisions as it to be free `trade'?

For this, we revert to scrutinize as to what tirade lotteries gambling and how State lotteries cleanses this character. As we have already recorded, the difference between gambling and the trade that a gambling inherently contains a chance with no skill, while trade contains skill with no chance. What makes lottery a pernicious is its gambling nature. Can it be said that in the State organised lotteries this element of gambling is excluded? There could possibly be no two opinions that even in the State lotteries the same element of chance remains with no skill. It remains within the boundaries of gambling. The stringent measures and the conditions imposed under the State lotteries are only to inculcate faith to the participant of such lottery, that it is being conducted fairly with ho possibility of fraud, misappropriation or deceit and assure the hopeful recipients of high prizes that all is fair and safe. That assurance is from stage one to the last with full transparency; No doubt holding of the State lotteries for public revenue has been authorised, legalised and once this having been done it is expected from the State to take such measure to see that people at large, faithfully and hopefully participate in larger number for the greater yield of its revenue with no fear in their mind. The Act further ensure by virtue of Section 4(d) that the proceeds of the sale of such lottery tickets is credited to the public accounts of the State. This is to give clear message to the participants that the proceeds is not in the hands of individual group or association but is ensured to be credited in the State accounts. But, as we have said, this by itself would not take it outside the realm of gambling. It remains within the same realm. In this regard there is no difference between lotteries under Entry 34, List II and a lottery organised by the State under Entry 4.0, List I When character of both the State organised lotteries and other lotteries remains the same by merely placing the apparel of the State with authority of law, would not make any difference, it remains gambling as element of chance persist with no element of skill. Even other lotteries under Entry 34, List II could only be run under the authority of the State or the law of the State. Only difference is in one case, authority is that of State and in other, the Parliament. That is why, what is excluded from the penal consequences under Section 294A, IPC is the lotteries authorised by the State not merely lotteries organised by the State, So, on the reasoning as put forward even lotteries under Entry 34, List II cannot be said to be pernicious. The lotteries authorised by the State is also has a sanction in law. As we have said, a

gambling may be taxed and may be authorised for a specified purpose, but it would not attain the status of trade like other trades or become res commercium. No gambling could be commercium hence in our considered opinion the principle of RMDC case (supra) would equally be applicable even to the State organised lottery. In no uncertain terms the said decision recorded that the constitutional makers could never have conceived to give protection to gambling either under Article 19(l)(g) or it as a trade Article 301 of the Constitution.

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REASONABLE RESTRICTIONS IN PUBLIC INTEREST

Chintaman Rao v. *State of Madhya Pradesh*

1950 SCR 759

MAHAJAN J.— These two applications for enforcement of the fundamental right guaranteed under Article 19(1)(*g*) of the Constitution of India have been made by a proprietor and an employee respectively of a bidi manufacturing concern of District Sagar (State of Madhya Pradesh). It is contended that the law in force in the State authorizing it to prohibit the manufacture of bidis in certain villages including the one wherein the applicants reside is inconsistent with the provisions of Part III of the Constitution and is consequently void.

2. The Central Provinces and Berar Regulation of Manufacture of Bidis (Agricultural Purposes) Act, 44 of 1948, was passed on 19th October, 1948 and was the law in force in the State at the commencement of the Constitution. Sections 3 and 4 of the Act are in these terms:

> "3. The Deputy Commissioner may by notification fix a period to be an agricultural season with respect to such villages as may be specified therein.
>
> 4. (1) The Deputy Commissioner may, by general order which shall extend to such villages as he may specify, prohibit the manufacture of bidis during the agricultural season.
>
> (2) No person residing in a village specified in such order shall during the agricultural season engage himself in the manufacture of bidis, and no manufacturer shall during the said season employ any person for the manufacture of bidis."

3. On 13th June, 1950 an order was issued by the Deputy Commissioner of Sagar under the provisions of the Act forbidding all persons residing in certain villages from engaging in the manufacture of bidis. On 19th June, 1950 these two petitions were presented to this Court under Article 32 of the Constitution challenging the validity of the order as it prejudicially affected the petitioners' right of freedom of occupation and business. During the pendency of the petitions the season mentioned in the order of 13th June ran out. A fresh order for the ensuing agricultural season - 8th October to 18th November, 1950 - was issued on 29th September, 1950 in the same terms. This order was also challenged in a supplementary petition.

4. The point for consideration in these applications is whether the Central Provinces and Berar Act 44 of 1948 comes within the ambit of this saving clause or is in excess of its provisions. The learned counsel for the petitioners contends that the impugned Act does not impose reasonable restrictions on the exercise of the fundamental right in the interests of the general public but totally negatives it. In order to judge the validity of this contention it is necessary to examine the impugned Act and some of its provisions. In the preamble to the Act, it is stated that it has been enacted to provide measures for the supply of adequate labour for agricultural purposes in bidi manufacturing areas. Sections 3 and 4 cited above empower the Deputy Commissioner to prohibit the manufacture of bidis during the agricultural season. The contravention of any of these provisions is made punishable by Section 7 of the Act, the penalty being imprisonment for a term which may extend to six months or with fine or with both. It was enacted to help in the grow more food campaign and for the purpose of bringing under the plough considerable areas of fallow land.

5. The question for decision is whether the statute under the guise of protecting public interests arbitrarily interferes with private business and imposes unreasonable and unnecessarily restrictive regulations upon lawful occupation; in other words, whether the total prohibition of carrying on the business of manufacture of bidis within the agricultural season amounts to a reasonable restriction on the fundamental rights mentioned in Article 19(1)(*g*) of the Constitution. Unless it is shown that there is a reasonable relation of the provisions of the Act to the purpose in view, the right of freedom of occupation and business cannot be curtailed by it.

6. The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(*g*) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality.

7. Clause (6) in the concluding paragraph particularizes certain instances of the nature of the restrictions that were in the mind of the constitution-makers and which have the quality of reasonableness. They afford a guide to the interpretation of the clause and illustrate the extent and nature of the restrictions which according to the statute could be imposed on the freedom guaranteed in clause (*g*). The statute in substance and effect suspends altogether the right mentioned in Article 19(1)(*g*) during the agricultural seasons and such suspension may lead to such dislocation of the industry as to prove its ultimate ruin. The object of the statute is to provide measures for the supply of adequate labour for agricultural purposes in bidi manufacturing areas of the Province and it could well be achieved by legislation restraining the employment of agricultural labour in the manufacture of bidis during the agricultural season. Even in point of time a restriction may well have been reasonable if it amounted to a regulation of the hours of work in the business. Such legislation though it would limit the field for recruiting persons for the manufacture of bidis and regulate the hours of the working of the industry, would not have amounted to a complete stoppage of the business of manufacture and might well have been within the ambit of clause (6). The effect of the provisions of the Act, however, has no reasonable relation to the object in view but is so drastic in scope that it goes much in excess of that object. Not only are the provisions of the statute in excess of the requirements of the case but the language employed prohibits a manufacturer of bidis from employing any person in his business, no matter wherever that person may be residing. In other words, a manufacturer of bidis residing in this area cannot import labour from neighbouring places in the district or province or from outside the province. Such a prohibition on the face of it is of an arbitrary nature inasmuch as it has no relation whatsoever to the object which the legislation seeks to achieve and as such cannot be said to be a reasonable restriction on the exercise of the right. Further the statute seeks to prohibit all persons residing in the notified villages during the agricultural season from engaging themselves in the manufacture of bidis. It cannot be denied that there would be a number of infirm and disabled persons, a number of children, old women and petty shopkeepers residing in these villages who are incapable of being used for agricultural labour.

All such persons are prohibited by law from engaging themselves in the manufacture of bidis; and are thus being deprived of earning their livelihood. It is a matter of common knowledge that there are certain classes of persons residing in every village who do not engage in agricultural operations. They and their womenfolk and children in their leisure hours supplement their income by engaging themselves in bidi business. There seems no reason for prohibiting them from carrying on this occupation. The statute as it stands, not only compels those who can be engaged in agricultural work from not taking to other avocations, but it also prohibits persons who have no connection or relation to agricultural operations from engaging in the business of bidi making and thus earning their livelihood. These provisions of the statute, in our opinion, cannot be said to amount to reasonable restrictions on the right of the applicants and that being so, the statute is not in conformity with the provisions of Part III of the Constitution. The law even to the extent that it could be said to authorize the imposition of restrictions in regard to agricultural labour cannot be held valid because the language employed is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the right. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void.

8. The determination by the legislature of what constitutes a reasonable restriction is not final or conclusive; it is subject to the supervision by this Court. In the matter of fundamental rights, the Supreme Court watches and guards the rights guaranteed by the Constitution and in exercising its functions it has the power to set aside an Act of the legislature if it is in violation of the freedoms guaranteed by the Constitution. We are therefore of opinion that the impugned statute does not stand the test of reasonableness and is therefore void. The result therefore is that the orders issued by the Deputy Commissioner on 13th June, 1950 and 26th September, 1950 are void, inoperative and ineffective.

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STATE MONOPOLY

Akadasi Padhan v. *State of Orissa*

AIR 1963 SC 1047 : 1963 Supp (2) SCR 691

GAJENDRAGADKAR, J.— In challenging the validity of the Orissa Kendu Leaves (Control of Trade) Act, 1961 (No. 28 of 1961) ("the Act"), this petition under Article 32 of the Constitution raises an important question about the scope and effect of the provisions of Article 19(6). The petitioner Akadasi Padhan owns about. 130 acres of land in village Bettagada, Sub-division Raira-khol in the District of Sambalpur, and in about 80 acres of the said land he grows Kendu leaves. Kendu leaves are used in the manufacture of Bidis and so, prior to 1961, the petitioner used to carry on extensive trade in the sale of Kendu leaves by transporting them to various places in and outside the District of sambalpur. But since the Act was passed in 1961 and it came into force on January 3, 1962, the State has acquired a monopoly in the trade of Kendu leaves, and that has put severe restrictions on the fundamental rights of the petitioner under Articles 19 (1)(*f*) and (*g*). That, in substance, is the basis of the present petition.

2. The petition alleges that, in substance, the Act creates a monopoly in favour of certain individuals described as Agents by the relevant provisions of the Act, and in that sense, it is a colourable piece of legislation. Under the relevant provisions of the Act, three notifications have been issued, and the validity of these notifications is also challenged by the petition. The first notification published on January 8, 1962 under Section 5 of the Act, gives a schedule of the Districts; the number of units in which the districts are divided and the local areas covered by the said units. The District of Sambalpur in which the petitioner resides has been divided into five units and the petitioner's lands fall under units 2 and 5. On January 10, 1962, applications were called from persons who desired to be appointed as Agents of the Government of Orissa for purchase of and trade in Kendu leaves, and the notification by which these applications were called for made it clear that the Government reserved to itself the right to reject any or all applications in respect of any unit without assigning any reason whatsoever. Then followed the notification of January 25, 1962, which prescribed the price for the Kendu leaves @ 50 leaves per naya paisa. This notification stated that the said price had been fixed by the State Government in consultation with the Advisory Committee appointed under Section 4 of the Act. The last notification to which reference must be made is the notification which was issued on March 10, 1962, making certain corrections in the units of the local areas notified by the notification of January 8, 1962. The validity of these notifications is challenged by the petitioner on the ground that the relevant provisions under which the said notifications are issued are invalid, and also on the general ground that the Act in its entirety is ultra vires.

3. The petition has averred that Sections 3, 5, 6 and 16 of the Act are invalid because they contravene Article 14, but this part of the case has not been argued before us. The main attack has been directed generally against the validity of the whole Act and Sections 3 and 4 in particular on the ground that they violate Article 19(1)(*f*) and (*g*). The relief claimed by the petitioner is that this Court may declare that the whole Act is ultra vires and restrain

Respondent 1, the State of Orissa, from giving effect either to the provisions of the impugned notifications or to the provisions of the impugned Act.

4. The challenge made by the petitioner to the validity of the Act and the relevant notifications is met by Respondent l mainly on the ground that the Orissa Legislature was competent to pass the Act and that its provisions do not contravene Article 19(l)(*f*) or (*g*). It is urged that under Article 19(6), the State Legislature is empowered to create a State monopoly in any trade or business and a monopoly thus created cannot be successfully challenged either under Article l9(l)(*f*) or under Article l9(l)(*g*). In support of its case that the prices fixed under the Act and the scheme of enforcing the State monopoly adopted by the Act are reasonable, Respondent 1 has referred to the previous legislative history in respect of Kendu leaves, and has pointed out that the Act was passed in pursuance of the recommendations made by a Taxation Enquiry Committee appointed by the State Government in 1959. Besides, it has emphasised that 75% of the Kendu leaves produced in the State of Orissa grow in Government lands, and the monopoly created by the Act affects only 25% of the total produce of Kendu leaves in the State. The affidavit filed by Respondent l also shows that the price fixed in consultation with the Advisory Committee is fair and reasonable and would leave a fair margin of profit to the grower of Kendu leaves. It is on these rival contentions that the validity of the Act as well as the notifications has to be considered in the present petition.

5. Before referring to the relevant provisions of the Act, it would be relevant to refer to the legislative background in respect of Kendu leaves. In 1949, the Government of Orissa had passed an Order in exercise of its powers conferred on it by sub-section (1) of Section 3 of the Orissa Essential Articles Control and Requisitioning (Temporary Powers) Act, 1947. This Order was called the Orissa Kendu Leaves (Control and Distribution) Order, 1949. The broad scheme of this Order was that the area in the State was divided into units, and licences were issued to persons who were entitled to trade in Kendu leaves. The District Magistrate fixed the minimum rate from time to time and the Order provided that the licensees were bound to purchase Kendu leaves from the pluckers or owners of private trees and forests at rates not below the minimum prescribed. In other words, the trade of Kendu leaves was entrusted to the licensees who were under an obligation to purchase Kendu leaves offered to them at prices not below the minimum prescribed by the Order.

6. This Order was followed by the Orissa Kendu Leaves Control Order, 1960, passed under the same provision of the Orissa Act of 1947. The licensees were continued under this Order, but some other provisions were made, such as the appointment of a Committee for each District to fix the minimum price. In other words, the licensing system continued even under this latter Order.

7. It appears that when there was a change in the Government of Orissa, the monopoly created in favour of the licensees was changed over to controlled competition, and when the Congress Government came back to power, it was faced with the problem that the controlled competition introduced by its predecessor had led to a loss in Government revenue. That is why, in pursuance of the recommendations made by the Taxation Enquiry Committee, the present Act has been passed with the object of creating a State monopoly in the trade of Kendu leaves. It would thus be seen that though the Act creates a State monopoly in the trade of Kendu leaves, a kind of monopoly in favour of the licensees had been in operation in the

State since 1949, except for a short period when the experiment of controlled competition was tried by the coalition Government which was then in power.

8. Let us now examine the broad features of the Act. The Act consists of 20 sections, and as its preamble indicates, it was passsd because the Legislature thought that it was expedient to provide for regulation of trade in Kendu leaves by creation of State monopoly in such trade. Section 2 of the Act defines "agent" as meaning an agent appointed under Section 8, and "unit" as a unit constituted under Section 5: "grower of Kendu leaves" means any person who owns lands on which Kendu plants grow or who is in possession of such lands under a lease or otherwise and "permit" means a permit issued under Section 3. Section 3(1) provides that no person other than (*a*) the Government; (*b*) an officer of Government authorised in that behalf; or (*c*) an agent in respect of the unit in which the leaves have grown; shall purchase or transport Kendu leaves. It is thus clear that by imposing restrictions on the purchase or transport of Kendu leaves Section 3 has created a monopoly. There are two explanations to Section 3 (*i*) and two sub-sections to the said section, but it is unnecessary to refer to them. Section 4 deals with the fixation of sale price. Section 4 (1) lays down that the pries at which Kendu leaves shall be purchased shall be fixed by the State Government after consultation with the Advisory Committee constituted under Section 4 (2). After the price is thus fixed, it has to be published in the Gazette in the manner prescribed not later than January 31, and after it is Published, the price would prevail for the whole of the year and shall not be altered during that period. The proviso to Section 4 (1) permits different prices to be fixed for different units, having regard to the five factors specified in Clauses (*a*) to (*e*). Clause (*a*) has reference to the prices fixed under any law during the preceding three years in respect of the area in question; clause (*b*) refers to the quality of the leaves grown in the unit; clause (*c*) to the transport facilities available in the unit; clause (*d*) to the cost of transport; and clause (*e*) to the general level of wages for unskilled labour prevalent in the unit. Section 4 (2) provides that the Advisory Committee to be constituted by the Government shall consist of not less than six members as will be notified from time to time; and the proviso to it lays down that not more than one-third of such members shall be from amongst persons who are growers of Kendu leaves. Under sub- Section (3), it is provided that it shall be the duty of the Committee to advise Government on such matters as may be referred to it by Government; and sub-section (4) prescribes that the business of the Committee shall be conducted in such manner and the members shall be entitled to such allowances, if any, as may be prescribed. Section 5 allows the constitution of units, and Section 6 provides for the opening of depots, publication of price list and the hours of business etc. Section 7 (1) imposes an obligation on the Government and the authorised officer or agent to purchase Kendu leaves offered at the price fixed under Section 4 in the manner specified by it; under the proviso, option is left to the Government or any Officer or agent not to purchase any leaves which in their opinion are not fit for the purpose of manufacture of bidis. Section 7 (2) provides for a remedy to a person aggrieved by the refusal of the Government to purchase the Kendu leaves. Section 7(3) deals with cases where leaves offered are suspected to be leaves from the Government forests and it lays down the manner in which such a case should be dealt with. Section 8 deals with the appointment of agents in respect of different units and it allows one person to be appointed for more than one unit. Under Section 9, every grower of Kendu leaves has to get himself registered in the prescribed manner if the quantity of leaves grown by him during the year is

likely to exceed ten standard maunds. Section 10 authorises the Government or its officer or agent to sell or otherwise dispose of Kendu leaves purchased by them. Section 11 provides for the application of net profits which the State Government may make as a result of the operation of this Act; this profit has to be divided between the different Samitis and Gram Panchayats as prescribed by the said section. Section 12 deals with delegation of powers; Section 13 confers power of entry, search and seizure; Section 14 deals with penalty; Section 15 deals with offences and Section 16 makes the offences cognizable; Section 17 makes savings in respect of acts done in good faith; by Section 18, Government is given power to make rules; by Section 19, the Orissa Essential Articles Control and Requisitioning (Temporary Powers) Act, 1955 is repealed in so far as it relates to Kendu leaves and Section 20 gives the power to the State Government to remove doubts and difficulties. These are the broad features of the Act.

9. The first contention which has been raised by Mr Pathak on behalf of the petitioner is that the creation of State monopoly in respect of the trade of purchase of Kendu leaves contravenes the petitioner's fundamental rights under Article l9(l)(*f*) and (*g*). There has been some controversy before us as to whether the petitioner can claim any fundamental right under Article l9(l)(*g*). The learned Attorney-General contended that the petitioner is merely a grower of Kendu leaves and as such, though he may be entitled to say that the restrictions imposed by the act affect his right to dispose of his property under Article l9(l)(*f*), he cannot claim to be a person whose occupation, trade or business has been affected. For the purpose of the present petition, we have, however, decided to proceed on the basis that the petitioner is entitled to challenge the validity of the Act both under Article l9(l)(*f*) and Article 19(1)(*g*); and that makes it necessary to examine the argument raised by Mr Pathak that the creation of the State monopoly contravenes Article l9(l)(*g*).

10. Mr Pathak suggests that the effect of the amendment made by the Constitution (First Amendment) Act, 1951 in Article 19(6) is not to exempt the law passed for creating a State monopoly from the application of the rule prescribed by the first part of Article l9(6). In other words, he suggests that the effect of the amendment is merely to enable the State legislature to pass a law creating a State monopoly, but that does not mean that the said law will still not have to be justified on the ground that the restrictions imposed by it are reasonable and are in the interests of the general public. On the other hand, the learned Attorney-General contends that the object of the amendment was to put the monopoly laws beyond the pale of challenge under Article l9(l)(*f*) and (*g*). It would thus be noticed that the two rival contentions take two extreme positions. The petitioner's argument is that the monopoly law has to be tested in the light of Article 19(6); if the test is satisfied, then the contravention of Article l9(l)(g) will not invalidate the law. On the other hand, the State contends that the monopoly law must be deemed to be valid in all its aspects because that was the very purpose of making the amendment in Article 19(6).

11. Before proceeding to examine the merits of these contentions, it is relevant to recall the genesis of the amendment introduced by the Constitution (First Amendment) Act, 1951. Soon after the Constitution came into force, the impact of socio-economic legislation, passed by the legislatures in the country in pursuance of their welfare policies, on the fundamental rights of the citizens in respect of prosperty came to be examined by courts, and the Articles

on which the citizens relied were 19(l)(*f*) and (*g*) and 31 respectively. In regard to State monopolies, there never was any doubt that as a result of Entry 21 in List III both the State and the Union Legislatures were competant to pass laws in regard to commercial and industrial monopolies, combines and trusts, so that the legislative competence of the Legislatures to create monopolies by legislation could not be questioned. But the validity of such legislation came to be challenged on the ground that it contravened the citizens' rights under Article 3(l)(*g*). As a typical case on the point, we may refer to the decision of the Allahabad High Court in ***Moti Lal* v. *Government of the State of Uttar Pradesh*** [(1951) I All 269]. The result of this decision was that a monopoly of transport sought to be created by the U.P. Government in favour of the State operated Bus Service, known as the Government Roadways, was struck down as unconstitutional, because it was held that such a monopoly totally deprived the citizens of their rights under Article l9(l)(*g*). As a result of this decision it was realised by the legislature that the legislative competence to create monopolies would not necessarilly make monopoly law valid if they contravened Article 19(1). That is why Article 19(6) came to be amended. Incidentally, it may be of interest to note that about the same time, the impact of legislative enactments in regard to acquisition of property on the citizens' fundamental rights to property under Article l9(l)(*f*) also came for judicial review and the decisions of Courts in respact of the acquisition laws in turn led to the amendment of Art 31 on two occasions; firstly when the Constitution (First Amendment) Act was passed in 1951 and secondly, when the Constitution (Fourth Amendment) Act was passed in 1955.

12. It would be noticed that the amendment provides, inter alia, that nothing contained in Article 19(l)(*g*) will prevent the State from making any law relating to the carrying on by the State of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise; and this clearly means that the State may make a law in respect of any trade, business, industry, or service whereby complete monopoly could be created by which citizens are wholly excluded from the trade, business, industry or service in question; or a law may be passed whereby citizens are partially excluded from such trade, business, industry or service; and a law relating to the carrying on of the business either to the complete or partial exclusion of citizens will not be affected because it contravenes Article 19(l)(*g*). The question which arises for our decision is; what exactly is the scope and effect of this provision?

13. In attempting to construe Article 19(6), it must be borne in mind that a literal construction may not be quite appropriate. The task of construing important Constitutional provisions like Article 19(6) cannot always be accomplished by treating the said problem as a mere exercise in grammar. In interpreting such a provision, it is essential to bear in mind the political or the economic philosophy underlying the provisions in question, and that would necessarily involve the adoption of a liberal and not a literal and mechanical approach to the problem. With the rise of the philosophy of Socialism, the doctrine of State ownership has been often discussed by political and economic thinkeRs Broadly speaking, this discussion discloses a difference in approach. To the socialist, nationalisation or State ownership is a matter of principle and its justification is the general notion of social welfare. To the rationalist, nationalisation or State ownership is a matter of expediency dominated by considerations of economic efficiency and increased output of production. This latter view supported nationalisation only when it appeared clear that State ownership would be more

efficient more economical and more productive. The former approach was not very much influenced by these considerations, and treated it as a matter of principle that all important and nation-building industries should come under State control. The first approach is doctrinaire, while the second is pragmatic. The first proceeds on the general ground that all national wealth and means of producing it should come under national control, whilst the second supports nationalisation only on grounds of efficiency and increased output.

14. The amendment made by the Legislature in Article 19(6) shows that according to the Legislature, a law relating to the creation of State monopoly should be presumed to be in the interests of the general public. Article l9(6)(*ii*) clearly shows that there is no limit placed on the power of the State in respect of the creation of State monopoly. The width of the power conferred on the State can be easily assessed if we look at the words used in the clause which cover trade, business, industry or service. It is true that the State may, according to the exigencies of the case and consistently with the requirements of any trade, business, industry or service, exclude the citizens either wholly or partially. In other words, the theory underlying the amendment in so far as it relates to the concept of State monopoly, does not appear to be based on the pragmatic approach, but on the doctrinaire approach which Socialisum accepts. That is why we feel no difficulty in rejecting Mr Pathak's argument that the creation of a State monopoly must be justified by showing that the restrictions imposed by it are reasonable and are in the interests of the general public. In our opinion, the amendment clearly indicates that State monopoly in respect of any trade or business must be presumed to be reasonable and in the interests of the general public, so far as Article 19(l)(*g*) is concerned.

15. The amendment made in Article 19(6) shows that it is open to the State to make laws for creating State monopolies, either partial or complete, in respect of any trade, business, industry or service. The State may enter trade as a monopolist either for administrative reasons, or with the object of mitigating the evils flowing from competition, or with a view to regulate prices, or improve the quality of goods, or even for the purpose of making profits in order to enrich the State ex-chequer. The Constitution-makers had apparently assumed that the State monopolies or schemes of nationalisation would fall under, and be protected by, Article 19(6) as it originally stood; but when judicial decisions rendered the said assumption invalid, it was thought necessary to clarify the intention of the Constitution by making the amendment. It is because the amendment was thus made for purposes of clarification that it begins with the words "in particular". These words indicate that restrictions imposed on the fundamental rights guaranteed by Article 19(l)(*g*) which are reasonable and which are in the interests of the general public, are saved by Article 19(6) as it originally stood; the subject-matter covered by the said provision being justiciable, and the amendment adds that the State monopolies or nationalisation, schemes which may be introduced by legislation, are an illustration of reasonable restrictions imposed in the interests of the general public and must be treated as such. That is why the question about the validity of the laws covered by the amendment is no longer left to be tried in Courts. This brings out the doctrinaire approach adopted by the amendment in respect of a State monopoly as such.

16. This conclusion, however, still leaves two somewhat difficult questions; to be decided what does "a law relating to" a monopoly used in the amendment mean? and what is the effect of the amendment on the other provisions of Article 19(1)? The Attorney-General

contends that the effect of the amendment is that whenever any law is passed creating a State monopoly, it will not have to stand the test of reasonableness prescribed by the first part of Article 19(6) and its reasonableness or validity cannot be examined under any other provision of Article 19(1). Taking the present Act, he urges that if the State monopoly is protected by the amendment of Article 19(6), all the relevant provisions made by the Act in giving effect to the said monopoly are also equally protected and the petitioners cannot be heard to challenge their validity on any ground. What is protected by the amendment must be held to be constitutionally valid without being tested by any other provisions of Article 19(1). That, in substance, is the position taken by the learned Attorney-Greneral.

17. In dealing with the question about the precise denotation of the clause "a law relating to", it is necessary to bear in mind that this clause occurs in Article 19(6) which is, in a sense, an exception to the main provision of Article l9(l)(*g*). Laws protected by Article 19(6) are regarded as valid even though they impinge upon the fundamental right guaranteed under Article 19(l)(*g*). That is the effect of the scheme contained in Article 19(1) read with Clauses (2) to (6) of the said Article. That being so, it would be unreasonable to place upon the relevant clause an unduly wide and liberal construction. "A law relating to" a State monopoly cannot, in the context, include all the provisions contained in the said law whether they have direct relation with the creation of the monopoly or not. In our opinion, the said expression should be construed to mean the law relating to the monopoly in its absolutely essential features. If a law is passed creating a State monopoly, the Court should enquire what are the provisions of the said law which are basically and essentially necessary for creating the State monopoly. It is only those essential and basic provisions which are protected by the latter part of Article 19(6). If there are other provisions made by the Act which are subsidiary, incidental or helpful to the operation of the monopoly, they do not fall under the said part and their validity must be judged under the first part of Article 19(6). In other words, the effect of the amendment made in Article l9(6) is to protect the law relating to the creation of monopoly and that means that it is only the provisions of the law which are integrally and essentially connected with the creation of the monopoly that are protected. The rest of the provisions which may be incidental do not fall under the latter part of Article 19(6) and would inevitably have to satisfy the test of the first part of Article 19(6).

18. The next question to consider is what is the effect of the amendment on the other fundamental rights guaranteed by Article 19(1)? It is likely that a law creating a State monopoly may, in some cases; affect a citizen's rights under Article 19(l)(*f*) because such a law may impinge upon the citizen's right to dispose of property. Is the learned Attorney-General right when he contends that laws protected by the latter part of Article 19(6) cannot be tested in the light of the other fundamental rights guaranteed by Article 19(1)? The answer to this question would depend upon the nature of the law under scrutiny. There is no doubt that the several rights guaranteed by the 7 sub-clauses of Article 19(1) are separte and distinct fundamental rights and they can be regulated only if the provisions contained in clauses (2) to (6) are respectively satisfied. But in dealing with the question as to the effect of a law which seeks to regulate the fundamental right guaranteed by Article 19(l)(*g*) on the citizen's right guaranteed by Article 19(l)(*f*), it will be necessary to distinguish between the direct purpose of the Act and its indirect or incidental effect. If the legislation seeks directly to control the citizen's right under Article 19(l)(*g*), its validity has to be tested in the light of the provisions

contained in Article 19(6); and if such a legislation, as for instance, a law creating a State monopoly, indirectly or incidentally affects a citizen's right under any other clause of Article 19(1) as for instance, Article 19(l)(*f*), that will not introduce any infirmity in the Act itself. As was observed by Kania, C.J. in ***A.K. Gopalan* v. *State of Madras*** [1950 SCR 88] if there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant clause of Article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance for gunitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Article 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenue's life.

21. It will be recalled that clause (6) is co-related to the fundamental right guaranteed under Article 19 (1) (*g*) as other clauses are co-related to the other fundamental rights guaranteed by Article l9 (l)(*a*) to (*f*), and so, the protection afforded by the said clause would be available to the impugned statute only in resisting the contention that it violates the fundamental right guaranteed under Article 19(l)(*g*). If the statute, in substance, affects any other right not indirectly, but directly, the protection of clause 19 (6) will not avail and it will have to be sustained by reference to the requirements of the corresponding clauses in Article 19. The position, therefore, is that a law creating a State monopoly in the narrow and limited sense to which we have already referred would be valid under the latter part of Article 19(6), and if it indirectly impinges on any other right, its validity cannot be challenged on that ground. If the said law contains other incidental provisions which are not essential and do not constitute an integral part of the monopoly created by it, the validity of those provisions will have to be tested under the first part of Article l9(6), and if they directly impinge on any other fundamental right guaranteed by Article 19(1), the validity of the said clauses will have to be tested by reference to the corresponding clauses of Article 19. It is obvious that if the validity of the said provisions has to be tested under the first part of Article l9(6) as well as Article 19 (5), the position would be the same because for all practical purposes, the tests prescribed by the said two clauses are the same. In our opinion this approach introduces a harmony in respect of the several provisions of Article 19 and avoids a conflict between them.

22. In this connection, it is necessary to add that in a large majority of cases where State monopoly is created by statute, no conflict would really arise e.g., where under State monopoly, the State purchases raw material in the open market and manufactures finished goods, there would hardly be an occasion for the infringement of the citizens' right under Article 19(l)(*f*). Take, for instance, the State monopoly in respect of road transporter air transport; a law relating to such a monopoly would not normally infringe the citizen's fundamental right under Article 19(l)(*f*). Similarly, a State monopoly to manufacture steel, armaments, or transport vehicles, or railway engines and coaches may be provided for by law which would normally not impinge on Article l9(l)(*f*). If the law creating such monopolies however, to make incidental provisions directly impinging on the citizens' rights under Article l9(l)(*f*), that would be another matter.

23. What provisions of the impugned statute are essential for the creation of the monopoly, would always be a question of fact. The essential attributes of the law creating a monopoly will vary with the nature of the trade or business in which the monopoly is created; they will depend upon the nature of the commodity, the nature of commerce in which it is involved and several other circumstances. In the present case, the State monopoly has been created in respect of Kendu leaves, and the main point of dispute between the parties is about the fixation of purchase price which has been provided for by Section 4. Mr Pathak contends that the fixation of purchase price is not essential for the creation of monopoly, whereas the learned Attorney-General argues that monopoly could not have functioned without the fixation of such price. We are not prepared to accept the argument that the fixation of purchase price in the context of the present Act was an essential feature of the monopoly. It may be that the fixing of the said price has been provided for by Section 4 in the interests of growers of Kendu leaves themselves, but that is a matter which would be relevant in considering the reasonableness of the restriction imposed by the section. But take a hypothetical case where in creating a State monopoly for purchasing a commodity like Kendu leaves, the law prescribes a purchase price at unreasonably low rate, that cannot be said to be an essential part of the State monopoly as such, and its reasonableness will have to be tested under Article 19(1)(6). On the facts of this case and in the light of the commodity in respect of which monopoly is created, it seems difficult to hold that the State monopoly could not have functioned without fixing the purchase price. We are not suggesting that fixing prices would never be an essential part of the creation of State monopoly though, prima facie, it seems doubtful whether fixing purchase price can properly form an integral part of State monopoly; what we are holding in the present case is that having regard to the scheme of the State monopoly envisaged by the Act, Section 4 cannot be said to be such an essential part of the said monopoly as to fall within the expression "law relating to" under Article l9(6). Therefore, we are satisfied that the validity of Section 4 must be tested in the light of the first part of Article 19(6) so far as the petitioner's rights under Article 19(1)(*g*) are concerned, and under Article I9(1)(*f*) so far as his rights under Article 19(5) are concerned.

24. Thus considered, there can be no difficulty in upholding the validity of Section 4. As we have just indicated, if the legislature had allowed the State monopoly to operate without fixing the prices, it would have meant hardship to the growers and undue advantage to the State. If the ordinary law of demand and supply was allowed to govern the processes in all probability the said prices would have worked adversely to the interests of the growers and to the benefit of the State in the case of perishable commodities like Kendu leaves. That is why the legislature has deliberately provided for the fixation of prices and prescribed the machinery in that behalf. It is true that the prices fixed are not the minimum prices; but the fixing of minimum prices would have served no useful purpose when a State monopoly was being created, and so, prices which can be regarded as fair are intended to be fixed by Section 4. A representative advisory Committee has to be appointed and it is in consultation with the advice of the said Committee that prices have to be fixed. In fact, the present prices have been fixed according to the recommendations made by the said Committee. Thus, it is clear that the object of fixing the prices was to help the growers to realise a fair price. It is nobody's case that the prices are unduly low or compare unfavourably with prices prevailing in the locality in the previous yeaRs Therefore, we feel no hesitation in holding that restrictions in regard to

the fixing of price prescribed by Section 4 are reasonable and in the interests of the general public both under Article 19(5) and Article 19(6). The result is that the challenge to the validity of Section 4 fails.

25. At this stage, we may refer to four decisions of this Court in which the question about the construction of Article 19(6) has been incidentally considered. In ***Saghir Ahmed* v. *State of U.P*** [(1955) 1 SCR 707], this Court was called upon to consider the validity of the relevant provisions of the U.P. Board Transport Act (2 of 1951) and the question had to be decided in the light of Article 19(6) as it stood before the amendment. But at the time when the judgment of this Court was pronounced, the Amendment Act had been passed, and Mukherjea J. who spoke for the Court, referred to this amendment incidentally. "The result of the amendment", observed the learned Judge, "is that the State would not have to justify such action as reasonable at all in a Court of law and no objection could be taken to it on the ground that it is an infringement of the right guaranteed under Article 19(1) (*g*) of the Constitution. It is quite true that if the present statute was passed after the coming into force of the new clause in Article 19(6) of the constitution, the question of reasonableness would not have arisen at all and the appellants' case on this point, at any rate, would have been unarguable." (p. 727). While appreciating the effect of these observations, however, we have to bear in mind the fact that the effect of the amendment did not really fall to be considered and the impact of the amendment in Article 19(6) on the right under Article 19(1)(*f*) has not been noticed.

29. We must now examine the validity of the argument urged by Mr Pathak that the Act is bad because it seeks to create a monopoly in favour of individual citizens described by the Act as 'agents'. For deciding this question, we must revert once again to the amendment made in Article 19(6). The argument is that though the State is empowered to create State monopoly bylaws the trade, in respect of which the monopoly is sought to be created must be carried on by the State or by a corporation owned or controlled by the State. There can be no doubt that though the power to create monopoly is conferred on the legislatures in very wide terms and it can be created in respect of any trade, business industry or service, there is a limitation imposed at the same time and that limitation is implicit in the concept of State monopoly itself. If a State monopoly is created, the State must carry on the trade, or the State may carry it on by a corporation owned or controlled by it. Thus far, there is no difficulty. Mr Pathak, however, contends that the State cannot appoint any agents in carrying on the State monopoly, whereas the learned Attorney-General urges that the State is entitled not only to carry on the trade by itself or by its officers serving in its departments, but also by agents appointed by it in that behalf; and in support of his argument that agents can be appointed, the learned Attorney-General suggests that persons who can be treated as agents in a commercial sense can be validly appointed by the State in working out its monopoly. We are not inclined to accept either the narrow construction pressed by Mr Pathak, or the broad construction suggested by the learned Attorney-General. It seems to us that when the State carries on any trade, business or industry, it must inevitably carry it on either departmentally or through its officers appointed in that behalf. In the very nature of things, the State as such, cannot function without the help of its servants or employees and that inevitably introduces the concept of agency in a narrow and limited sense. If the State cannot act without the aid and

assistance of its employees or servants, it would be difficult to exclude the concept of agency altogether. Just as, the State can appoint a public officer to carry on the trade on its business, so can it appoint an agent to carry on the trade on its behalf. Normally and ordinarily, the trade should be carried on departmentally or with the assistance of public servants appointed in that behalf. But there may be some trades or businesses in which it would be inexpedient to undertake the work of trade or business departmentally or with the assistance of State servants. In such cases, it would be open to the State to employ the services of agents, provided the agents work on behalf of the State and not for themselves. Take the case of Kendu leaves with which we are concerned in the present proceedings. These leaves' are not cultivated but grow in forests and they are plucked during 3 to 4 months every year, so that the trade of purchasing and selling them if confined generally to the said period. In such a case, it may not be expedient for the State always to appoint Government servants to operate the State monopoly, and agency would be more convenient, appropriate and expedient. Thus considered, it is only persons who can be called agents in the strict and narrow sense to whom the working of the State monopoly can be legitimately left by the State. If the agent acquires a personal interest in the working of the monopoly, ceases to be accountable to the principal at every stage, is not able to bind the principal by his acts, or if there are any other terms of the agency which indicate that the trade or business is not carried on solely on behalf of the State but at least partially on behalf of the individual concerned, that would fall outside Article 19(6)(*ii*). Therefore, in our opinion, if a law passed creating a State monopoly and the working of the monopoly is left either to the State or to the officers of the State appointed in that behalf, or to the department of the State, or to persons appointed as agents to carry on the work of the monopoly strictly on behalf of the State, that would satisfy the requirements of Article 19(6)(*ii*). In other words, the limitations imposed by the requirement that the trade must be carried on by the State or by a corporation owned or controlled by the State cannot be widened and must be strictly construed and agency can be permitted only in respect of trades or businesses where it appears to be inevitable and where it works within the well recognised limits of agency. Whether or not the operation of State monopoly has been entrusted to an agent of this type, will have to be tried as a question of fact in each case. The relationship of agency must be proved in substance, and in deciding the question, the nature of the agreement, the circumstances under which the agreement was made and the terms of the agreement will have to be carefully examined. It is not the form, but the substance that will decide the issue. Thus considered, we do not think that Section 3 is open to any challenge. Section 3 allows either the Government or an officer of the Government authorised in that behalf or an agent in respect of the unit in which the leaves have grown, to purchase or transport Kendu leaves. We are satisfied that the two categories of persons specified in clauses (*b*) and (*c*) are intended to work as agents of the Government and all their actions and their dealings in pursuance of the provisions of the Act would be actions and dealings on behalf of the Government and for the benefit of the Government. Mr Pathak's contention that the persons specified in clauses (*b*) and (*c*) are intended by the Act to work on their own account seems to us to be inconsistent with the object of the section and the plain meaning of the words used in the relevant clauses. We wish to make it clear that we uphold the validity of Section 3 because we are satisfied that clauses (*b*) and (*c*) of the said section have been added merely for clarification and are not intended to and do not include any forms of agency which

would have been outside the provision of Section 3 if the said two clauses had not been enacted. If Section 3 is valid, then Section 8 which authorises the appointment of agents must also be held to be valid.

30. In the petition, the validity of Sections 5, 6 and 9 was challenged on the ground that they contravene Article 14. But as we have already mentioned, no contention has been urged before us in support of the plea that Article 14 has been contravened by any section of the Act. The petition further avers that the Act was a colourable piece of legislation, but that argument really proceeded on the basis whether the agreement entered into by the State Government with the agents to which we shall presently refer correctly represents the effect of Sections 3 and 8 of the Act. So far as the Act is concerned, the two sections which were seriously challenged were Sections 3 and 4, and as we have already held, the provisions in these two sections are not shown to be invalid; and so, the argument that the Act is colourable, has no substance. The notifications which were impugned have also been issued under the relevant provisions of the Act and their validity also cannot be effectively challenged once we reach the conclusion that the Act is good and valid. We have already observed that the petitioner has not specifically and clearly alleged that the price actually fixed under Section 4 is grossly unfair and as such, contravenes his rights under Article 19(l)(*f*). No evidence has been adduced before us to show that the price is even unreasonable. On the other hand, the counter affidavit filed by Respondent 1 would seem to show that the price has been fixed in accordance with the recommendations made by the Advisory Committee and it does not compare unfavourably with the prices prevailing in the past in this locality in respect of Kendu leaves. Therefore, the main grounds on which the petitioner came to this Court to challenge the validity of the Act fail.

31. There are, however, two other points which have been urged before us and on which the petitioner is entitled to succeed. The first ground relates to the agreement actually entered into between Respondent 1 and the agents. This agreement consists of ten clauses and it has apparently been drawn in accordance with Rule 7 (5) of the Rules framed under the Act. It appears, that on the January 9, 1962, the Rules framed by the State Government by virtue of the power conferred on it by Section 18 of the Act were published. Rule 7 deals with appointment of Agent. Rule 7(2) prescribes the Form in which an application for appointment as agent has to be made. Rule 7(5) provides that on appointment as agent the person appointed shall execute an agreement in such form as Government may direct within ten days of the date of receipt of the order of appointment failing which the appointment shall be liable to cancellation and the amount deposited as earnest money shall be liable to forfeiture. It is significant that though the Form for an application which has to be made by a person applying for agency is prescribed, no form has been prescribed for the agreement which the State Government enters into with the agent. The agreement is apparently entered into on an ad hoc, basis and that clearly is unreasonable. In our opinion, if the State Government intends that for carrying on the State monopoly authorised by the Act agents must be appointed, it must take care to appoint agent on such terms and conditions as would justify the conclusion that the relationship between them and the State Government is that of agent and principal; and if such a result is intended to be achieved, it is necessary that the principal terms and conditions of the agency agreement must be prescribed by the rules. Then it would be open to the citizens to examine the said terms and conditions and challenge their validity if they

contravene any provisions of the constitution, or are inconsistent with the provisions of the Act itself. Therefore, we are satisfied that the petitioner is entitled to contend that Rule 7(5) is bad in that it leaves it to the sweet will and pleasure of the officer concerned to fix any terms and conditions on an ad hoc basis, that is beyond the competence of the State Government and such terms and conditions must be prescribed by the rules made under Section 18 of the Act.

32. That takes us to the terms and conditions of the agreement which has been produced before us. These terms indicate a complete confusion in the mind of the person who drafted them. Some of them are terms which would be relevant in the case of agency, while others would be relevant and material if a contract of Government forest was made in favour of the party signing those conditions; and some others would indicate that the person appointed as an agent is not an agent at all but in a person in whom personal interest is created in carrying on the so called agency work. Clause 4 of the agreement provides for the payment which the agent has to make in respect of the Kendu leaves from private lands as well as from Government lands. It is not easy to appreciate the precise scope of the provisions of the respective sub-clauses of clause 4 and their validity. But, on the whole, it does appear that after the agent makes the payment prescribed by the relevant clauses to the Government, he is likely to keep some profit to himself; and that would clearly show that the relationship is not of the type which is permissible under Article 19(6) (*ii*). Under clause 4(*iii*) the agent has to pay a sum of Rs 5 per bag to the Government as consideration for being permitted by Government to enter into and collect leaves from Government lands and forests. It is remarkable that in the absence of any specific rule, the amount to be paid per bag can be determined differently from place to place and that is a serious anomaly. It is also not clear how this amount of Rs 5 per bag has been determined, and in the absence of any explanation it would be difficult to accept the plea of the learned Attorney-General that this amount has been fixed after making calculations about the profits which the agent was likely to secure and the price which the total produce of the forest was likely to acquire on an average basis. Under clause 4(*v*), it is conceded that the agent would be entitled to make some profits in some cases. Clause 4(*vi*) entitles the agent to claim deductions for the expenses and commission that he may be entitled to in respect of the number of bags of processes, leaves and it requires him to pay to Government the profits accruing from the trading in the leaves collected in four equal instalments in the manner specified. Under clause 4 (*ix*) the agent has to finance all transactions involved in purchase collections, storage, processing, transport and disposal of the Kendu leaves purchased or collected in the Unit. Then there are certain sub-clauses under this clause which would be appropriate if it was a matter of a contract between the Government and a forest contractor. Clause 4(*ix*)(*i*) requires the agent to keep a register of daily accounts. Under clause 4 (*ix*)(*p*) during the subsistence of the agreement, the agent is responsible for the disposal of the Kendu leaves collected or purchased by him and the Government shall not bear any liability whatsoever, except as indicated in sub-clause (*vii*) of clause 4(*ix*).

33. Clause 6 provides that subject to other terms and conditions, all charges and outgoings, shall be paid by the agent and he shall not be entitled to any compensation whatsoever for any loss that may be sustained by reasons of fire, tempest, disease, pest, flood, draught or other natural calamity, or by any wrongful act committed by any third party or for

any loss sustained by him through any operation undertaken in the interest of fire conservancy. This clause clearly shows that the agent becomes personally liable to bear the loss which, under the normal rules of agency, the principal would have to bear. We have not thought it necessary to refer to all the clauses in detail because we are satisfied that even if the agreement is broadly considered, it leaves no room for doubt that the person appointed under the agreement to work the monopoly of the State is not an agent in the strict and narrow sense of the term contemplated by Article l9(6)(*ii*). The agent appointed under this agreement seems to carry on the trade substantially on his own account, subject, of course, to the payment of the amount specified in the contract. If he makes any profit after complying with the said terms, the profit is his, if he incurs any loss owing to circumstances specified in clause 6, the loss is his. In terms, he is not made accountable to the State Government; and in terms, the State Government is not responsible for his actions. In such a case, it is impossible to hold that the agreement in question is consistent with the terms of Section 3 of the Act. No doubt, the learned Attorney-General contended that in commercial transactions, the agreement in question may be treated as an agreement of agency, and in support of this argument he referred us to the decisions in ***Ex parte Bright In re Smith*** [10 LR Chancery Divn. 566], and ***Weiner* v. *Harris*** [1 K.B. Divn. 285]. It is true that an agent is entitled to commission in commercial transactions, and so the fact that a person earns commission in transactions carried on by him on behalf of another would not destroy his character as that other person's agent. Cases of Delcredere agents are not unknown to commercial law. But we must not forget that we are dealing with agency which is permissible under Article l9(6)(*ii*), and as we have already observed, agency which can be legitimately allowed under Article 19(6)(*ii*) is agency in the strict and narrow sense of the term; it includes only agents who can be said to carry on the monopoly at every stage on behalf of the State for its benefit and not for their own benefit at all. All that such agents would be entitled to, would be remuneration for their work as agents. That being so, the extended meaning of the word "agent" in a commercial sense on which the learned Attorney-General relies is wholly inapplicable in the context of Article 19(6)(*ii*). Therefore, we must hold that the agreement which has been produced before us is invalid inasmuch as it is wholly inconsistent with the requirements of Section 3(l)(*c*).

34. The result is, the petitioner succeeds only partially inasmuch as we have held that Rule 7(5) is bad and the agreement is invalid, and that means that the State Government cannot implement the provisions of the Act with the assistance of Agents appointed under the said invalid agreement. We accordingly direct that a direction or order to that effect should be issued against the State Government. The main contentions raised by the petitioner against the validity of the Act and its relevant provisions on which specific reliefs were claimed, however, fail. The petition is accordingly partially allowed. There would be no order as to costs.

* * * * *

THE ESSENTIAL COMMODITIES ACT, 1955

The relevant part of sections 2 and 3 of the Act reads thus:

2. Definition.- In this Act, unless the context otherwise requires, -

(a) "essential commodity" means any of the following classes of commodities:-

* * * * *

(v) foodstuffs, including edible oilseeds and oils; * * * * *

3. Powers to control production, supply, distribution, etc., of essential commodities.- (1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, or for securing any essential commodity for the defence of India or the efficient conduct of military operations, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), an order made thereunder may provide:

(*a*) for regulating by licences, permits or otherwise the production or manufacture of any essential commodity;

(*b*) for bringing under cultivation any waste or arable land, whether appurtenant to a building or not, for the growing thereon of food-crops and for otherwise maintaining or increasing the cultivation of food-crops generally, or of specified food-crops;

(*c*) for controlling the price at which any essential commodity may be bought or sold;

(*d*) for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of, any essential commodity;

(*e*) for prohibiting the withholding from sale of any essential commodity ordinarily kept for sale;

(*f*) for requiring any person holding in stock, or engaged in the production, or in the business of buying or selling, of any essential commodity,

(*a*) to sell the whole or a specified part of the quantity held in stock or produced or received by him, or

(*b*) in the case of any such commodity which is likely to be produced or received by him, to sell the whole or a specified part of such commodity when produced or received by him,

to the Central Government or a State Government or an officer or agent of such Government or to a Corporation owned or controlled by such Government or to such other person or class of persons and in such circumstances as may be specified in the matter.

Explanation 1—An order made under this clause in relation to food-grains, edible oilseeds or edible oils, may, having regard to the estimated production, in the concerned area, of such foodgrains, edible oilseeds and edible oils, fix the quantity to be sold by the producers in such area and may also fix, or provide for the fixation of, such quantity on a graded basis, having regard to the aggregate of the area held by, or under the cultivation of, the producers.

Explanation 2—For the purpose of this clause, "production" with its grammatical variations and cognate expressions includes manufacture of edible oils and sugar;"

* * * * *

(5) An order made under this section shall, -

(a) in the case of an order of a general nature or affecting a class of persons, be notified in the Official Gazette; and * * * *

(6) Every order made under this section by the Central Government or by any officer or authority of the Central Government shall be laid before both Houses of Parliament, as soon as may be, after it is made.

* * * * *

INDUSTRIES (DEVELOPMENT AND REGULATION) ACT, 1951

Some of the relevant provisions of the Act are given below:-

15. Power to cause investigation to be made into scheduled industriesnor industrial undertakings.- Where the Central Government is of the opinion that -

(*a*) in respect of any scheduled industry or industrial undertaking or undertakings -

(*i*) there has been, or is likely to be, a substantial fall in the volume of production in respect of any article or class of articles relatable to that industry or manufactured or produced in the industrial undertaking or undertakings, as the case may be, for which, having regard to the economic conditions prevailing, there is no justification; or

(*ii*) there has been, or is likely to be, a marked deterioration in the quality of any article or class of articles relatable to that industry or manufactured or produced in the industrial undertaking or undertakings, as the case may be, which could have been or can be avoided; or

(*iii*) there has been, or is likely to be, a rise in the price of any article or class of articles relatable to that industry or manufactured or produced in the industrial undertaking or undertakings, as the case may be, for which there is no justification; or

(*iv*) it is necessary to take any such action as is provided in this Chapter for the purpose of conserving any resources of national importance which are utilised in the industry or the industrial undertaking or undertakings, as the case may be; or

(*b*) any industrial undertaking is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest;

the Central Government may make or cause to be made a full and complete investigation into the circumstances of the case by such person or body of persons as it may appoint for the purpose.

16. Powers of Central Government on completion of investigation under section 15.- (1) If after making or causing to be made any such investigation as is referred to in section 15 the Central Government is satisfied that action under this section is desirable, it may issue such directions to the industrial undertaking or undertakings concerned, as may be appropriate in the circumstances for all or any of the following purposes, namely:-

(*a*) regulating the production of any article or class of articles by the industrial undertaking or undertakings and fixing the standards of production;

(*b*) requiring the industrial undertaking or undertakings to take such steps as the Central Government may consider necessary to stimulate the development of the industry to which the undertaking or undertakings relates or relate;

(*c*) prohibiting the industrial undertaking or undertakings from resorting to any act or practice which might reduce its or their production, capacity or economic value;

(*d*) controlling the prices, or regulating the distribution, of any article or class of articles which have been the subject-matter of investigation.

* * * * *

18A. Power of Central Government to assume management or control of an industrial undertaking in certain cases.- (1) If the Central Government is of opinion that

(*a*) an industrial undertaking to which directions have been issued in pursuance of Section 16 has failed to comply with such directions, or

(*b*) an industrial undertaking in respect of which an investigation has been made under Section 15 (whether or not any directions have been issued to the undertaking in

pursuance of Section 16), is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest,

the Central Government may, by notified order, authorise any person or body of persons to take over the management of the whole or any part of the undertaking or to exercise in respect of the whole or any part of the undertaking such functions of control as may be specified in the order.

(2) Any notified order issued under sub-section (1) shall have effect for such period not exceeding five years as may be specified in the order. * * * * *

18B. Effect of notified order under section 18A.- (1) On the issue of a notified order under Section 18A authorising the taking over of the management of an industrial undertaking,—

(*a*) all persons in charge of the management, including persons holding office as managers or directors of the industrial undertaking immediately before the issue of the notified order, shall be deemed to have vacated their offices as such;

(*b*) any contract of management between the industrial undertaking and any managing agent or any director thereof holding office as such immediately before the issue of the notified order shall be deemed to have been terminated;

(*c*) the managing agent, if any, appointed under Section 18-A shall be deemed to have been duly appointed as the managing agent in pursuance of the Indian Companies Act, 1913 (7 of 1913), and the memorandum and articles of association of the industrial undertaking, and the provisions of the said Act and of the memorandum and articles shall, subject to the other provisions contained in this Act, apply accordingly, but no such managing agent shall be removed from office except with the previous consent of the Central Government;

(*d*) the person or body of persons authorised under Section 18-A to take over the management shall take all such steps as may be necessary to take into his or their custody or control all the property, effects and actionable claims to which the industrial undertaking is or appears to be entitled, and all the property and effects of the industrial undertaking, shall be deemed to be in the custody of the person or, as the case may be, the body of persons as from the date of the notified order; and

(*e*) the persons, if any, authorised under Section 18-A to take over the management of an industrial undertaking which is a company shall be for all purposes the directors of industrial undertaking duly constituted under the Indian Companies Act, 1913 (7 of 1913), and shall alone be entitled to exercise all the powers of the directors of the industrial undertaking, whether such powers are derived from the said Act or from the memorandum or articles of association of the industrial undertaking or from any other source. * * * * *

18F. Power of Central Government to cancel notified order under section 18A.- If at any time it appears to the Central Government on the application of the owner of the industrial undertaking or otherwise that the purpose of the order made under Section 18-A has been fulfilled or that for any other reason it is not necessary that the order should remain in force, the Central Government may, by notified order, cancel such order and on the cancellation of any such order the management or the control, as the case may be, of the industrial undertaking shall vest in the owner of the undertaking.

TAKE-OVER OF MANAGEMENT AFTER INVESTIGATION
Ambalal M. Shah **v.** *Hathisingh Manufacturing Co., Ltd.*

(1962) 3 SCR 171

DAS GUPTA, J.— This appeal by special leave raises a question of the correct interpretation of some words in Section 18-A(1)(*b*) of the Industries (Development and Regulation) Act, 1951. The Central Government made an order under Section 15 of that Act appointing a committee of three persons for the purpose of making full and complete investigation into the circumstances of the case as it was of opinion that there had been or was likely to be a substantial fall in the volume of production in respect of cotton textile manufactured in the industrial undertaking known as Hathising Manufacturing Company Ltd., Ahmedabad, for which having regard to the economic conditions prevailing there was no justification. After the committee made its report the Central Government being of opinion thereupon that this industrial undertaking was being managed in a manner highly detrimental to public interest made an order under Section 18-A of the Act authorising Ambalal Shah (the first appellant before us) to take over the management of the whole of the said undertaking.

2. Against this order the industrial undertaking and its proprietor - who are the two respondents before us - filed a petition in the Gujarat High Court under Article 226 of the Constitution praying for issue of writs directing the authorised controller and the Union of India not to take over the management on the basis of the order under Section 18-A. The main ground on which the application was based was that on a proper construction of Section 18-A(l)(*b*) the Central Government has the right to make an order thereunder only where the investigation made under Section 15 was initiated on the basis of the opinion as mentioned in Section 15(*b*) — that the industrial undertaking is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest. It was also urged that in fact the committee appointed to investigate had not directed its investigation into the question whether the industrial undertaking was being managed in the manner mentioned above. The other grounds mentioned in the petition which were however abandoned at the time of the hearing included one that the alleged opinion formed by the Government as mentioned in the order under Section 18-A was in the absence of any material for the same in the report of the investigating committee and therefore was arbitrary, capricious and mala fide.

3. On behalf of the Government and the authorised controller it was urged that the question which one of the five opinions mentioned in Section 15 formed the basis of the investigation under that section was wholly immaterial. The allegation that the investigating committee had not directed its investigation into the question whether the undertaking was being managed in a manner highly detrimental to the scheduled industry concerned or to public interest was also denied.

4. The High Court however came to the conclusion that on a correct construction of Section 18-A(l)(*b*) it was necessary before any order could be made thereunder that the investigation should have been initiated on the basis of the opinion mentioned in Section 15(*b*) of the Act. It also accepted the petitioners' contention that no investigation had in fact been held into the question, whether the undertaking was being managed in a manner highly detrimental to public interest. Accordingly it made an order "setting aside the order of the

Central Government dated 28th July, 1960, and directing the respondents not to interfere with or take over the management of the undertaking of the first petitioner, namely "Hathising Mills" by virtue of or in pursuance of the said order". It is against this decision that the present appeal is directed.

5. The principal question in appeal is whether the High Court is right in its view as regards the construction of Section 18-A. The dispute is over the construction of the words "an investigation has been made under Section 15". It may be mentioned here that Section 15(*b*) as it originally stood was amended in 1955 and it was after the amendment that the words as mentioned above appear. Reference may also be made in passing to Section 16 under which once an investigation under Section 15 has been commenced or completed the Central Government if it considers desirable, may issue directions to the industrial undertaking or undertakings concerned in several matters. Section 17 of the original Act was repealed in 1953 by Act 26 of 1953. The same amending Act introduced into this Act two new chapters - Chapter III-A and Chapter III-B of which Section 18-A in Chapter III-A makes provisions as set out above for an order by the Central Government authorising any person or body of persons to take over the management of the whole or any part of the undertaking.

6. These provisions of Section 18-A it may be mentioned take the place of the provisions that previously appeared in Section 17(1). That section, now repealed, had empowered the Central Government to authorise any person, or development council or any other body of persons to take over the management of an undertaking or to exercise with respect thereto such functions of control as might be provided by the order, in one class of cases only - viz. where after a direction had been issued in pursuance of Section 16 the Central Government was of opinion that the directions had not been complied with and that the industrial undertaking in respect of which directions had been issued was being managed in a manner highly detrimental to the scheduled industry concerned or to public interest. The present Section 18-A empowers the Government to authorise any person or persons to take over the management or to exercise such functions of control as may be specified, in two classes of cases. The first of these classes is mentioned in clause (*a*) of Section 18-A viz. where the Central Government is of opinion that directions issued in pursuance of Section 16 have not been complied with by an industrial undertaking. The second class with which we are here directly concerned is mentioned in clause (*b*) - viz. where the Central Government is of the opinion that an industrial undertaking in respect of which an investigation has been made under Section 15 is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest - irrespective of whether any directions had been issued in pursuance of Section 16 or not. What is noticeable in the wording of this clause is that while an investigation under Section 15 may be initiated in respect of an industrial undertaking where the Central Government is of any of the five opinions mentioned in Section 15(*a*)(*i*), 15(*a*)(*ii*), 15(*a*)(*iii*), 15(*a*)(*iv*) and Section 15(*b*), Section 18-A(l)(*b*) does not refer to any of these opinions. Indeed, it does not refer at all to the question of the initiation of the investigation and mentions only the making of the investigation under Section 15. Read without the addition of anything more, the language of Section 18-A(l)(*b*) empowers the Central Government to authorise a person or persons to take over the management of an industrial undertaking or to exercise specified functions of control in respect of that

undertaking, if the one condition of an investigation made under Section 15 has been fulfilled irrespective of on what opinion that investigation was initiated and the further condition is fulfilled that the Central Government is of opinion that such undertaking is being managed in a highly detrimental to the scheduled industry concerned or to public interest.

7. The contention made on behalf of the respondents before us which found favour with the High Court is that when the legislature used the words "an investigation has been made under Section 15" it meant "an investigation has been made under Section 15 based on an opinion of the Central Government that the industrial undertaking is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest". We should have thought that if the legislature wanted to express such an intention it would not have hesitated to use the additional words mentioned above. It was urged however on behalf of the respondents that these further words viz. "based on an opinion of the Central Government that the industrial undertaking is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest" are implicit in clause (*b*) of Section 18-A. In his lengthy address to convince us of the correctness of this contention the learned counsel advanced in substance only two arguments. The first is that it is only where the investigation under Section 15 is initiated on an opinion mentioned in Section 15(*b*) - that the industrial undertaking is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest - that the report of the investigation can furnish the Government with materials on which any opinion can be formed that an industrial undertaking is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest. For this argument we can find no basis. It appears to us that where the investigation has been initiated, in respect of an industrial undertaking, on an opinion that there has been or is likely to be a fall in the volume of production for which having regard to the economic conditions there is no justification [15(*a*)(*i*)] or an opinion that there has been or is likely to be a marked deterioration in the quality of any article which could have been or can be avoided [Section 15(*a*)(*ii*)]; or an opinion that there has been or is likely to be a rise in the price of any article for which there is no justification [Section 15(*a*)(*iii*)]; or an opinion that it is necessary to take action for the purpose of conserving any resources of national importance [Section 15(*a*)(*iv*)], the investigation in order to be complete must also consider the quality of the management of the undertaking just as it would so consider the quality of management where the investigation is initiated on an opinion that the industrial undertaking is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest. For, even when the investigation has been initiated on the Government's forming any of the opinions mentioned in the four sub-clauses of clause (*a*) of Section 15, the investigator has necessarily to examine three matters: (*1*) whether the opinion formed by the Government is correct; secondly, what are the causes of this state of things viz. the unjustifiable fall in the volume of production or the deterioration in the quality of the article or the rise in the price of the articles or the necessity of an action for the purpose of conserving the resources; and thirdly how this state of things, if it exists, can be remedied. In considering the second of these matters viz. the cause of this state of things the investigator must examine how far and in what manner the quality of management is responsible for it. He may come to the conclusion that the management is in no way responsible and that some other cause lies at the root of the difficulty. He may hold on the other hand, that the

management is solely responsible; or he may hold that while other causes also play their part the defect in the quality of management is also in part responsible. Indeed, we find it difficult to understand how an investigator having embarked on an investigation ordered by the Government in respect of an industrial undertaking on the basis of one or more of the opinions mentioned in Section 15(*a*) can avoid an inquiry into the quality of the management of the industrial undertaking. It is said that the use of the words "for which having regard to the economic conditions prevailing there is no justification" in clause (*a*)(*i*) indicate and circumscribe the scope of the enquiry and that the investigator would only try to ascertain whether or not the economic conditions are such that do or do not justify the fall in the volume of production and then to see, where necessary, how these economic conditions can be altered. To say so is however to miss the entire scheme of the legislation providing for the investigation and for action following the same. Clearly, the purpose of this legislation is to enable the Central Government to take suitable action to remedy the undesirable state of things mentioned in the different clauses of Section 15. In order that Government may have proper materials to know what action is necessary the legislature empowered the Government to make or cause to be made "a full and complete investigation". In Section 18, it empowered the person or body of persons appointed to make investigation to choose one or more persons possessing special knowledge to assist in the investigation and further vested the investigating committee with all the powers of the civil court under the Code of Civil Procedure for the purpose of taking evidence on oath and for enforcing the attendance of witnesses and compelling the production of documents and material objects. The whole purpose of the legislation would be frustrated unless the investigation could be "full and complete". No investigation which has not examined the quality of management of the industrial undertaking could be said to be full or complete.

8. It was next contended that the use of the words "circumstances of the case" shows that the investigation had to be made only into the matter in respect of which the Government has formed an opinion and not into anything else. Assuming that it is so and that the investigator has primarily to conduct his investigation where the investigation has been initiated on the basis of an opinion as regards fall in production, into questions as regards such fall; and similarly, where the investigation has been initiated on an opinion as regards the deterioration in quality, into the question of such deterioration, that does not alter the fact that the investigator would have to try to ascertain the causes of the fall in production or the deterioration in quality and this part of the investigation would necessarily include an investigation into the quality of the management.

9. Learned counsel contended that if an investigation made on the basis of one or more of the opinions mentioned in clause (*a*) of Section 15 was sufficient to furnish the materials on which the Government could form an opinion whether or not an industrial undertaking was being managed in a manner highly detrimental to the scheduled industry concerned or to public interest, clause (*b*) would be wholly unnecessary. With this we are unable to agree. There may be many cases where there may be information justifying the formation of opinion that the industrial undertaking was being managed in a manner highly detrimental to the scheduled industry concerned or to public interest, even though there are no materials for an opinion that there has been or is likely to be an unjustifiable fall in production or an avoidable deterioration in quality or an unjustifiable rise in prices or the necessity of taking action for

the purpose of conserving resources as mentioned in the four sub-clauses of clause (*a*) of Section 15.

10. It was also urged that it would be unfair to expect the management, where the investigation has been initiated on the formation of an opinion as mentioned in clause 15(*a*), to lead any evidence as regards the quality of its management and so there is risk of the investigator being misled. We can see no reason however for any management to have any doubt on the question that investigation would be directed among other things to the question of quality of management. We believe that one of the first things that any management would do when an investigation is initiated on the basis of any such opinion would be to try to show how efficient it was and how in spite of the high quality of its management the misdeeds of labour or the unsympathetic attitude of the Government or the difficulties of transport or some other cause beyond their control was responsible for the undesirable state of things into which the investigation was being held.

11. The argument that except where the investigation has been initiated on the basis of an opinion mentioned in Section 15(*b*) there would be no material for the Government to form an opinion that the industrial undertaking was being managed in a manner highly detrimental to the scheduled industry concerned or to public interest, therefore fails.

12. Equally untenable is the second argument advanced by the learned counsel that absurd results would follow if the words "investigation has been made under Section 15" are held to include investigations based on any of the opinions mentioned in Section 15(*a*). Asked to mention what the absurd results would be the learned counsel could only say that an order under Section 18-A(l)(*b*) would be unfair in such cases, as the owner of an industrial undertaking would have no notice that the quality of management was being investigated. That will be, says the learned counsel, condemning a person unheard. This argument is really based on the assumption that when the investigation has been initiated on the basis of any of the opinions mentioned in clause (*a*), the quality of the management will not be investigated. As we have stated earlier, there is no basis for this assumption.

13. We have therefore come to the conclusion that the plain words used by. the legislature "in respect of which an investigation has been made under Section 15" cannot be cut down by the restricting phrase "based on an opinion that the industrial undertaking is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest". We must therefore hold that the construction placed by the High Court on these words in Section 18-A(l)(*b*) is not correct.

14. This brings us to the consideration of the other question raised viz. whether in fact the investigation had been held into the question whether the industrial undertaking was being managed in a manner highly detrimental to the scheduled industry concerned or to public interest. On this question the High Court came to a conclusion adverse to the appellants. It is not clear how the respondents though abandoning the ground that the Government had no material before it for forming the opinion that the undertaking was being managed in a manner highly detrimental to the scheduled industry concerned or to public interest could still urge that no investigation had been actually held into the question whether the industrial undertaking was being managed in a manner highly detrimental to the scheduled industry concerned or to public interest. The question whether investigation had in fact been held or

not into the question whether the industrial undertaking was being managed in a manner highly detrimental to the scheduled industry concerned or to public interest would be relevant only to show that the Government acted without any material before it or acted mala fide. If the allegation of mala fide or the allegation that there was no material before the Government for forming its opinion is abandoned, the question whether an investigation had in fact been held into the question whether the industrial undertaking was being managed in a manner highly detrimental to the scheduled industry concerned or to public interest becomes irrelevant.

15. We are satisfied however that the High Court was wrong in its view that it was not established that investigation had in fact been held into this question. We find that the assertion in the petition under Article 226 that the investigation had not been directed "towards any alleged mis-management of the mills" was denied in the affidavit sworn on behalf of the Union of India. When thereafter on October 10, 1960 affidavits in rejoinder filed on behalf of the petitioners affirmed that "no question was put which would suggest that the committee was investigating into any mismanagement of the mills", an affidavit of Mr Thomas de Sa, who was a member of the investigating committee was filed on behalf of the Union of India. This affidavit made the categorical assertion that the "committee investigated not only into the question relating to the fall in the volume of production in respect of cotton textiles manufactured in the said industrial undertaking but also made a full and complete investigation into the circumstances of the working of the said industrial undertaking including the management thereof and as to whether the said undertaking was being managed in a manner detrimental to the industry concerned or to public interest". The High Court has thought it fit to reject this testimony of Mr De Sa for reasons which appear to us to be wholly insufficient. It appears that during the hearing the Advocate-General asked for time to file an affidavit preferably of Mr P.H. Bhuta who was the non-official member of the committee of investigation but ultimately filed the affidavit of Mr De Sa and not the affidavit of Mr Bhuta. The High Court seems to think that as Mr Bhuta was an independent member of the investigation committee while Mr. De Sa was in the service of the Government Mr De Sa's statement is open to suspicion. In our view such suspicion of high public officials is not ordinarily justified. Mr De Sa was as much a member of the investigating committee as Mr Bhuta and so no less competent than Mr Bhuta to testify as regards the matter in issue. We do not think it right to suspect his honesty merely because he is an officer of the Union of India. The learned Judges of the High Court appear also to have lost sight of the fact that the questionnaire which is annexed as Annexure X to the affidavit of the second respondent Rajendra Prasad Manek Lal itself includes a number of questions which show unmistakably that the quality of management was being enquired into.

16. A circumstance which appears to have weighed with the High Court is that the report of the committee which as the learned Judges rightly say would be the best evidence to show "that there was in fact an investigation into the question of the management of the said undertaking" was not produced by the Union of India when called upon to do so by Mr Nanavati on behalf of the petitioners. It is proper to mention that it does not appear that the learned Judges themselves directed or desired the Advocate-General to produce the report for their inspection. It further appears that no written application for the production of the document was made on behalf of the petitioners. It does not seem to us to be fair to draw an inference against the Union of India merely because an informal request by the petitioners' advocate was not acceded to. In view of what happened in the court below we asked the appellants' counsel whether he was prepared to produce

the report before us. The learned counsel readily produced the report and after examining the relevant portion where the report deals with the question of management, we read it out in Court so that the respondents' counsel could know the exact situation. This portion of the report says: "that the management is in the hands of a young and inexperienced person....; and the committee is of the opinion that the present manager is incapable of handling the affairs of the mills....; the present managing agents are incapable of investing any further....." The fact that the report does contain such an opinion is sufficient to show that an investigation was actually held into the question of the quality of the management as affirmed by Mr De Sa. The High Court's view therefore that no investigation was held into the question of the management of the undertaking was wrong.

17. We have therefore come to the conclusion that the respondents were not entitled to any writ directing these appellants not to give effect to the Government's Order under Section 18-A(l)(*b*). We therefore allow the appeal, set aside the order of the High Court directing the issue of the writ and order that the application under Article 226 of the Constitution be dismissed.

* * * * *

SUPPLY OF INVESTIGATION REPORT

Keshav Mills Co. Ltd. v. *Union of India*

(1973) 1 SCC 380

MUKHERJEA, J.— This appeal by special leave from a judgment and order of the Delhi High Court arises out of a petition under Articles 226 and 227 of the Constitution of India made by Keshav Mills Company Limited (hereinafter referred to as "the Company") and Navin Chandra Chandulal Parekh who is a shareholder and a Director of the Company challenging the validity of an order, dated November 24, 1970, passed by the Government of India under Section 18-A of the Industries (Development and Regulation) Act, 1951 (65 of 1951)(hereinafter referred to as "the Act") by which the Gujarat State Textile Corporation Ltd. has been appointed the authorised controller of the Company for a period of five years. The Delhi High Court dismissed the writ petition after hearing the parties and hence this appeal. The facts and circumstances leading to the filing of the petition are briefly stated as follows.

2. The Company is the owner of a cotton textile mill at Petlad known as Keshav Mills. The Company was established in 1934 and, as far as one can judge from the facts and figures cited in the petition, the Company made flourishing business between the years 1935 and 1965. Indeed, if the appellants' figures are to be believed, and there is no reason to disbelieve them, each holder of the 250 ordinary shares of the Company seems to have received Rs 33,685 in course of a period of 30 years between 1935 and 1964/65 as profit on an initial investment of Rs 1000 only. On top of this the Company's capital block was increased from Rs 10.62 lakhs in 1935 to Rs 78,38,900 at the end of the year 1964/65. All these profits, however, went to a close group of people, since 80 per cent. of the share capital belongs to petitioner Parekh, his family members, relations and friends and only 20 per cent. share capital is in the hands of the members of the public. The Company, however, fell on evil days after the years 1964/65 and the textile mill of the Company was one of the 12 sick textile mills in Gujarat which had to be closed down during 1966 and 1968. We are not here directly concerned with the various causes which were responsible for this sudden reversal of the fortunes of this Company. Suffice it to say that on May 31, 1969, the Government of India passed an order appointing a committee for investigating into the affairs of the Company under the provisions of Section 15 of the Act. We shall hereafter refer to this Committee as the Investigating Committee. The material portion of the order, dated May 31, 1969, is reproduced as hereunder:

> "*S.O. 15-IDRA-69.*—Whereas the Central Government is of the opinion that there has been, or is likely to be substantial fall in the volume of production in respect of cotton textiles manufactured in the industrial undertaking known as the Petlad Keshav Mills Co. Ltd., Petlad (Gujarat) for which, having regard to the economic conditions prevailing there is no justification.
>
> Now, therefore, in exercise of the powers conferred by Section 15 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), the Central Government hereby appoints, for the purpose of making full and complete investigation into the circumstances of the case, a body of persons consisting of—

(1) Shri I.C. Shah (General Manager, Ambica Group of Mills, Ahmedabad) Chairman

(2) Shri M.O. Mirchandani, Director (Technical), National Textile Corporation Member

(3) Shri J.P. Singh, Director (Finance), National Textile Corporation Member

(4) Shri M. Sivagnanam, Industries Commissioner, Government of Gujarat, Ahmedabad Member

(5) Shri V.A. Mahajan, Senior Accounts Officer, Office of the Regional Director, Company Law Board, Bombay Member

(6) Shri Y.L.N. Achar, Inspecting Officer, Office of the Textile Commissioner, Bombay Member."

In this connection it may be relevant to set out some extracts from the communication that was sent out on June 11, 1969 by the Government of India to the various members of the aforesaid Committee. The Communication which was in the nature of a supplemental order by the Government of India detailing the point of reference to the Investigating Committee was to the following effect:

"*Subject.*— Appointment of Investigation Committee for Petlad Keshav Mills Co. Ltd., Petlad (Gujarat) under the Industries (Development and Regulation) Act, 1951.

Sir

I am directed to enclose a copy of order, dated May 31, 1969, issued under Section 15 of the Industries (Development and Regulation) Act, 1951, setting up a committee to enquire into the affairs of Petlad Keshav Mills Co. Ltd., Petlad, Gujarat for your information and necessary action. The investigation should also be directed to the following specific points—

(*a*) Reasons for the present state of affairs.

(*b*) Deficiencies, if any, in the existing machinery.

(*c*) Immediate requirements, under separate heads of accounts, of working capital, if any.

(*d*) Requirement of long-term capital for modernisation/rehabilitation.

(*e*) Financial result of:

(*i*) Immediate working without further investment on capital account.

(*ii*) Working after further investment on capital account.

(*f*) Suggestion regarding source of funds required under (*c*) and (*d*) and security available for their repayment.

I am further to request that 15 copies of the report may kindly be submitted to this Ministry at a very early date."

3. In due course, the Investigating Committee completed its inquiry and submitted its report to the Government some time about January, 1970. On or about November 24, 1970 the Government of India passed an order under Section 18-A of the Act authorising the Gujarat State Textile Corporation (hereinafter to be referred to as the "Authorised Controller") to take over the management of the whole of the undertaking of the Company for a period of five years from the date of publication of that order in the Official Gazette. The relevant order is in the following terms:

"*S.O. 18-A/IDRA-70.*—Whereas the Central Government is of the opinion that the Keshav Mills Co. Ltd., Petlad, an industrial undertaking in respect of which an investigation has been made under Section 15 of the Industrial (Development and Regulation) Act, 1951 (65 of 1951), is being managed in a manner highly detrimental to public interest;

Now, therefore, in exercise of the powers conferred by Section 18-A of the said Act, the Central Government authorises the Gujarat State Textile Corporation (hereinafter referred to as "Authorised Controller") to take over the management of the whole of the said undertaking namely, the Keshav Mills Go. Ltd., Petlad, subject to the following terms and conditions, namely—

(*i*) The Authorised Controller shall comply with all directions issued from time to time by the Central Government;

(*ii*) The Authorised Controller shall hold office for five years from the date of publication in the Official Gazette of this notified order;

(*iii*) The Central Government may terminate the appointment of the Authorised Controller earlier if it considers necessary to do so.

This order will have effect for a period of five years commencing from the date of its publication in the Official Gazette."

On December 5, 1970, one R.C. Bhatt, Assistant Secretary to the Authorised Controller went to the Company's office at Petlad and presented a letter from his principals authorising him to take over possession of the mill of the Company and requested the Company to hand over the keys of the office buildings, godowns and other departments as well as the office records, account books etc., to Bhatt. The Company handed over the keys of the Company's premises to R.C. Bhatt under protest. On December 15, 1970, the Company filed a writ petition before the High Court of Delhi under Articles 226 and 227 of the Constitution of India praying for "appropriate reliefs".

4. Though several grounds were taken in the writ petition, the main contention of the appellants before the Delhi High Court was that it was not competent for the Government of India to proceed under Section 18-A against the Company without supplying before hand a copy of the report of the Investigating Committee to the Company. The appellants complained that though the Investigating Committee had submitted a report to the Government of India in January 1970, the Government did not furnish the management of the Company with the contents of the report. According to the appellants the Government should not only have supplied a copy of the report to the Company but should also have given a hearing to the Company before finally deciding upon taking over the Company's undertaking under Section 18-A of the Act. This contention was pressed on behalf of the appellants in spite of the fact that an opportunity had been given by the Investigating Committee to the management and the employees of the Company for adducing evidence and making representations before the completion of the investigation. Reliance was placed on behalf of the appellants on a Bench decision of the Delhi High Court in ***Bharat Kumar Chinubhai* v. *Union of India*** The correctness of that decision was, however, seriously questioned on behalf of the respondents and the Single Judge before whom the instant petition came up for hearing referred the matter to adjudication before a Full Bench of that High Court. The question of law that was referred for the decision of the Full Bench was framed by the learned Judge in the following manner:

"Whether in view of Rule 5 of the Investigation of Industrial Undertakings (Procedure) Rules of 1967 providing for an opportunity of hearing before the Investigator and the absence of any specific provision either in the Act or in the Rules for supplying a copy of the Investigator's report to the management, the taking over of the industrial undertaking, without supplying a copy of the Investigator's report is vitiated?"

5. The Full Bench of Delhi High Court after hearing the parties answered the above question of law in the negative and since this was the only question argued before them, dismissed the petition.

6. The whole dispute between the parties is in substance a question regarding the exact requirement of the rules of natural justice in the facts and situation of the case. There can be no question that whenever an order is made under Section 18-A against a company it has far-reaching consequences on the rights of that company, its shareholders, its employees and all persons who have contractual dealings and transactions with that company. It is also not seriously questioned that before passing an order of "take-over" under Section 18-A it is incumbent on the Government to give at some stage a reasonable opportunity to the undertaking concerned for making suitable representations against the proposed take-over. In fact, under the rule-making power conferred by Section 30 of the Act the Government of India has already made a rule viz. Rule 5 which provides for such an opportunity. Rule 5 runs as follows:

"5. *Opportunity for hearing*.— The Investigator shall, before completion of his investigation, give the Management and the employees of the undertaking or undertakings in respect of which the investigation is ordered, reasonable opportunity of being heard including opportunity to adduce any evidence."

The only question that we have to decide now is whether after the undertaking has already been given such an opportunity at the time of investigation it is entitled to have a copy of the report and to make, if necessary, further representation about that report before a final decision is made by the Government about taking action under Section 18-A of the Act. Our decision on this question will depend on our answers to the following questions:

"(*i*) Is it necessary at all to observe the rules of natural justice before enforcing a decision under Section 18-A of the Act?

(*ii*) What are the rules of natural justice in such a case?

(*iii*) (*a*) In the facts and circumstances of the present case, have the rules to be observed once during the investigation under Section 15 and then again after the investigation is complete and action on the report of the Investigating Committee taken under Section 18-A?

(*b*) Was it necessary to furnish a copy of the Investigating Committee's Report before passing the order of take-over?"

7. The first of these questions does not present any difficulty. It is true that the order of the Government of India that has been challenged by the appellants was a purely executive order embodying an administration decision. Even so the question of natural justice does arise in this case. It is too late now to contend that the principles of natural justice need not apply to administrative orders or proceedings, in the language of Lord Denning M.R. in ***Regina* v.**

Gaming Board ex parte Benaim [(1970) 2 WLR 1009] "that heresy was scotched in ***Ridge* v. *Baldwin*** [(1963) 2 All ER 66].

8. The second question, however, as to what are the principles of natural justice that should regulate an administrative act or order is a much more difficult one to answer. We no not think it either feasible or even desirable to lay down any fixed or rigorous yard-stick in this manner. The concept of natural justice cannot be put into a straight-jacket. It is futile, therefore, to look for definitions or standards of natural justice from various decisions and then try to apply them to the facts of any given case. The only essential point that has to be kept in mind in all cases is that the person concerned should have a reasonable opportunity of presenting his case and that the administrative authority concerned should act fairly, impartially and reasonably. Where administrative officers are concerned, the duty is not so much to act judicially as to act fairly. See, for instance, the observations of Lord Parker in ***In re H.K.* (*an infant*)** [(1967) 2 QB 617]. It only means that such measure of natural justice should be applied as was described by Lord Reid in ***Ridge* v. *Baldwin*** case a "insusceptible of exact definition but what a reasonable man would regard as a fair procedure in particular circumstances". However, even the application of the concept of fair-play requires real flexibility. Every thing will depend on the actual facts and circumstances of a case. As Tucker, L.J., observed in ***Russell* v. *Duke of Norfolk*** [(1949) 1 All ER 109]:

> "The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with and so forth."

9. We now turn to the third and the last question which is in two parts. For answering that question we shall keep in mind the observations of Tucker, L.J., set out just now and examine the nature and scope of the inquiry that had been carried out by the Investigating Committee set up by the Government, the scope and purpose of the Act and rules under which the Investigating Committee was supposed to act, the matter that was being investigated by the Committee and finally the opportunity that was afforded to the appellants for presenting their case before the Investigating Committee.

10. The Act was passed to provide for development and regulation of important industries the activities of which, according to the Statement of Objects and Reasons of the Bill which resulted in the Act "affect the country as a whole and the development of which must be governed by economic factors of all-India import". For achieving this purpose the Act confers certain powers on Government to secure the planning of future development on sound and balanced lines by the licensing of all new undertakings and also by making rules for the registration of existing undertakings, for regulating the production and development of the industries and also, in certain cases, by taking over the control and management of certain industrial concerns. The various powers conferred on Government as aforesaid are to be exercised after carrying out suitable investigations. Section 2 of the Act states categorically that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule. No attempt was made before us to question the expediency of control by the Central Government over any industry mentioned in the Schedule or any undertaking pertaining to such an industry. The industry engaged in the

manufacture and production of "textiles" is Item 23 of the First Schedule to the Act. Therefore, we start from the premise that the Central Government as a matter of public policy is interested in the well-being and efficient administration of any undertaking relating to the textile industry and is also entitled to exercise some degree of control over it. Section 15 empowers the Government to cause investigation to be made into any scheduled industry or industrial undertaking under certain circumstances, namely (*i*) if there has been or is likely to be a substantial fall in production of articles relatable to that industry or produced by the undertaking concerned for which, in the light of the economic conditions prevailing, there is no justification; or (*ii*) if there has been or is a marked deterioration in the quality of the articles relatable to that industry or produced by the undertaking; or (*iii*) if there is an unjustifiable rise in the price of such articles; or (*iv*) Government considers it necessary for the purpose of conserving any resources of national importance which are utilised in that particular industry or undertaking. Central Government may cause such an investigation also if an industrial undertaking is being managed in a manner which is detrimental to the scheduled industry or to public interest. Section 16 of the Act empowers the Government to issue appropriate directions to the industrial undertaking or undertakings concerned after the investigation under Section 15 has been completed. Such directions may be given for the purpose of regulating the production or fixing the standards of production of any article or articles or for taking steps to stimulate the development of the industry or for preventing any act or practice which might reduce the production capacity or economic value of the industrial undertaking and, finally, for controlling the price or regulating the distribution of any article or class of articles which have been the subject-matter of the investigation. In certain cases, however, such indirect control may not be enough and Government may interfere and take up the direct management or control of industrial undertakings. Section 18-A details the circumstances when the Government may impose such control by authorising a person or body of persons to take over the management of the whole or any part of the undertaking. Before the Government assumes such management or control, the Government must be of the opinion that the undertaking concerned has failed to comply with the directions issued under Section 16 of the Act or that the industrial undertaking regarding which there has been an investigation under Section 15 "is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest".

11. In the instant case, the Government of India came to hold the opinion that there was a substantial fall in the volume of production in respect of the Company's production of cotton textiles for which Government apparently found no justification having regard to the prevailing economic conditions. The Government was perfectly within its rights to appoint, under the terms of Section 15, an investigating body for the purpose of making full and complete investigation into the circumstances of the case. This is what the Government did and the appellants do not, as indeed they cannot, find fault with this action of the Government. It is the admitted case that for three years prior to 1969 the Company had been running into continual difficulties as a result of which the company suffered losses which amounted up to Rs 57.76 lakhs. In fact the mill had to be closed by the end of 1968. It was only on May 31, 1969, that Government of India appointed the Investigating Committee to investigate into the affairs of the Company's mill. The appellants do not make any grievance

against the Investigating Committee regarding the manner in which they carried out the investigation. It is admitted that the Committee gave to the Company a full opportunity of being heard and also an opportunity of adducing evidence. There can, therefore, be no complaint that up to this stage there was any failure to observe the rules of natural justice.

12. In January 1970, the report of the Investigating Committee was submitted to Government and, on the appellants' own showing, they knew that there was a likelihood of Government appointing a Controller under Section 18-A to take over the appellants' undertaking. There can be no question that the appellants were fully aware of the scope and amplitude of the investigation initiated by Government. A copy of the letter, dated June 11, 1969, which had been addressed to the members of the Investigating Committee was sent also to the Company at the time of setting up of the Committee. We have already set out this letter in extenso. The Government clearly indicated in that letter the scope of the investigation ordered under Section 15. It is not possible to suggest that the appellants were not aware of the Company's distressing economic position about the middle of 1969. The terms of reference of the Committee would make it clear even to one not aware of the economic condition of the Company that the Government was genuinely concerned about its financial position. Even though the enquiry itself was ordered under the provisions of Section 15(*a*), the Committee and the Government had authority to treat the report as if it was also made under Section 15(*b*) of the Act. In the case of ***Shri Ambalal M. Shah* v. *Hathisingh Manufacturing Co. Ltd.*** [AIR 1962 SC 588] the Central Government made an order under Section 15 of the Act by which a committee of three persons was appointed for the purpose of making a full and complete investigation into the circumstances of the case. Before appointing this committee the Government came to hold the opinion that there had been a substantial fall in the volume of production in respect of cotton textiles manufactured by Hathisingh Manufacturing Co. Ltd., for which, having regard to the economic conditions prevailing at that time there was according to Government no justification. After the committee had submitted its report the Central Government held the opinion that the company was being managed in a manner highly detrimental to public interest and made an order under Section 18-A of the Act authorising Ambalal M. Shah to take over the management of the whole of the undertaking of that company. The legality of the order was challenged on the ground that the order under Section 18-A could have been made only after the Central Government had initiated an investigation on the basis of the opinion mentioned in Section 15(*b*), that is to say on the strength of the opinion that the company was being managed in a manner highly detrimental to public interest. It was argued that insofar as the investigation ordered by the Central Government was initiated on the formation of an opinion as mentioned in clause (*a*)(*i*) of Section 15, the order was illegal. This Court held, however, the order to be perfectly valid, because the words used by the legislature in Section 18-A(1)(*b*) viz. "in respect of which an investigation has been made under Section 15" could not be cut down by the restricting phrase "based on an opinion that the industrial undertaking is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest". Once an investigation has been validly made under Section 15 it was held sufficient to empower the Central Government to authorise a person to take over the management of an industrial undertaking irrespective of the nature or content of the opinion on which the investigation was

initiated. In view of this decision it is not possible for the appellants to contend that they were not aware that as a result of the report of the Investigating Committee the Government could pass an order under Section 18-A(1)(*b*) and assume management or control of the Company's undertaking. In fact, it appears from a letter addressed by Appellant 2 Navinchandra Chandulal Parikh on behalf of the Company to Shri H.K. Bansal, Deputy Secretary, Ministry of Foreign Trade and Supply on September 12, 1970, that the appellants had come to know that the Government of India was in fact considering the question of appointing an authorised controller under Section 18-A of the Act in respect of the appellants' undertaking. In that letter a detailed account of the facts and circumstances under which the mill had to be closed down was given. There is also an account of the efforts made by the Company's Directors to restore the mill. There is no attempt to minimise the financial difficulties of the Company in that letter. Parikh only seeks to make out that the Company was facing a serious financial crisis in common with other textile mills in the country which also had to face closure. He speaks of the various approaches made by the Company to the Government of Gujarat for getting financial assistance. The letter specifically mentions the Company's application to the Gujarat State Textile Corporation Ltd. for financial help. It appears clearly from this letter that though according to Parikh some progress had been made in the matter of securing assistance from the Gujarat State Textile Corporation Ltd. the Corporation ultimately failed to come to the succour of the Company. Parikh requested Government not to appoint an authorised controller and further prayed that the Government of India should ask the State Government and the Gujarat State Textile Corporation Ltd., to give a financial guarantee to the Company. Two things appear quite clearly from that letter; first, that the appellants required a minimum sum of Rs 20 lakhs as immediate aid and, secondly, that the Company in spite of various approaches had not succeeded in securing the same. Only a few days before this letter had been addressed, Parikh, it appears, had an interview with the Minister of Foreign Trade on August 26, 1970, when the Minister gave him, as a special case, four weeks' time with effect from August 26, 1970, to obtain the necessary financial guarantee from the State or the Gujarat State Textile Corporation without which the Company had expressed its inability to reopen and run the mill. In a letter of September 22, 1970, Bansal informed Parikh in clear language that if the Company failed to obtain the necessary guarantee by September 26, 1970, Government was proceeding to take action under the Act. It is obvious, therefore, that the appellants were aware all along that as a result of the report of the Investigating Committee the Company's undertaking was going to be taken up by Government. Parikh had not only made written representations but had also seen the Minister of Foreign Trade and Supply. He had requested the Minister not to take over the undertaking and, on the contrary, to lend his good offices so that the Company could get financial support from the Gujarat State Textile Corporation or from the Gujarat State Government.

13. All these circumstances leave us in no manner of doubt that the Company had full opportunities to make all possible representations before the Government against the proposed take-over of its mill under Section 18-A. In this connection it is significant that even after the writ petition had been filed before the Delhi High Court the Government of India had given the appellants at their own request one month's time to obtain the necessary funds to commence the working of the mill. Even then, they failed to do so.

14. There are at least five features of the case which make it impossible for us to give any weight to the appellants' complaint that the rules of natural justice have not been observed. First, on their own showing they were perfectly aware of the grounds on which Government had passed the order under Section 18-A of the Act. Secondly, they are not in a position to deny (*a*) that the Company had sustained such heavy losses that its mill had to be closed down indefinitely, and (*b*) that there was not only loss of production of textiles but at least 1,200 persons had been thrown out of employment. Thirdly, it is transparently clear from the affidavits that the Company was not in a position to raise the resources to recommence the working of the mill. Fourthly, the appellants were given a full hearing at the time of the investigation held by the Investigating Committee and were also given opportunities to adduce evidence. Finally, even after the Investigating Committee had submitted its report, the appellants were in constant communion with the Government and were in fact negotiating with Government for such help as might enable them to reopen the mill and to avoid a take-over of their undertaking by the Government. Having regard to these features it is impossible for us to accept the contention that the appellants did not get any reasonable opportunity to make out a case against the take-over of their undertaking or that the Government has not treated the appellants fairly. There is not the slightest justification in this case for the complaint that there has been any denial of natural justice.

15. We must, however, deal with the specific point raised by the appellants that they should have been given further hearing by the Government before they took the final decision of taking over their undertaking under Section 18-A of the Act and that, in any event, they should have been supplied with a copy of the report of the Investigating Committee.

16. In our opinion, since the appellants have received a fair treatment and also all reasonable opportunities to make out their own case before Government they cannot be allowed to make any grievance of the fact that they were not given a formal notice calling upon them to show cause why their undertaking should not be taken over or that they had not been furnished with a copy of the report. They had made all the representations that they could possibly have made against the proposed take-over. By no stretch of imagination, can it be said that the order for take-over took them by surprise. In fact Government gave them ample opportunity to reopen and run the mill on their own if they wanted to avoid the takeover. The blunt fact is that the appellants just did not have the necessary resources to do so. Insistence on a formal hearing in such circumstances is nothing but insistence on an empty formality.

17. The question still remains whether the appellants were entitled to get a copy of the report. It is the same question which arose in the celebrated case of ***Local Government Board* v. *Arlidge*** [1915 AC 120]. That was a case in which a local authority made a closing order in respect of a dwelling house in their district on the ground that the house was unfit for human habitation. The owner of the dwelling house who had a right to appeal to the Local Government Board against the closing order made such an appeal. Section 39 of the Housing, town Planning & Co. Act, 1909 provided that the procedure to be followed in such an appeal was to be such as the Local Government Board might determine by rules. The section, however, required the rules to provide that the Board was not to dismiss any appeal without having first made a public local enquiry. The Local Government Board had made such rules

and in conformity with these rules held an enquiry in the appeal preferred against the closing order. The house-owner attended the enquiry with his solicitor and also adduced evidence. After considering the facts and the evidence given at the enquiry as well as the report of the inspector who inspected the house the Local Government Board refused to interfere with the decision of the Borough Council not to determine the closing order. The house-owner thereupon obtained an order nisi for a writ of certiorari for the purpose of quashing of the closing order. One of the principal grounds urged by the house-owner was that he was entitled to see the report of the appellant's inspector but the report had not been shown to him. A Divisional Court discharged the order nisi but the Court of Appeal reversed the decision and ordered the writ of certiorari to issue. The matter then went up to the House of Lords who allowed the appeal and upheld the closing order. Viscount Hawane L.C., in his judgment held that though the decision of the Board must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice it does not follow that the procedure of every such tribunal must be the same. In the absence of a declaration to the contrary, the Board was intended by Parliament to follow the procedure which is its own and is necessary if the administration is to be capable of doing its work efficiently. All that was necessary for the Board was to act in good faith and to listen fairly to both sides. (Emphasis is ours.) As to the contention that the report of the inspector should have been disclosed, His Lordship observed:

> "It might or might not have been useful to disclose this report, but I do not think that the Board was bound to do so, any more than it would have been bound to disclose all the minutes made on the papers in the office before a decision was come to".

18. Lord Moulton in his judgment observed that since the appeal provided by the legislature is an appeal to an administrative department of a State and not to a judicial body it was enough if the Local Government Board preserved a judicial temper and performed its duties consciously with a proper feeling of responsibility. On the question whether it was necessary to disclose the report, His Lordship observed:

> "Like every administrative body, the Local Government Board must derive its knowledge from its agents, and I am unable to see any reason why the reports which they make to the department should be made public. It would, in my opinion, cripple the usefulness of these enquiries.... I dissociate myself from the remarks which have been made in this case in favour of a department making reports of this kind public. Such a practice would, in my opinion, be decidedly mischievous."

19. In a later case, namely, ***Danby & Sons Ltd.* v. *Minister of Health*** [(1936) 1 KB 337] the law stated in ***Local Government Board* v. *Arlidge*** case was reaffirmed. Indeed, the law in England still stands unchanged.

20. The law relating to observance of the rules of natural justice has, however, made considerable strides since the case of ***Local Government Board* v. *Arlidge*** case. In particular, since the decision in ***Ridge* v. *Baldwin*** [1964 AC 40] a copious case-law on the subject of natural justice has produced what has been described by some authorities as a detailed law of "administrative due process". In India also the decisions of this Court have extended the horizons of the rules of natural justice and their application. See, for instance the judgment of

this Court in ***Kraipak* v. *Union of India*** [(1969) 2 SCC 262]. The problem has also received considerable attention from various tribunals and committees set up in England to investigate the working of Administrative Tribunals and, in particular, the working of such administrative procedures as the holding of an enquiry by or on behalf of a Minister. In fact, a parliamentary committee known as the Franks Committee was set up in 1955 to examine this question. This Committee specifically dealt with the question of what is described as "Inspectors' Reports". The Committee mentions that the evidence that the Committee received, other than the evidence from Government departments was overwhelmingly in favour of "some degree of publication" of such reports. After summarising various arguments given in favour of as well as against the publication of the reports, the Committee recommended that "the right course is to publish the inspectors' reports". The Committee also recommended that the parties concerned should have an opportunity if they so desired to propose corrections of facts stated in the reports. It may be mentioned, however, that these recommendations of the Committee were not accepted by the British Government.

21. In our opinion it is not possible to lay down any general principle on the question as to whether the report of an investigating body or of an inspector appointed by an administrative authority should be made available to the persons concerned in any given case before the authority takes a decision upon that report. The answer to this question also must always depend on the facts and circumstances of the case. It is not at all unlikely that there may be certain cases where unless the report is given the party concerned cannot make any effective representation about the action that Government takes or proposes to take on the basis of that report. Whether the report should be furnished or not must therefore depend in every individual case on the merits of that case. We have no doubt that in the instant case non-disclosure of the report of the Investigating Committee has not caused any prejudice whatsoever to the appellants.

22. In this view of the matter we confirm the order of the Delhi High Court and dismiss this appeal.

* * * * *

TAKE-OVER OF MANAGEMENT WITHOUT INVESTIGATION/HEARING

Section 18AA of the Industries (Development andRregulation) Act, 1951 reads as follows:-

18AA. Power to take over industrial undertakings without investigation under certain circumstances.- (1) Without prejudice to any other provision of this Act, if, from the documentary or other evidence in its possession, the Central Government is satisfied, in relation to an industrial undertaking, that—

(*a*) the persons incharge of such industrial undertaking have, by reckless investments or creation of encumbrances on the assets of the industrial undertaking, or by diversion of funds, brought about a situation which is likely to affect the production of articles manufactured or produced in the industrial undertaking, and that immediate action is necessary to prevent such a situation; or

(*b*) it has been closed for a period of not less than three months (whether by reason of the voluntary winding up of the Company owning the industrial undertaking or for any other reason) and such closure is prejudicial to the concerned scheduled industry and that the financial condition of the Company owning the industrial undertaking and the condition of the plant and machinery of such undertaking are such that it is possible to re-start the undertaking and such re-starting is necessary in the interests of the general public,

it may, by a notified order, authorise any person (hereinafter referred to as the 'authorised person') to take over the management of the whole or any part of the industrial undertaking or to exercise in respect of the whole or any part of the undertaking such functions of control as may be specified in the order.

(2) The provisions of sub-section (2) of Section 18-A shall, as far as may be, apply to a notified order made under sub-section (1) as they apply to a notified order made under sub-section (1) of Section 18-A.

(3) Nothing contained in sub-section (1) and sub-section (2) shall apply to an industrial undertaking owned by a company which is being wound up by or under the supervision of the court.

(4) Where any notified order has been made under sub-section (1), the person or body of persons having, for the time being, charge of the management or control of the industrial undertaking, whether by or under the orders of any court or any contract, instrument or otherwise, shall notwithstanding anything contained in such order, contract, instrument or other arrangement, forthwith make over the charge of management or control, as the case may be, of the industrial undertaking to the authorised person.

(5) The provisions of Sections 18-B to 18-E (both inclusive) shall, as far as may be, apply to, or in relation to, the industrial undertaking, in respect of which a notified order has been made under sub-section (1), as they apply to an industrial undertaking in relation to which a notified order has been issued under Section 18-A.

Swadeshi Cotton Mills v. *Union of India*

(1981) 1 SCC 664

SARKARIA, J. (*for himself and Desai, J.*) - These appeals arise out of a judgment, dated May 1, 1979, of the High Court of Delhi, in the following circumstances:

2. Appellant 1 in Civil Appeal 1629 of 1979 is Swadeshi Cotton Mills Co. Ltd. ("the Company"). It was incorporated as a private company with an authorised capital of Rs 30 lakhs in 1921 by the Horseman family by converting their partnership business into a Private Joint Stock Company. Its capital was raised in 1923 to Rs 32 lakhs and thereafter in 1945 to Rs 52.50 lakhs by issue of bonus shares. In 1946, the Jaipuria family acquired substantial holding in the Company. Jaipuria family is the present management. By issue of further bonus in 1946, the capital of the Company was increased to Rs 122.50 lakhs. In 1948, the paid-up capital of the Company was raised to Rs 210 lakhs by the issue of further bonus shares. The subscribed and issued capital consisting mainly of the bonus shares has since remained constant at Rs 210 lakhs.

3. In the year 1946, the Company had only one undertaking, a Textile Unit at Kanpur, known as "The Swadeshi Cotton Mills, Kanpur". Between 1956 and 1973, the Company set up and/or acquired five further Textile Units in Pondicherry, Naini, Udaipur, Maunath Bhanjan and Rae Bareilly. Each of these six units or undertakings of the Company was separately registered in accordance with the provisions of Section 10 of the Industries (Development and Regulation) Act, 1951 ("the IDR Act").

4. In addition to these six industrial undertakings, the Company (it is claimed) had other distinct businesses and assets. It holds inter alia 97 per cent shares in the subsidiary, Swadeshi Mining and Manufacturing Company Ltd., which owns two sugar mills. The Company claims, it has substantial income from other businesses and activities including investments in its subsidiary and in other shares and securities which include substantial holding of Rs 10,00,000 Equity Shares of Rs 10 each in Swadeshi Polytex Ltd., representing 30 per cent of the total equity capital value of Swadeshi Polytex Ltd., the intrinsic value whereof exceeds Rs 5 crores.

5. The Company made considerable progress during the years 1957 to 1973. The reserves and surplus of the Company increased from Rs 2.3 crores in 1957 to Rs 4.3 crores in 1973-74, but declined to Rs 2.8 crores in 1976-77. The fixed assets of the Company increased from 5.8 crores in 1957 to 19 crores in 1973-74, but declined to Rs 18 crores, registering a marginal decrease of Rs 1 crore in 1976-77.

6. The Company maintained separate books of accounts for each of its six industrial undertakings. From and after April 1973, the Company maintained separate sets of books of accounts of the businesses and assets other than of the said six industrial undertakings. Annual accounts of the six industrial undertakings were first prepared separately in seven sets which were separately audited. The consolidated annual accounts of the Company were then prepared from such annual accounts at the registered office of the Company at Kanpur, and after audit, were placed before the shareholders of the Company. The Company made overall profits up to the year 1969 and even thereafter up to 1975. The Balance Sheet showed that the Company suffered a loss of Rs 86.23 lakhs after providing depreciation of Rs 93.93 lakhs and

gratuity of Rs 48.79 lakhs, though the trading results showed a gross profit of Rs 56.49 lakhs. During the year ending March 31, 1976, the Company again suffered a loss of Rs 294.82 lakhs after providing for depreciation. The last Balance Sheet and Profit & Loss Account adopted by the shareholders and published by the Company relates to the year ending March 31, 1977. It shows that the Company suffered a loss of Rs 200.34 lakhs after taking into account depreciation of Rs 73.27 lakhs which was not provided in accounts.

7. Between 1975 and 1978, the Company created encumbrances on the fixed assets.

8. The borrowings of the Kanpur, Pondicherry, Naini, Udaipur, Maunath Bhanjan and Rae Bareilly Units of the Company as on March 31, 1978 against current assets were Rs 256.78, 183.92, 271.05, 70.72, 47.98 and 55.82 lakhs respectively. All the encumbrances on fixed assets (except the encumbrance of Rs 70 lakhs on the fixed assets of Naini Unit for gratuity funding to get the benefit of Section 44-A of the Income Tax Act) were created prior to March 31, 1976.

9. In the accounting year 1976-77, only one new encumbrance was created by the Company on its fixed assets.

10. On April 13, 1978, the Government of India in exercise of its power under clause (*a*) of sub-section (1) of Section 18-AA of the IDR Act, passed an order (hereinafter referred to as "the impugned Order") which reads as follows:

> So 265(*E*)/18AA/IDRA/78— Whereas the Central Government is satisfied from the documentary and other evidence in its possession, that the persons in charge of the industrial undertakings namely,
>
> (*i*) M/s Swadeshi Cotton Mills, Kanpur,
> (*ii*) M/s Swadeshi Cotton Mills, Pondicherry,
> (*iii*) M/s Swadeshi Cotton Mills, Naini,
> (*iv*) M/s Swadeshi Cotton Mills, Maunath Bhanjan,
> (*v*) M/s Udaipur Cotton Mills, Udaipur, and
> (*vi*) Rae Bareilly Textile Mills, Rae Bareilly
>
> of M/s Swadeshi Cotton Mills Company Ltd., Kanpur (hereinafter referred to as "the said industrial undertakings"), have, by creation of encumbrances on the assets of the said industrial undertakings, brought about a situation which has affected and is likely to further affect the production of articles manufactured or produced in the said industrial undertakings and that immediate action is necessary to prevent such a situation;
>
> Now, therefore, in exercise of power conferred by clause (*a*) of sub-section (1) of Section 18-AA of the Industries (Development and Regulation) Act, 1951 (65 of 1951), the Central Government hereby authorises the National Textile Corporation Limited (hereinafter referred to as "the authorised person") to take over the management of the whole of the said industrial undertakings, subject to the following terms and conditions, namely:—
>
> (*i*) The authorised person shall comply with all the directions issued from time to time by the Central Government;
>
> (*ii*) the authorised person shall hold office for a period of five years from the date of publication of this order in the Official Gazette;
>
> (*iii*) the Central Government may terminate the appointment of the authorised person earlier if it considers necessary to do so.

This Order shall have effect for a period of five years commencing from the date of its publication in the Official Gazette.

Sd/- (R. Ramakrishna) Joint Secretary to the Government of India. (Seal)

11. On April 19, 1978, three petitioners, namely, the Company through its Joint Secretary, Shri Bhim Singh Gupta, its Managing Director, Dr Rajaram Jaipuria, and its subsidiary company, named Swadeshi Mining and Manufacturing Company, through its Directors and shareholders filed a writ petition under Article 226 of the Constitution in the Delhi High Court against the Union of India and the National Textile Corporation to challenge the validity of the aforesaid Government Order dated April 13, 1978. The writ petition was further supplemented by subsequent affidavits and rejoinders.

12. The Union of India and the National Textile Corporation Ltd., who has been authorised to assume management of the undertakings concerned, were impleaded, as respondents. The writ petition first came up for hearing before a Division Bench who by its order dated August 11, 1978, requested the Chief Justice to refer it to a larger Bench. The case was then heard by a three-Judge Bench who by their order dated October 12, 1978, requested the Hon'ble the Chief Justice to constitute a still larger Bench to consider the question whether a prior hearing is necessary to be given to the persons affected before the order under Section 18-AA is passed. Ultimately, the reference came up for consideration before a Full Bench of five Judges to consider the question, which was reframed by the Bench as under:

Whether in construing Section 18-AA of the Industries Development and Regulation Act, 1951, as a pure question of law, compliance with the principle of audi alteram partem is to be implied. If so,

(*a*) whether such hearing is to be given to the parties who would be affected by the order to be passed under the said section prior to the passing of the order; or

(*b*) whether such hearing is to be given after the passing of the order; and

(*c*) if prior hearing is to be normally given and the order passed under the said section is vitiated by not giving of such hearing, whether such vice can be cured by the grant of a subsequent hearing.

13. The Bench, by a majority (consisting of Deshpande, C.J., R. Sacher and M.L. Jain, JJ.) answered this three-fold question as follows:

(*1*) Section 18-AA(1)(*a*), (*b*) excludes the giving of prior hearing to the party who would be affected by order thereunder.

(*2*) Section 18-F expressly provides for a post-decisional hearing to the owner of the industrial undertaking, the management of which is taken over under Section 18-AA to have the order made under Section 18-AA cancelled on any relevant ground.

(*3*) As the taking over of management under Section 18-AA is not vitiated by the failure to grant prior hearing, the question of any such vice being cured by a grant of a subsequent hearing does not arise.

H.L. Anand and N.N. Goswamy, JJ. however dissented. In the opinion of the minority, in compliance with the principles of natural justice, a prior hearing to the owner of the undertaking was required to be given before passing an order under Section 18-AA, that the second question did not arise as the denial of a prior hearing would not cure the vice by the grant of subsequent hearing, but it would be open to the court to moderate the relief in such a

way that the order is kept alive to the extent necessary until the making of the fresh order to subserve public interest, and to make appropriate directions to ensure that the subsequent hearing would be a full and complete review of the circumstances of the take-over and for the preservation and maintenance of the property during the interregnum.

14. After the decision of the reference, the case was reheard on merits by a Bench of three learned Judges (consisting of Deshpande, C.J., Anand and M.L. Jain, JJ.) who by their judgment, dated May 1, 1979, disposed of the writ petition. The operative part of the judgment reads as under:

> In the result, the writ petition succeeds in part, the challenge to the validity of the impugned Order fails and to that extent the petition is dismissed. The petition succeeds insofar as it seeks to protect from the impugned Order the corporate entity of the company, the corporate entity of the subsidiary and its assets, the holding of the Company in Polytex and the assets and property of the Company which are not referable to any of the industrial undertakings. The respondents are hereby restrained from in any manner interfering with the corporate entity, the assets and property which are outside the impugned order. The respondents would release from its control and custody and/or deliver possession of any assets or property of the Company, which are not referable to the industrial undertakings in terms of the observations made in paras 46 and 47 of the judgment, within a period of three months from today (May 1, 1979). In the peculiar circumstances the parties would bear their respective costs.

15. On the application of the Company, the Delhi High Court certified under Article 133 of the Constitution that the case was fit for appeal to this Court. Subsequently, on July 12, 1979, a similar certificate was granted by the High Court to the Union of India and the National Textile Corporation Ltd. Consequently, the Company, the Union of India and the National Textile Corporation have filed Civil Appeals Nos. 1629, 2087 and 1857 of 1979, respectively, in this Court. All the three appeals will be disposed of by this judgment.

16. The primary, two-fold proposition posed and propounded by Shri F.S. Nariman, learned counsel for the appellant Company in Civil Appeal No. 1629 of 1979, is as follows:

> (*a*) Whether it is necessary to observe the rules of natural justice before issuing a notified order under Section 18-AA, or enforcing a decision under Section 18-AA, or
>
> (*b*) Whether the provisions of Section 18-AA and/or Section 18-F impliedly exclude rules of natural justice relating to prior hearing.

17. There were other contentions also which were canvassed by the learned counsel for the parties at considerable length. But for reasons mentioned in the final part of this judgment, we do not think it necessary, for the disposal of these appeals, to deal with the same.

18. Thus, the first point for consideration is whether, as a matter of law, it is necessary, in accordance with the rules of natural justice, to give a hearing to the owner of an undertaking before issuing a notified order, or enforcing a decision of its take-over under Section 18-AA.

19. Shri Nariman contends that there is nothing in the language, scheme or object of the provisions in Section 18-AA and/or Section 18-F which expressly or by inevitable implication, excludes the application of the principles of natural justice or the giving of a pre-decisional hearing, adapted to the situation, to the owner of the undertaking. It is submitted that mere use of the word "immediate" in sub-clause (*a*) of Section 18-AA(1) does not show a

legislative intent to exclude the application of audi alteram partem rule, altogether. It is maintained that according to the decision of this Court in ***Keshav Mills Company Ltd.* v. *Union of India*** [(1973) 1 SCC 380] even after a full investigation has been made under Section 15 of the IDR Act, the Government has to observe the rules of natural justice and fair play, which in the facts of a particular case, may include the giving of an opportunity to the affected owner to explain the adverse findings against him in the investigation report. In support of his contention, that the use of the word "immediate" in Section 18-AA(1)(*a*) does not exclude natural justice, learned counsel has advanced these reasons:

(*i*) The word "immediate" in clause (*a*) has been used in contradistinction to "investigation". It only means that under Section 18-AA action can be taken without prior investigation under Section 15, if there is evidence in the possession of the Government, that the assets of the Company owning the undertaking are being frittered away by doing any of the three things mentioned in clause (*a*); or, the undertaking has remained closed for a period of not less than three months and the condition of plant and machinery is such that it is possible to restart the undertaking. This construction, that the use of the word "immediate" in Section 18-AA(l)(*a*) *only* dispenses with investigation under Section 15 and *not* with the principle of audi alteram partem altogether, is indicated by the marginal heading of Section 18-AA and para 3 of the Statement of Objects and Reasons of the Amendment Bill which inserted Section 18-AA, in 1971.

(*ii*) The word "immediate" occurs only in clause (*a*) and not in clause (*b*) of Section 18-AA(1). It would be odd if intention to exclude this principle of natural justice is spelt out in one clause of the sub-section, when its other clause does not exclude it.

(*iii*) Section 18-F does not exclude a pre-decisional hearing. This section was there, when in ***Keshav Mills*** case it was held by this Court, that even at the post-investigation stage, before passing an order under Section 18-A, the Government must proceed fairly in accordance with the rules of natural justice. The so-called post-decisional hearing contemplated by Section 18-F cannot be - and is not intended to be - a substitute for a pre-decisional hearing. Section 18-F, in terms, deals with the power of Central Government to cancel an order of take-over under two conditions, namely: *First* when "the purpose of an order under Section 18-A has been fulfilled, or, *second*, when "for any other reason it is not necessary that the order should remain in force". "Any other reason" has reference to post-"take-over" circumstances only, and does not cover a reason relatable to pre-"take-over" circumstances. An order of cancellation under Section 18-F is intended to be prospective. This is clear from the plain meaning of the expressions "remain in force", "necessary" etc. used in the section.

Section 18-F incorporates only a facet, albeit qualified, of Section 21 of the General Clauses Act **(*Kamla Prasad Khetan* v. *Union of India*** [AIR 1957 SC 676]. Therefore, the illusory right given by Section 18-F to the aggrieved owner of the undertaking, to make an application for cancellation of the order, is not a full right of appeal on merits. The language of the section impliedly prohibits an enquiry into circumstances that led to the passing of the order of "take-over", and under it, the aggrieved person is not entitled to show that on merits, the order was void ab initio.

As held by a Bench (consisting of Bhagwati and Vakil, JJ.) of the Gujarat High Court, in ***Dosabhai Ratanshah Keravale* v. *State of Gujarat*** [(1970) 2 Guj LR 361] a power to rescind or cancel an order, analogous to that under Section 21, General Clauses Act, has to be construed as a power of prospective cancellation, and not of retroactive obliteration. It is only the existence of a full right of appeal on the merits or the existence of a provision which unequivocally confers a power to reconsider, cancel and obliterate completely the original order, just as in appeal, which may be construed to exclude natural justice or a pre-decisional hearing in an emergent situation. (reference on this point has been made to *Wade's administrative law*, 4th Edn., pp. 464 to 468)

(*iv*) "Immediacy", does not exclude a duty to act fairly, because, even an emergent situation can coexist with the canons of natural justice. The only effect of urgency on the application of the principle of fair hearing would be that the width, form and duration of the hearing would be tailored to the situation and reduced to the reasonable minimum so that it does not delay and defeat the purpose of the contemplated action.

(*v*) Where the civil consequences of the administrative action — as in the instant case — are grave and its effect is highly prejudicial to the rights and interests of the person affected and there is nothing in the language and scheme of the statute which unequivocally excludes a fair pre-decisional hearing and the post-decisional hearing provided therein is not a real remedial hearing equitable to a full right of appeal, the court should be loath to infer a legislative intent to exclude even a minimal fair hearing at the pre-decisional stage merely on ground of urgency. (reference in this connection has been made to Wade's Administrative Law, ibid., p. 468 bottom)

20. Applying the proposition propounded by him to the facts of the instant case, Shri Nariman submits that there was ample time at the disposal of the Government to give a reasonably short notice to the Company to present its case. In this connection, it is pointed out that according to para 3 of the further affidavit filed by Shri Daulat Ram on behalf of the Union of India and other respondents, the Central Government had in its possession two documents, namely: (*a*) copy of the Survey Report on M/s Swadeshi Cotton Mills Company Ltd., covering the period from May to September 1977 prepared by the office of the Textile Commissioner, and (*b*) Annual Report (dated September 30, 1977) of the Company for the year ending March 31, 1971. In addition, the third circumstance mentioned in the affidavit of Shri Daulat Ram is, that by an order dated January 28, 1978, the Central Government appointed four government officials, including one from the office of the Textile Commissioner, to study the affairs of the Company and to make recommendation. This Official Group submitted its report on February 16, 1978. It is submitted that this evidence on the basis of which the impugned Order was passed, was not disclosed to the appellant Company till May 1978, only after it had filed the writ petition in the High Court to challenge the impugned Order. It is emphasised that if the Survey Report was assumed to contain something adverse to the appellants, there was time enough — about six weeks between the submission of the Survey Report and the passing of the impugned Order for giving a short, reasonable opportunity to the appellants to explain the adverse findings against them. It is urged that even if there was immediacy, situational modifications could be made to meet the requirement of fairness, by reducing the period of notice; that even the manner and form of

such notice could be simplified to eliminate delay; that telephonic notice or short opportunity for furnishing their explanation to the Company might have satisfied the requirements of natural justice. Such an opportunity of hearing could have been given after the passing of a conditional tentative order and before its enforcement under Section 18-AA. For the interregnum suitable interim action such as freezing the assets of the Company or restraining the Company from creating further encumbrances, etc. could be taken under Section 16.

22. As against this, Shri Soli Sorabjee, learned Solicitor-General appearing on behalf of Respondent 1, contends that the presumption in favour of audi alteram partem rule stands impliedly displaced by the language, scheme, setting, and the purpose of the provision in Section 18-AA. It is maintained that Section 18-AA, on its plain terms, deals with situations where immediate preventive action is required. The paramount concern is to avoid serious problems which may be caused by fall in production. The purpose of an order under Section 18-AA is not to condemn the owner but to protect the scheduled industry. The issue under Section 18-AA is not solely between the Government and the management of the industrial undertaking. The object of taking action under this Section is to protect other outside interests of the community at large and the workers. On these premises, it is urged, the context, the subject-matter and the legislative history of Section 18-AA negative the necessity of giving a prior hearing; that Section 18-AA does not contemplate any interval between the making of an order thereunder and its enforcement, because it is designed to meet an emergent situation by immediate preventive action. Shri Sorabjee submits that this rule of natural justice in a modified form has been incorporated in Section 18-F which gives an opportunity of a post-decisional hearing to the owner of the undertaking who, if he feels aggrieved, can, on his application, be heard to show that even the original order under Section 18-AA was passed on invalid grounds and should be cancelled or rescinded. Thus, Shri Sorabjee does not go to the length of contending that the principles of natural justice have been fully displaced or completely excluded by Section 18-AA. On the contrary, his stand is that on a true construction of Section 18-AA read with Section 18-F, the requirements of natural justice and fair play can be read into the statute only "insofar as conformance to such canons can reasonably and realistically be required of it", by the provision for a remedial hearing at a subsequent stage.

23. Shri Sorabjee further submits that since Section 18-F does not specify any period of time within which the aggrieved party can seek the relief thereunder, the opportunity of full, effective and post-decisional hearing has to be given within a reasonable time. It is stressed that under Section 18-F, the Central Government exercises curial functions, and that section confers on the aggrieved owner a right to apply to the Government to cancel the order of take-over. On a true construction, this section casts an obligation on the Central Government to deal with and dispose of an application filed thereunder with reasonable expedition. Shri Sorabjee further concedes that on the well settled principle of implied and ancillary powers, the right of hearing afforded by Section 18-F carries with it the right to have inspection and copies of all the relevant books, documents, papers etc. and the section obligates the Central Government to take all steps which are necessary for the effective hearing and disposal of an application under Section 18-F.

25. Before dealing with the contentions advanced on both sides, it will be useful to have a general idea of the concept of "natural justice" and the broad principles governing its application or exclusion in the construction or administration of statutes and the exercise of judicial or administrative powers by an authority or tribunal constituted thereunder.

26. Well then, what is "natural justice"? The phrase is not capable of a static and precise definition. It cannot be imprisoned in the straight-jacket of a cast-iron formula. Historically, "natural justice" has been used in a way "which implies the existence of moral principles of self-evident and unarguable truth".In course of time, Judges nurtured in the traditions of British jurisprudence, often invoked it in conjunction with a reference to "equity and good conscience". Legal experts of earlier generations did not draw any distinction between "natural justice" and "natural law". "Natural justice" was considered as "that part of natural law which relates to the administration of justice". Rules of natural justice are not embodied rules. Being means to an end and not an end in themselves, it is not possible to make an exhaustive catalogue of such rules.

27. But two fundamental maxims of natural justice have now become deeply and indelibly ingrained in the common consciousness of mankind, as pre-eminently necessary to ensure that the law is applied impartially, objectively and fairly. Described in the form of Latin tags these twin principles are: (*i*) *audi alteram partem* and (*ii*) *nemo judex in re sua.* For the purpose of the question posed above, we are primarily concerned with the *first.* This principle was well-recognised even in the ancient world. Seneca, the philosopher, is said to have referred in *Medea* that it is unjust to reach a decision without a full hearing. In *Maneka Gandhi* case[5], Bhagwati, J. emphasised that audi alteram partem is a highly effective rule devised by the courts to ensure that a statutory authority arrives at a just decision and it is calculated to act as a healthy check on the abuse or misuse of power. Hence its reach should not be narrowed and its applicability circumscribed.

28. During the last two decades, the concept of natural justice has made great strides in the realm of administrative law. Before the epoch- making decision of the House of Lords in ***Ridge* v. *Baldwin*** it was generally thought that the rules of natural justice apply only to judicial or quasi-judicial proceedings; and for that purpose, whenever a breach of the rule of natural justice was alleged, courts in England used to ascertain whether the impugned action was taken by the statutory authority or tribunal in the exercise of its administrative or quasi-judicial power. In India also, this was the position before the decision, dated February 7, 1967, of this Court in ***Dr Bina Pani Dei*** case; wherein it was held that even an administrative order or decision in matters involving civil consequences, has to be made consistently with the rules of natural justice. This supposed distinction between quasi-judicial and administrative decisions, which was perceptibly mitigated in ***Dr Bina Pani Dei*** case, was further rubbed out to a vanishing point in ***A.K. Kraipak* v. *Union of India***, thus:

> If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries.... Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far-reaching effect than a decision in a quasi-judicial enquiry.

29. In ***A.K. Kraipak*** case, the court also quoted with approval the observations of Lord Parker from the Queen's Bench decision in ***In re H.K.* (*Infants*)***;*** which were to the effect, that good administration and an honest or bona fide decision require not merely impartiality or merely bringing one's mind to bear on the problem, but *acting fairly.* Thus irrespective of whether the power conferred on a statutory body or tribunal is administrative or quasi-judicial, a duty to act fairly, that is, in consonance with the fundamental principles of substantive justice is generally implied, because the presumption is that in a democratic polity wedded to the rule of law, the State or the legislature does not intend that in the exercise of their statutory powers its functionaries should act unfairly or unjustly.

30. In the language of V.R. Krishna Iyer, J. (vide ***Mohinder Singh Gill*** case [(1978) 1 SCC 405]): "... subject to certain necessary limitations natural justice is now a brooding omnipresence although varying in its play ... Its essence is good conscience in a given situation; nothing more - but nothing less."

31. The rules of natural justice can operate only in areas not covered by any law validly made. They can supplement the law but cannot supplant it (per Hedge, J. in ***A.K. Kraipak***). If a statutory provision *either specifically or by inevitable implication* excludes the application of the rules of natural justice, then the court cannot ignore the mandate of the legislature. Whether or not the application of the principles of natural justice in a given case has been excluded, wholly or in part, in the exercise of statutory power, depends upon the language and basic scheme of the provision conferring the power, the nature of the power, the purpose for which it is conferred and the effect of the exercise of that power.

32. The maxim *audi alteram partem* has many facets. Two of them are: (*a*) notice of the case to be met; and (*b*) opportunity to explain. This rule is universally respected and duty to afford a fair hearing in Lord Lore-burn's oft-quoted language, is "a duty lying upon everyone who decides something", in the exercise of legal power. The rule cannot be sacrificed at the altar of administrative convenience or celerity; for, "convenience and justice" - as Lord Atkin felicitously put it - "are often not on speaking terms".

33. The next general aspect to be considered is: Are there any exceptions to the application of the principles of natural justice, particularly the audi alteram partem rule? We have already noticed that the statute conferring the power, can by *express* language exclude its application. Such cases do not present any difficulty. However, difficulties arise when the statute conferring the power does not expressly exclude this rule but its exclusion is sought *by implication* due to the presence of certain factors: such as, urgency, where the obligation to give notice and opportunity to be heard would obstruct the taking of prompt action of a preventive or remedial nature. It is proposed to dilate a little on this aspect, because in the instant case before us, exclusion of this rule of fair hearing is sought by implication from the use of the word "immediate" in Section 18-AA(1). Audi alteram partem rule may be disregarded in an emergent situation where immediate action brooks no delay to prevent some imminent danger or injury or hazard to paramount public interests. Thus, Section 133 of the Code of Criminal Procedure, empowers the Magistrates specified therein to make an ex parte conditional order in emergent cases, for removal of dangerous public nuisances. Action under Section 17, Land Acquisition Act, furnishes another such instance. Similarly, action on grounds of public safety, public health may justify disregard of the rule of prior hearing.

34. Be that as it may, the fact remains that there is no consensus of judicial opinion on whether mere urgency of a decision is a practical consideration which would uniformly justify non-observance of even an abridged form of this principle of natural justice. In ***Durayappah* v. *Fernando*** Lord Upjohn observed that "while urgency may rightly limit such opportunity timeously, perhaps severely, there can never be a denial of that opportunity if the principles of natural justice are applicable.

35. These observations of Lord Upjohn in ***Durayappah*** case were quoted with approval by this Court in ***Mohinder Singh Gill*** case. It is therefore, proposed to notice the same here.

36. In ***Mohinder Singh Gill*** case the appellant and the third respondent were candidates for election in a Parliamentary Constituency. The appellant alleged that when at the last hour of counting it appeared that he had all but won the election, at the instance of the respondent, violence broke out and the Returning Officer was forced to postpone declaration of the result. The Returning Officer reported the happening to the Chief Election Commissioner. An officer of the Election Commission who was an observer at the counting, reported about the incidents to the Commission. The appellant met the Chief Election Commissioner and requested him to declare the result. Eventually, the Chief Election Commissioner issued a notification which stated that taking all circumstances into consideration the Commission was satisfied that the poll had been vitiated, and therefore in exercise of the powers under Article 324 of the Constitution, the poll already held was cancelled and a repoll was being ordered in the constituency. The appellant contended that before making the impugned order, the Election Commission had not given him a full and fair hearing and all that he had was a vacuous meeting where nothing was disclosed. The Election Commission contended that a prior hearing had, in fact, been given to the appellant. In addition, on the question of application of the principles of natural justice, it was urged by the respondents that the tardy process of notice and hearing would thwart the conducting of elections with speed, that unless civil consequences ensued, hearing was not necessary and that the right accrues to a candidate only when he is declared elected. This contention, which had found favour with the High Court, was negatived by this Court. Delivering the judgment of the Court, V.R. Krishna Iyer, J., lucidly explained the meaning and scope of the concept of natural justice and its role in a case where there is a competition between the necessity of taking speedy action and the duty to act fairly. It will be useful to extract those illuminating observations, in extenso: (SCC p. 434, para 48)

> Once we understand the soul of the rule as fair play in action - and it is so - we must hold that it extends to both the fields. After all, administrative power in a democratic set-up is not allergic to fairness in action and discretionary executive justice cannot degenerate into unilateral injustice. Nor is there ground to be frightened of delay, inconvenience and expense, if natural justice gains access. For fairness itself is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop, nor a bee in one's bonnet. Its essence is good conscience in a given situation; nothing more - but nothing less. The 'exceptions' to the rules of natural justice are a misnomer or rather are but a shorthand form of expressing the idea that in those exclusionary cases nothing unfair can be inferred by not affording an opportunity to present or meet a case.

37. After referring to several decisions, including the observations of Lord Upjohn in ***Durayappah* v. *Fernando***, the court explained that mere invocation or existence of urgency does not exclude the duty of giving a fair hearing to the person affected:

> It is untenable heresy, in our view, to lock-jaw the victim or act behind his back by tempting invocation of urgency, unless the clearest case of public injury flowing from the least delay is self-evident. Even in such cases a remedial hearing as soon as urgent action has been taken is the next best. Our objection is not to circumscription dictated by circumstances, but to annihilation as an easy escape from a benignant, albeit inconvenient obligation. The procedural pre-condition of fair hearing, however minimal, even post-decisional, has relevance to administrative and judicial gentlemanliness....
>
> We may not be taken to ... say that situational modifications to notice and hearing are altogether impermissible.... The glory of the law is not that sweeping rules are laid down but that it tailors principles to practical needs, doctors remedies to suit the patient, promotes, not freezes, life's processes, if we may mix metaphors....

38. The court further emphasised the necessity of striking pragmatic balance between the competing requirements of acting urgently and fairly, thus:

> "Should the cardinal principle of 'hearing' as condition for decision-making be martyred for the cause of administrative immediacy? We think not. The full panoply may not be there but a manageable minimum may make-do.
>
> In ***Wiseman* v. *Borneman*** there was a hint of the competitive claims of hurry and hearing. Lord Reid said:
>
> Even where the decision has to be reached by a body acting judicially, there must be a balance between the need for expedition and the need to give full opportunity to the defendant to see material against him. (emphasis added)
>
> We agree that the elaborate and sophisticated methodology of a formalised hearing may be injurious to promptitude so essential in an election under way. Even so, natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances. To burke it altogether may not be a stroke of fairness except in very exceptional circumstances.

The court further pointed out that the competing claims of hurry and hearing can be reconciled by making situational modifications in the audi alteram partem rule:

> (Lord Denning M.R., in Howard v. Borneman, summarised the observations of the Law Lords in this form.) No doctrinaire approach is desirable but the court must be anxious to salvage the cardinal rule to the extent permissible in a given case. After all, it is not obligatory that counsel should be allowed to appear nor is it compulsory that oral evidence should be adduced. Indeed, it is not even imperative that written statements should be called for disclosure of the prominent circumstances and asking for an immediate explanation orally or otherwise may, in many cases be sufficient compliance. It is even conceivable that an urgent meeting with the concerned parties summoned at an hour's notice, or in a crisis, even a telephone call, may suffice. If all that is not possible as in the case of a fleeing person whose passport has to be impounded lest he should evade the course of justice or a dangerous nuisance needs immediate abatement, the action may be taken followed immediately by a hearing for the purpose of sustaining or setting aside the action to the extent feasible. It is quite on the cards that the Election Commission, if

> pressed by circumstances may give a short hearing. In any view, it is not easy to appreciate whether before further steps got under way he could have afforded an opportunity of hearing the parties, and revoke the earlier directions.... All that we need emphasize is that the content of natural justice is a dependent variable, not an easy casualty.
>
> Civil consequences undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation everything that affects a citizen in his civil life inflicts a civil consequence. (emphasis added)

39. In ***Maneka Gandhi***, it was laid down that where in an emergent situation, requiring immediate action, it is not practicable to give prior notice or opportunity to be heard, the preliminary action should be soon followed by a full remedial hearing.

40. The High Court of Australia in ***Commissioner of Police* v. *Tanos*** [(1958) 98 CLR 383] held that some urgency, or necessity of prompt action does not necessarily exclude natural justice because a true emergency situation can be properly dealt with by short measures. In ***Heatley* v. *Tasmanian Racing & Gaming Commission*** [14 Aus LR 519] the same High Court held that without the use of unmistakable language in a statute, one would not attribute to Parliament an intention to authorise the commission to order a person not to deal in shares or attend a stock exchange without observing natural justice. In circumstances of likely immediate detriment to the public, it may be appropriate for the commission to issue a warning-off notice without notice or stated grounds but limited to a particular meeting, coupled with a notice that the commission proposed to make a long-term order on stated grounds and to give an earliest practicable opportunity to the person affected to appear before the commission and show why the proposed long-term order be not made.

41. As pointed out in ***Mohinder Singh Gill* v. *Chief Election Commissioner*** and in ***Maneka Gandhi* v. *Union of India*** such cases where owing to the compulsion of the fact-situation or the necessity of taking speedy action, no pre-decisional hearing is given but the action is followed soon by a full post-decisional hearing to the person affected, do not, in reality, constitute an "exception" to the audi alteram partem rule. To call such cases an "exception" is a misnomer because they do not exclude "fair play in action", but adapt it to the urgency of the situation by balancing the competing claims of hurry and hearing.

42. "The necessity for speed", writes Paul Jackson: "may justify immediate action, it will, however, normally allow for a hearing at a later stage". The possibility of such a hearing — and the adequacy of any later remedy should the initial action prove to have been unjustified — are considerations to be borne in mind when deciding whether the need for urgent action excludes a right to rely on natural justice. Moreover, however, the need to act swiftly may modify or limit what natural justice requires, it must not be thought "that because rough, swift or imperfect justice only is available that there ought to be no justice": ***Pratt* v. *Wanganui Education Board***.

43. Prof. de Smith, the renowned author of ***Judicial Review*** (3rd Edn.) has at p. 170, expressed his views on this aspect of the subject, thus: "Can the absence of a hearing before a decision is made be adequately compensated for by a hearing ex post facto? A prior hearing may be better than a subsequent hearing, but a subsequent hearing is better than no hearing at

all; and in some cases the courts have held that statutory provision for an administrative appeal or even full judicial review on the merits are sufficient to negative the existence of any implied duty to hear before the original decision is made. The approach may be acceptable where the original decision does not cause serious detriment to the person affected, or where there is also a paramount need for prompt action, or where it is impracticable to afford antecedent hearings."

44. In short, the general principle - as distinguished from an absolute rule of uniform application - seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage. Conversely, if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative progress or frustrate the need for utmost promptitude. In short, this rule of fair play "must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands". The court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. But, to recall the words of Bhagwati, J., the core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise.

45. Keeping the general principles stated above, let us now examine the scheme, content, object and legislative history of the relevant provisions of the IDR Act.

46. The IDR Act (65 of 1951) came into force on May 8, 1952. The Statement of Objects and Reasons published in the Gazette of India, dated March 26, 1949, says that its object is to provide the Central Government with the means of implementing their industrial policy which was announced in their resolution, dated April 6, 1948, and approved by the Central Legislature. The Act brings under Central Control the development and regulation of a number of important industries, specified in its First Schedule, the activities of which affect the country as a whole and the development of which must be governed by economic factors of all-India import. The requirement with regard to registration, issue or revocation of licences of these specific industrial undertakings has been provided in Chapter II of the Act. Section 3(*d*) defines an "industrial undertaking" to mean "any undertaking pertaining to a scheduled industry carried on in one or more factories by any person or authority including Government". Clause (*f*) of the same section defines "owner" in relation to an undertaking.

47. Section 15 gives power to the Central Government to cause investigation to be made into a scheduled industry or industrial undertaking.

48. Section 16 empowers the Central Government to issue appropriate directions to the industrial undertaking concerned on completion of investigation under Section 15.

Sub-section (2) enables the Central Government to issue such directions to the industrial undertakings pending investigation.

49. In the course of the working of IDR Act, certain practical difficulties came to light. One of them was that "Government cannot take over the management of any industrial undertaking, even in a situation calling for emergent action without first issuing directions to it and waiting to see whether or not they are obeyed". In order to remove such difficulties, the Amending Act 26 of 1953 inserted Chapter III-A containing Sections 18-A to 18-F in the IDR Act. Section 18-A confers power on the Central Government to assume management or control of an industrial undertaking in certain cases.

Section 18-B specifies the effect of notified order under Section 18-A.

Section 18-D provides that a person whose office is lost under clause (*a*) or whose contract of management is terminated under clause (*b*) of Section 18-B shall have no right to compensation for such loss or termination. Section 18-F is material.

50. By the Constitution Fourth Amendment Act, 1955, Chapter III-A of the IDR Act was included as Item 19 in the Ninth Schedule of the Constitution.

51. Before we may come to Section 18-AA, we may notice here the legislative policy with regard to Cotton Textile Industry, as adumbrated in the Cotton Textile Companies Management of Undertakings and Liquidation or Reconstruction Act, 1967 (Act 29 of 1967). The Statement of Objects and Reasons for enacting this statute, inter alia, says:

> "The cotton textile industry provides one of the basic necessities of life and affords gainful employment to millions of people. Over the last few years, this vital industry has been passing through difficult times. Some mills have already had to close down and the continuing economic operation of many others is beset with many difficulties. These difficulties have been aggravated in many cases by the heavy burden of past debts. The taking over of the management of these mills for a limited time and then restoring them to original owners has not remedied the situation. Steps are, therefore, necessary to bring about a degree of rationalisation of the financial and managerial structure of such units with a view to their rehabilitation, so that production and employment may not suffer."

Textile industry is also among the industries, included in the First Schedule to the IDR Act.

52. The Amendment Act 72 of 1971 inserted Section 18-AA in the original IDR Act. The material part of the Statement of Objects and Reasons for introducing this Bill of 1971 published in the *Gazette of India Extraordinary*, is as follows:

> "The industries included in the First Schedule ... not only substantially contribute to the Gross National Product of the country, but also afford gainful employment to millions of people. For diverse reasons a number of industrial undertakings engaged in these industries have had to close down and the continuing economic operation of many others is beset with serious difficulties affecting industrial production and employment.... During the period of take over Government has to invest public funds in such undertakings and it must be able to do so with a measure of confidence about the continued efficient management of the undertaking at the end of the period of take over. In order to ensure that at the end of the period of take over by Government, the industrial undertaking is not returned to the same hands which were responsible for its earlier misfortune, it has been provided in the Bill that in relation to an undertaking taken over by them, Government will have the power to move for (i) the sale of the undertaking at a reserve price or higher (Government purchasing it at the reserve price if no offer at or above the reserve price is received), action being taken simultaneously for the winding up of the Company owning

> the industrial undertaking; or (ii) the reconstruction of the Company owning the industrial undertaking with a view to giving the Government a controlling interest in it.... With a view to ensuring speedy action by Government, it has been provided in the Bill that if the Government has evidence to the effect that the assets of the Company owning the industrial undertaking are being frittered away or the undertaking has been closed for a period not less than three months and such closure is prejudicial to the concerned scheduled industry and that the financial condition of the Company owning the industrial undertaking and the condition of the plant and machinery installed in the undertaking is such that it is possible to restart the undertaking and such restarting is in the public interest, Government may take over the management without an investigation." (emphasis added)

53. With the aforesaid objects in view, Section 18-AA was inserted by the Amendment Act 72 of 1971. The marginal heading of the section is to the effect: "*Power to take over industrial undertakings without investigation under certain circumstances"*. This marginal heading, it will be seen, accords with the Objects and Reasons extracted above.

54. A comparison of the provisions of Section 18-A(1)(*b*) and Section 18-AA(l)(*a*) would bring out two main points of distinction: *First*, action under Section 18-A(1)(*b*) can be taken *only after an investigation* had been made under Section 15; while under Section 18-AA(l)(*a*) or (*b*) action can be taken *without such investigation.* The language, scheme and setting of Section 18-AA read in the light of the Objects and Reasons for enacting this provision make this position clear beyond doubt. *Second*, before taking action under Section 18-A(1)(*b*), the Central Government has to form an opinion on the basis of the investigation conducted under Section 15, in regard to the existence of the objective fact, namely: that the industrial undertaking is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest; while under Section 18-AA(l)(*a*) the Government has to satisfy itself that the persons in charge of the undertaking have brought about a situation likely to cause fall in production, by committing any of the three kinds of acts specified in that provision. This shows that the preliminary objective fact attributable to the persons in charge of the management or affairs of the undertaking, on the basis of which action may be taken under Section 18-A(1)(*b*), is of far wider amplitude than the circumstances, the existence of which is a sine qua non for taking action under Section 18-AA(1). The phrase "highly detrimental to the scheduled industry or public interest" in Section 18-A is capable of being construed to cover a large variety of acts or things which may be considered wrong with the manner of running the industry by the management. In contrast with it, action under Section 18-AA(l)(*a*) can be taken only if the Central Government is satisfied with regard to the existence of the twin conditions specifically mentioned therein, on the basis of evidence in its possession.

55. From an analysis of Section 18-AA(l)(*a*), it will be clear that as a necessary preliminary to the exercise of the power thereunder, the Central Government must be satisfied "from documentary or other evidence in its possession" in regard to the coexistence of two circumstances:

> "(i) that the persons in charge of the industrial undertaking have by committing any of these acts, namely, reckless investments, or creation of incumbrances on the assets of industrial undertaking, or by diversion of funds, brought about a situation, which is likely

to affect the production of the article manufactured or produced in the industrial undertaking, and

(ii) that immediate action is necessary to prevent such a situation."

56. Speaking for the High Court (majority), the learned Chief Justice (Deshpande, C.J.) has observed that only with regard to the fulfilment of condition (*i*) the satisfaction of the Government is required to be objectively reached on the basis of relevant evidence in its possession; while with regard to condition (*ii*), that is, the need for immediate action, it is purely subjective, and therefore, the satisfaction of the Government with regard to the immediacy of the situation is outside the scope of judicial review.

59. It cannot be laid down as a general proposition that whenever a statute confers a power on an administrative authority and makes the exercise of that power conditional on the formation of an opinion by that authority in regard to the existence of an immediacy, its opinion in regard to that preliminary fact is not open to judicial scrutiny at all. While it may be conceded that an element of subjectivity is always involved in the formation of such an opinion, but, as was pointed out by this Court in *Barium Chemicals*[232], the existence of the circumstances from which the inferences constituting the opinion, as the sine qua non for action, are to be drawn, must be dimonstrable, and the existence of such "circumstances", if questioned, must be proved at least prima facie.

60. Section 18-AA(l)(*a*), in terms, requires that the satisfaction of the Government in regard to the existence of the circumstances or conditions precedent set out above, including the necessity of taking immediate action, must be based *on evidence* in the possession of the Government. If the satisfaction of the Government in regard to the existence of any of the conditions, (*i*) and (*ii*), is based on no evidence, or on irrelevant evidence or on an extraneous consideration, it will vitiate the order of "take-over", and the court will be justified in quashing such an illegal order on judicial review in appropriate proceedings. Even where the statute conferring the discretionary power does not, in terms, regulate or hedge around the formation of the opinion by the statutory authority in regard to the existence of preliminary jurisdictional facts with express checks, the authority has to form that opinion reasonably like a reasonable person.

61. While spelling out by a construction of Section 18-AA(1)(*a*) the proposition that the opinion or satisfaction of the Government in regard to the necessity of taking immediate action could not be the subject of judicial review, the High Court (majority) relied on the analogy of Section 17 of the Land Acquisition Act, under which, according to them, the Government's opinion in regard to the existence of the urgency is not justiciable. This analogy holds good only up to a point. Just as under Section 18-AA of the IDR Act, in case of a genuine "immediacy" or imperative necessity of taking immediate action to prevent fall in production and consequent risk of imminent injury to paramount public interest, an order of "take-over" can be passed without prior, time-consuming investigation under Section 15 of the Act, under Section 17(1) and (4) of the Land Acquisition Act, also, the preliminary inquiry under Section 5-A can be dispensed with in case of an urgency. It is true that the grounds on which the Government's opinion as to the existence of the urgency can be challenged are not unlimited, and the power conferred on the Government under Section 17(4) of that Act has been formulated in subjective terms; nevertheless, in cases, where an

issue is raised, that the Government's opinion as to urgency has been formed in a manifestly arbitrary or perverse fashion without regard to patent, actual and undeniable facts, or that such opinion has been arrived at on the basis of irrelevant considerations or no material at all, or on materials so tenuous, flimsy, slender or dubious that no reasonable man could reasonably reach that conclusion, the court is entitled to examine the validity of the formation of that opinion by the Government in the context and to the extent of that issue.

66. For the reasons already stated, it is not possible to subscribe to the proposition propounded by the High Court that the satisfaction of the Central Government in regard to condition (*ii*), i.e. the existence of "immediacy", though subjective, is not open to judicial review at all.

67. From a plain reading of Section 18-AA, it is clear that it does not expressly in unmistakable and unequivocal terms exclude the application of the audi alteram partem rule at the pre-decisional stage. The question, therefore, is narrowed down to the issue, whether the phrase "that immediate action is necessary" excludes absolutely, by inevitable implication, the application of this cardinal canon of fair play *in all cases* where Section 18-AA(l)(*a*) may be invoked. In our opinion, for reasons that follow, the answer to this question must be in the negative.

68. Firstly, as rightly pointed out by Shri Nariman, the expression "immediate action" in the said phrase, is to be construed in the light of the marginal heading of the section, its context and the Objects and Reasons for enacting this provision. Thus construed, the expression only means "without prior investigation" under Section 15. Dispensing with the requirement of such prior investigation does not necessarily indicate an intention to exclude the application of the fundamental principles of natural justice or the duty to act fairly by affording to the owner of the undertaking likely to be affected, at the pre-decisional stage, wherever practicable, a short-measure fair hearing adjusted, attuned and tailored to the exigency of the situation.

> [The court took note of decisions in Ambalal M. Shah v. Hathisingh Manufacturing-Co. Ltd.; and Keshav Mills Co. Ltd. v. Union of India. After noticing the object, purpose and content of the relevant provisions, the judgment proceeded].

73. It will be seen from what has been extracted above that in *Keshav Mills case*[37] this Court did not lay it down as an invariable rule that where a full investigation after notice to the owner of the industrial undertaking has been held under Section 15, the owner is never entitled on grounds of natural justice, to a copy of the investigation report and to an opportunity of making a representation about the action that the Government proposes to take on the basis of that report. On the contrary, it was clearly said that this rule of natural justice will apply at that stage in cases "where unless the report is given the party concerned cannot make any effective representation about the action that Government takes or proposes to take on the basis of that report". It was held that the application or non-application of this rule depends on the facts and circumstances of the particular case. In the facts of that case, it was found that the non-disclosure of the investigation report had not caused any prejudice whatever because the Company were "aware all along that as a result of the report of the investigating committee the Company's undertaking was going to be taken (over) by the

Government", and had full opportunities, to make all possible representations before the Government against the proposed take over of the mill.

74. Shri Sorabjee submitted that the observations made by this Court in *Keshav Mills case*[1] to the effect, that in certain cases even at the post-investigation stage before making an order of take over under Section 18-A, it may be necessary to give another opportunity to the affected owner of the undertaking to make a representation, appear to be erroneous. The argument is that the legislature has provided in Sections 15 and 18-A of the Act and Rule 5 framed thereunder, its measure of this principle of natural justice and the stage at which it has to be observed. The High Court, therefore, was not right in engrafting any further application of the rule of natural justice at the post-investigation stage. According to the learned Solicitor-General for the decision of the case, it was not necessary to go beyond the ratio of ***Ambalal M. Shah* v. *Hathisingh Manufacturing Co. Ltd***. which was followed in ***Keshav Mills*** case.

75. In our opinion, the observations of this Court in ***Keshav Mills*** in regard to the application of this rule of natural justice at the post-investigation stage, cannot be called obiter dicta. There is nothing in those observations, which can be said to be inconsistent with the ratio decidendi of ***Ambalal*** case. The main ground on which the order of take over under Section 18-A was challenged in ***Ambalal*** case was that on a proper construction of Section 18-A, the Central Government had the right to make the order under that Section on the ground that the Company was being managed in a manner highly detrimental to public interest, only where the investigation made under Section 15 was initiated on the basis of the opinion as mentioned in Section 15(b), whereas in the present case (i.e. ***Ambalal*** case), the investigation ordered by the Central Government was initiated on the formation of an opinion as mentioned in clause (*a*)(*z*) of Section 15. It was urged that, in fact, the committee appointed to investigate had not directed its investigation into the question whether the industrial undertaking was being managed in the manner mentioned above. The High Court came to the conclusion that on a correct construction of Section 18-A(1)(b) it was necessary before any order could be made thereunder that the investigation should have been initiated on the basis of the opinion mentioned in Section 15(*b*) of the Act. It also accepted the petitioner contention that no investigation had, in fact, been held into the question whether the undertaking was being managed in a manner highly detrimental to public interest.

76. On appeal by special leave, this Court reversed the decision of the High Court, and held that the words used by the legislature in Section 18-A(1)(b) "in respect of which an investigation has been made under Section 15" could not be cut down by the restricting phrase "based on an opinion that the industrial undertaking is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest"; that Section 18-A(1)(b) empowers the Central Government to authorise a person to take over the management of an industrial undertaking if the one condition of an investigation made under Section 15 had been fulfilled irrespective of on what opinion that investigation was initiated and the further condition is fulfilled that the Central Government was of opinion that such undertaking was being managed in a manner highly detrimental to the scheduled industry concerned or to public interest. In this Court, it was urged on behalf of the Company that absurd results would follow if the words "investigation has been made under Section 15" are held to include investigation based on any of the opinions mentioned in Section 15(*a*). Asked

to mention what the absurd results would be, the counsel could only say that an order under Section 18-A(1)(b) would be unfair and contrary to natural justice in such cases, as the owner of an industrial undertaking would have no notice that the quality of management was being investigated. The court found no basis for this assumption because in its opinion, the management could not but be aware that investigation would be directed in regard to the quality of management, also. It is to be noted that the question of natural justice was casually and half-heartedly raised in a different context, as a last resort. It was negatived because *in the facts and circumstances of that case*, the Company was fully aware that the quality of the management was also being inquired into and it had full opportunity to meet the allegations against it during investigation.

77. The *second* reason - which is more or less a facet of the *first* - for holding that the mere use of the word "immediate" in the phrase "immediate action is necessary", does not necessarily and absolutely exclude the prior application of the audi alteram partem rule, is that immediacy or urgency requiring swift action is a situational fact having a direct nexus with the likelihood of adverse effect on fall in production. And, such likelihood and the urgency of action to prevent it, may vary greatly in degree. The words "likely to affect. . .production" used in Section 18-AA(1)(*a*) are flexible enough to comprehend a wide spectrum of situations ranging from the one where the likelihood of the happening of the apprehended event is imminent to that where it may be reasonably anticipated to happen sometime in the near future. Cases of extreme urgency where action under Section 18-AA(l)(*a*) to prevent fall in production and consequent injury to public interest, brooks absolutely no delay, would be rare. In most cases, where the urgency is not so extreme, it is practicable to adjust and strike a balance between the competing claims of hurry and hearing.

78. The audi alteram partem rule, as already pointed out, is a very flexible, malleable and adaptable concept of natural justice. To adjust and harmonise the need for speed and obligation to act fairly, it can be modified and the measure of its application cut short in reasonable proportion to the exigencies of the situation. Thus, in the ultimate analysis, the question (as to what extent and in what measure), this rule of fair hearing will apply at the pre-decisional stage will depend upon the degree of urgency, if any, evident from the facts and circumstances of the particular case.

79. In the instant case, so far as Kanpur Unit is concerned, it was lying closed for more than three months before the passing of the impugned order. There was no "immediacy" in relation to that unit, which could absolve the Government from the obligation of complying fully with the audi alteram partem rule at the pre-decisional or pre-take over stage. As regards the other five units of the Company, the question whether on the basis of the evidential matter before the Government at the time of making the impugned order, any reasonable person could reasonably form an opinion about a likelihood of fall in production and the urgency of taking immediate action, will not be discussed here. For the purpose of the question under consideration we shall assume that there was a likelihood of fall in production. Even so, the undisputed facts and figures of production of 2 or 3 years preceding the takeover, relating to these units, show that on the average, production in these units has remained fairly constant. Rather, in some of these units, an upward trend in production was discernible. Be that as it may, the likelihood of fall in production or adverse effect on production in these five units,

could not, by any stretch of prognostication or feat of imagination, be said to be imminent, or so urgent that it could not permit the giving of even *a minimal but real hearing* to the Company before taking over these units. There was an interval of about six weeks between the Official Group's Report, dated February 16, 1978 and the passing of the impugned order, dated April 13, 1978. There was thus sufficient time available to the Government to serve a copy of that report on the appellant Company and to give them a short-measure opportunity to submit their reply and representation regarding the findings and recommendations of the Group Officers and the proposed action under Section 18-AA(1).

80. The *third* reason for our forbearance to imply the exclusion of the audi alteram partem rule from the language of Section 18-AA(l)(*a*) is, that although the power thereunder is of a drastic nature and the consequences of a take over are far-reaching and its effect on the rights and interests of the owner of the undertaking is grave and deprivatory, yet the Act does not make any provision giving a full right of a remedial hearing equitable to a full right of appeal, at the post-decisional stage.

81. The High Court seems to be of the view that Section 18-F gives a right of full post-decisional remedial hearing to the aggrieved party. Shri Soli Sorabjee also elaborately supported that view of the High Court. In the alternative, the learned counsel has committed himself on behalf of his client, to the position, that the Central Government will, if required, give the Company a full and fair hearing on merits, including an opportunity to show that the impugned order was not made on adequate or valid grounds.

82. Shri Nariman on the other hand contends — and we think rightly — that the so-called right of a post-decisional hearing available to the aggrieved owner of the undertaking under Section 18-F is illusory as in its operation and effect the power of review, if any, conferred thereunder, is prospective, and not retroactive, being strictly restricted to and dependent upon the post-take over circumstances.

83. By virtue of sub-section (2) of Section 18-AA, the reference to Section 18-A in Section 18-F will be construed as a reference to Section 18-AA, also. The power of cancellation under Section 18-F can be exercised only on any of these grounds: (*i*) "that the purpose of the order made under Section 18-A has been fulfilled", or (*ii*) "that for any other reason it is not necessary that the order should remain in force". These "grounds" and the language in which they are couched is clear enough to show that the cancellation contemplated thereunder cannot have the effect of annulling, rescinding or obliterating; the order of take over with retroactive force; it can have only a prospective effect. Section 18-F embodies a principle analogous to that in Section 21 of the General Clauses Act. The first "ground" in Section 18-F for the exercise of the power, obviously does not cover a review of the merits or circumstances preceding and existing at the date of passing the order of 'take over' under Section 18-AA(1). The words "for any other reason" if read in isolation, no doubt, appear to be of wide amplitude. But their ambit has been greatly cut down and circumscribed by the contextual phrase "no longer necessary that it should remain in force". Construed in this context, the expression "for any other reason" cannot include a ground that the very order of take over was invalid or void ab initio. Thus, the post-decisional hearing available to the aggrieved owner of the undertaking is not an appropriate substitute for a fair hearing at the pre-decisional stage. The Act does not provide any adequate remedial hearing

or right of redress to the aggrieved party even where his undertaking has been arbitrarily taken over on insufficient grounds. Rather, the plight of the aggrieved owner is accentuated by the provision in Section 18-D which disentitles him and other persons whose offices are lost or whose contract of management is terminated as a result of the "take over", from claiming any compensation whatever for such loss or termination.

84. Before we conclude the discussion on this point, we may notice one more argument that has been advanced on behalf of the respondents. It is argued that this was a case where a prior hearing to the Company could only be a useless formality because the impugned action has been taken on the basis of evidence, consisting of the balance sheet, account books and other records of the Company itself, the correctness of which could not have been disputed by the Company. On these premises, it is submitted that non-observance of the rule of audi alteram partem would not prejudice the Company, and thus make no difference.

85. The contention does not appear to be well founded. Firstly, this documentary evidence, at best, shows that the Company was in debt and the assets of some of its "units" had been hypothecated or mortgaged as security for those debts. Given an opportunity the Company might have explained that as a result of this indebtedness there was no likelihood of fall in production, which is one of the essential conditions in regard to which the Government must be satisfied before taking action under Section 18A-A(l)(*a*). Secondly, what the rule of natural justice required in the circumstances of this case, was not only that the Company should have been given an opportunity to explain the evidence against it, but also an opportunity to be informed of the proposed action of take over and to represent why it be not taken.

86. In the renowned case ***Ridge* v. *Baldwin,*** it was contended before the House of Lords that since the appellant police officer had convicted himself out of his own mouth, a prior hearing to him by the Watch Committee could not have made any difference; that on the undeniable facts of that case, no reasonable body of men could have reinstated the appellant. This contention was rejected by the House of Lords for the reason that if the Watch Committee had given the police officer a prior hearing they would not have acted wrongly or unreasonably if they had in the exercise of their discretion decided to take a more lenient course than the ones they had adopted.

90. Observance of this fundamental principle is necessary if the courts and the tribunals and the administrative bodies are to command public confidence in the settlement of disputes or in taking quasi-judicial or administrative decisions affecting civil rights or legitimate interests of the citizens.

91. In concluding the discussion in regard to this aspect of the matter, we can do no better than reiterate what was said by one of us (Chinnappa Reddy, J.) in ***S.L. Kapoor* v. *Jagmohan***:

> "In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who had been denied justice is not prejudiced."

92. We, therefore, overrule this last contention.

93. In sum, for all the reasons aforesaid, we are of the view that it is not reasonably possible to construe Section 18-AA(1) as universally excluding, either expressly or by inevitable intendment, the application of the audi alteram partem rule of natural justice at the pre-take over stage, regardless of the facts and circumstances of the particular case. In the circumstances of the instant case, in order to ensure fair play in action it was imperative for the Government to comply substantially with this fundamental rule of prior hearing before passing the impugned order. We therefore, accept the two-fold proposition posed and propounded by Shri Nariman.

94. The further question to be considered is: What is the effect of the non-observance of this fundamental principle of fair play? Does the non-observance of the audi alteram partem rule, which in the quest of justice under the rule of law, has been considered universally and most spontaneously acceptable principle, render an administrative decision having civil consequences, void or voidable? In England, the outfall from the watershed decision, ***Ridge* v. *Baldwin*** brought with it a rash of conflicting opinion on this point. The majority of the House of Lords in ***Ridge* v. *Baldwin*** held that the non-observance of this principle, had rendered the dismissal of the Chief Constable void. The rationale of the majority view is that where there is a duty to act fairly, just like the duty to act reasonably, it has to be enforced as an implied statutory requirement, so that failure to observe it means that the administrative act or decision was outside the statutory power, unjustified by law, and therefore ultra vires and void. In India, this Court has consistently taken the view that a quasi-judicial or administrative decision rendered in violation of the audi alteram partem rule, wherever it can be read as an implied requirement of the law, is null and void In the facts and circumstances of the instant ease, there has been a non-compliance with such implied requirement of the audi alteram partem rule of natural justice at the pre-decisional stage. The impugned order therefore, could be struck down as invalid on that score alone. But we refrain from doing so, because the learned Solicitor-General in all fairness, has both orally and in his written submissions dated August 28, 1979, committed himself to the position that under Section 18-F, the Central Government in exercise of its curial functions, is bound to give the affected owner of the undertaking taken-over, a "full and effective hearing on all aspects touching the validity and/or correctness of the order and/or action/of take over", within a reasonable time after the take over. The learned Solicitor-General has assured the court that such a hearing will be afforded to the appellant Company if it approaches the Central Government for cancellation of the impugned order. It is pointed out that this was the conceded position in the High Court that the aggrieved owner of the undertaking had a right to such a hearing.

95. In view of this commitment/or concession fairly made by the learned Solicitor-General, we refrain from quashing the impugned order, and allowing Civil Appeal No. 1629 of 1979 send the case back to the Central Government with the direction that it shall, within a reasonable time, preferably within three months from today, give a full, fair and effective hearing to the aggrieved owner of the undertaking i.e. the Company, on all aspects of the matter, including those touching the validity and/or correctness of the impugned order and or action of take over and then after a review of all the relevant materials and circumstances including those obtaining on the date of the impugned order, shall take such fresh decision, and/or such remedial action as may be necessary, just, proper and in accordance with law.

COMPETITION ACT, 2002

Competition Commission of India v. *Steel Authority of India Ltd. & Anr.*(2010)

[Jindal Steel and Poers Ltd, the informant, invoked the provisions of Section 19 read with Section 26 (1) of the Act by providing information to the Commission alleging that Steel Authority of India entered into an exclusive supply agreement with Indian Railways for supply of rails,thereby violating Section 3 and 4 of the Act. The Commission formed the opinion that prima facie a case existed against SAIL and directed the Director General to investigate the matter. SAIL filed an interim reply seeking a hearing before the Commission before any interim order is passed. On reiteration of its earlier orders by the Commission, SAIL challenged the correctness of the directions before the Competition Appellate Tribunal. The Tribunal in its order dated 15th February, 2010*, inter alia,* but significantly held as under:

a) The application of the Commission for impleadment was dismissed, as in the opinion of the Tribunal the Commission was neither a necessary nor a proper party in the appellate proceedings before the Tribunal. Resultantly, the application for vacation of stay also came to be dismissed.

b) It was held that giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review. Thus, the Commission is directed to give reasons while passing any order, direction or taking any decision.

c) The appeal against the order dated 8th December, 2009 was held to be maintainable in terms of Section 53A of the Act. While setting aside the said order of the Commission and recording a finding that there was violation of principles of natural justice, the Tribunal granted further time to SAIL to file reply by 22nd February, 2010 in addition to the reply already filed by SAIL.

This order of the Tribunal dated 15th February, 2010 is impugned in the present appeal].

In order to examine the merit or otherwise of the contentions raised by the respective parties,itwill be appropriate for us to formulate the following points for determination:--

1) Whether the directions passed by the Commission in exercise of its powers under Section 26(1) of the Act forming a *prima facie* opinion would be appealable in terms of Section 53A(1) of the Act?

2) What is the ambit and scope of power vested with the Commission under Section 26(1) of the Act and whether the parties, including the informant or the affected party, are entitled to notice or hearing, as a matter of right, at the preliminary stage of formulating an opinion as to the existence of the *prima facie* case?

3) Whether the Commission would be a necessary, or at least a proper, party in the proceedings before the Tribunal in an appeal preferred by any party?

4) At what stage and in what manner the Commission can exercise powers vested in it under Section 33 of the Act to pass temporary restraint orders?

5) Whether it is obligatory for the Commission to record reasons for formation of a *prima facie* opinion in terms of Section 26(1) of the Act?

6) What directions, if any, need to be issued by the Court to ensure proper compliance in regard to procedural requirements while keeping in mind the scheme of the Act and the legislative intent? Also to ensure that the procedural intricacies do not hamper in achieving the object of the Act, i.e., free market and competition**.**

Submissions made and findings in relation to Point No.1

If we examine the relevant provisions of the Act, the legislature, in its wisdom, has used different expressions in regard to exercise of jurisdiction by the Commission. The Commission may issue directions, pass orders or take decisions, as required, under the various provisions of the Act. The object of the Act is demonstrated by the prohibitions contained in Sections 3 and 4 of the Act. Where prohibition under Section 3 relates to anti-competition agreements there Section 4 relates to the abuse of dominant position. The regulations and control in relation to combinations is dealt with in Section 6 of the Act. The power of the Commission to make inquiry into such agreements and the dominant position of an entrepreneur, is set into motion by providing information to the Commission in accordance with the provisions of Section 19 of the Act and such inquiry is to be conducted by the Commission as per the procedure evolved by the legislature under Section 26 of the Act. In other words, the provisions of Sections 19 and 26 are of great relevance and the discussion on the controversies involved in the present case would revolve on the interpretation given by the Court to these provisions. (Refer to Sections 19 and 26 of the Act).

The Tribunal has been vested with the power to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission in exercise of its powers under the provisions mentioned in Section 53A of the Act. The appeals preferred before the Tribunal under Section 53A of the Act are to be heard and dealt with by the Tribunal as per the procedure spelt out under Section 53B of the Act. (Refer to Sections 53A and 53B of the Act).As already noticed, in exercise of its powers, the Commission is expected to form its opinion as to the existence of a *prima facie* case for contravention of certain provisions of the Act and then pass a direction to the Director General to cause an investigation into the matter. These proceedings are initiated by the intimation or reference received by the Commission in any of the manners specified under Section 19 of theAct. At the very threshold, the Commission is to exercise its powers in passing the direction for investigation; or where it finds that there exists no *prima facie* case justifying passing of such a direction to the Director General, it can close the matter and/or pass such orders as it may deem fit and proper. In other words, the order passed by the Commission under Section 26(2) is a final order as it puts an end to the proceedings initiated upon receiving the information in one of the specified modes. This order has been specifically made appealable under Section 53A of the Act. In contradistinction, the direction under Section 26(1) after formation of a *prima facie* opinion is a direction *simpliciter* to cause an investigation into the matter. Issuance of such a direction, at the face of it, is an administrative direction to one of its own wings departmentally and is without entering upon any adjudicatory process. It does not effectively determine any right or obligation of the parties to the *lis*. Closure of the case causes determination of rights and affects a party, i.e. the informant; resultantly, the said party has a right to appeal against such

closure of case under Section 26(2) of the Act. On the other hand, mere direction for investigation to one of the wings of the Commission is akin to a departmental proceeding which does not entail civil consequences for any person, particularly, in light of the strict confidentiality that is expected to be maintained by the Commission in terms of Section 57 of the Act and Regulation 35 of the Regulations.

The provisions of Sections 26 and 53A of the Act clearly depict legislative intent that the framers never desired that all orders, directions and decisions should be appealable to the Tribunal. Once the legislature has opted to specifically state the order, direction and decision, which would be appealable by using clear and unambiguous language, then the normal result would be that all other directions, orders etc. are not only intended to be excluded but, in fact, have been excluded from the operation of that provision.

The objective of the Act is more than clear that the legislature intended to provide a very limited right to appeal. The orders which can be appealed against have been specifically stipulated by unambiguously excluding the provisions which the legislature did not intend to make appealable under the provisions of the Act. It is always expected of the Court to apply plain rule of construction rather than trying to read the words into the statute which have been specifically omitted by the legislature.

Right to appeal is a creation of statute and it does require application of rule of plain construction. Such provision should neither be construed too strictly nor too liberally, if given either of these extreme interpretations, it is bound to adversely affect the legislative object as well as hamper the proceedings before the appropriate forum.

In the case of Maria Cristina De Souza Sadder vs. Amria Zurana Pereira Pinto [(1979) 1 SCC 92], this Court held as under:

> "5 …It is no doubt well-settled that the right of appeal is a substantive right and it gets vested in a litigant no sooner the *lis* is commenced in the Court of the first instance, and such right or any remedy in respect thereof will not be affected by any repeal of the enactment conferring such right unless the repealing enactment either expressly or by necessary implication takes away such right or remedy in respect thereof."

The principle of 'appeal being a statutory right and no party having a right to file appeal except in accordance with the prescribed procedure' is now well settled. The right of appeal may be lost to a party in face of relevant provisions of law in appropriate cases. It being creation of a statute, legislature has to decide whether the right to appeal should be unconditional or conditional. Such law does not violate Article 14 of the Constitution. An appeal to be maintainable must have its genesis in the authority of law.

Thus, it is evident that the right to appeal is not a right which can be assumed by logical analysis much less by exercise of inherent jurisdiction. It essentially should be provided by the law in force. In absence of any specific provision creating a right in a party to file an appeal, such right can neither be assumed nor inferred in favour of the party. A statute is stated to be the edict of Legislature. It expresses the will of Legislature and the function of the Court is to interpret the document according to the intent of those who made it. It is a settled rule of construction of statute that the provisions should be interpreted by applying plain rule

of construction. The Courts normally would not imply anything which is inconsistent with the words expressly used by the statute. In other words, the Court would keep in mind that its function is *jus dicere*, not *jus dare*. The right of appeal being creation of the statute and being a statutory right does not invite unnecessarily liberal or strict construction. The best norm would be to give literal construction keeping the legislative intent in mind.

Recently, again Supreme Court in Grasim Industries Ltd. v. Collector of Customs, Bombay, (2002) 4 SCC 297 has followed the same principle and observed:

> "Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for Court to take upon itself the task of amending or altering the statutory provisions."

Having enacted these provisions, the legislature in its wisdom, made only the order under Section 26(2) and 26(6) appealable under Section 53A of the Act. Thus, it specifically excludes the opinion/decision of the authority under Section 26(1) and even an order passed under Section 26(7) directing further inquiry, from being appealable before the Tribunal. Therefore, it would neither be permissible nor advisable to make these provisions appealable against the legislative mandate. The existence of such excluding provisions, in fact, exists in different statutes. Reference can even be made to the provisions of Section 100A of the Code of Civil Procedure, where an order, which even may be a judgment, under the provisions of the Letters Patent of different High Courts and are appealable within that law, are now excluded from the scope of the appealable orders. In other words, instead of enlarging the scope of appealable orders under that provision, the Courts have applied the rule of plain construction and held that no appeal would lie in conflict with the provisions of Section 100A of the Code of Civil Procedure.

Expressum facit cessare tacitum – Express mention of one thing implies the exclusion of other. (Expression precludes implication). This doctrine has been applied by this Court in various cases to enunciate the principle that expression precludes implication. [Union of India vs. Tulsiram Patel, AIR 1985 SC 1416]. It is always safer to apply plain and primary rule of construction. The first and primary rule of construction is that intention of the legislature is to be found in the words used by the legislature itself.

Applying these principles to the provisions of Section 53A(1)(a), we are of the considered view that the appropriate interpretation of this provision would be that no other direction, decision or order of the Commission is appealable except those expressly stated in Section 53A(1)(a). The maxim *est boni judicis ampliare justiciam, nonjurisdictionem* finds application here. Right to appeal, being a statutory right, is controlled strictly by the provision and the procedure prescribing such a right. To read into the language of Section 53A that every direction, order or decision of the Commission would be appealable will amount to unreasonable expansion of the provision, when the language of Section 53A is clear and unambiguous. Section 53B(1) itself is an indicator of the restricted scope of appeals that shall be maintainable before the Tribunal; it provides that the aggrieved party has a right of appeal against 'any direction, decision or order referred to in Section 53A(1)(a).' If the legislature intended to enlarge the scope and make orders, other than those, specified in Section 53A(1)(a), then the language of Section 53B(1) ought to have been quite distinct from the one

used by the legislature. One of the parties before the Commission would, in any case, be aggrieved by an order where the Commission grants or declines to grant extension of time. Thus, every such order passed by the Commission would have to be treated as appealable as per the contention raised by the respondent before us as well as the view taken by the Tribunal. In our view, such orders cannot be held to be appealable within the meaning and language of Section 53A of the Act and also on the principle that they are not orders which determine the rights of the parties. No appeal can lie against such an order. Still the parties are not remediless as, when they prefer an appeal against the final order, they can always take up grounds to challenge the interim orders/directions passed by the Commission in the memorandum of appeal. Such an approach would be in consonance with the procedural law prescribed in Order XLIII Rule 1A and even other provisions of Code of Civil Procedure. The above approach will subserve the purpose of the Act in the following manner :

First, expeditious disposal of matters before the Commission and the Tribunal is an apparent legislative intent from the bare reading of the provisions of the Act and more particularly the Regulations framed thereunder. Second, if every direction or recording of an opinion are made appealable then certainly it would amount to abuse of the process of appeal. Besides this, burdening the Tribunal with appeals against non-appealable orders would defeat the object of the Act, as a prolonged litigation may harm the interest of free and fair market and economy. Finally, we see no ambiguity in the language of the provision, but even if, for the sake of argument, we assume that the provision is capable of two interpretations then we must accept the one which will fall in line with the legislative intent rather than the one which defeat the object of the Act.

For these reasons, we have no hesitation in holding that no appeal will lie from any decision, order or direction of the Commission which is not made specifically appealable under Section 53A(1)(a) of the Act. Thus, the appeal preferred by SAIL ought to have been dismissed by the Tribunal as not maintainable.

Submissions made and findings in relation to Point Nos.2 & 5

The issue of notice and hearing are squarely covered under the ambit of the principles of natural justice. Thus, it will not be inappropriate to discuss these issues commonly under the same head. The principle of *audi alteram partem,* as commonly understood, means 'hear the other side or hear both sides before a decision is arrived at'. It is founded on the rule that no one should be condemned or deprived of his right even in quasi judicial proceedings unless he has been granted liberty of being heard. In cases of Cooper v. Wands Worth Board of Works [(1863), 14 C.B. (N.S.) 180] and Errington v. Minister of Health, [(1935) 1 KB 249], the Courts in the United Kingdom had enunciated this principle in the early times. This principle was adopted under various legal systems including India and was applied with some limitations even to the field of administrative law. However, with the development of law, this doctrine was expanded in its application and the Courts specifically included in its purview, the right to notice and requirement of reasoned orders, upon due application of mind in addition to the right of hearing. These principles have now been consistently followed in judicial dictum of Courts in India and are largely understood as integral part of principles of natural justice. In other words, it is expected of a tribunal or any quasi judicial body to ensure compliance of these principles before any order adverse to the interest of the party can be

passed. However, the exclusion of the principles of natural justice is also an equally known concept and the legislature has the competence to enact laws which specifically exclude the application of principles of natural justice in larger public interest and for valid reasons. Generally, we can classify compliance or otherwise, of these principles mainly under three categories. First, where application of principles of natural justice is excluded by specific legislation; second, where the law contemplates strict compliance to the provisions of principles of natural justice and default in compliance thereto can result in vitiating not only the orders but even the proceedings taken against the delinquent; and third, where the law requires compliance to these principles of natural justice, but an irresistible conclusion is drawn by the competent court or forum that no prejudice has been caused to the delinquent and the non-compliance is with regard to an action of directory nature. The cases may fall in any of these categories and therefore, the Court has to examine the facts of each case in light of the Act or the Rules and Regulations in force in relation to such a case. It is not only difficult but also not advisable to spell out any straight jacket formula which can be applied universally to all cases without variation.

In light of the above principles, let us examine whether in terms of Section 26(1) of the Act read with Regulations in force, it is obligatory upon the Commission to issue notice to the parties concerned (more particularly the affected parties) and then form an opinion as to the existence of a *prima facie* case, or otherwise, and to issue direction to the Director General to conduct investigation in the matter. At the very outset, we must make it clear that we are considering the application of these principles only in light of the provisions of Section 26(1) and the finding recorded by the Tribunal in this regard. The intimation received by the Commission from any specific person complaining of violation of Section 3(4) read with Section 19 of the Act, sets into the motion, the mechanism stated under Section 26 of the Act. Section 26(1), as already noticed, requires the Commission to form an opinion whether or not there exists a *prima facie* case for issuance of direction to the Director General to conduct an investigation. This section does not mention about issuance of any notice to any party before or at the time of formation of an opinion by the Commission on the basis of a reference or information received by it. Language of Sections 3(4) and 19 and for that matter, any other provision of the Act does not suggest that notice to the informant or any other person is required to be issued at this stage. In contra-distinction to this, when the Commission receives the report from the Director General and if it has not already taken a decision to close the case under Section 26(2), the Commission is not only expected to forward the copy of the report, issue notice, invite objections or suggestions from the informant, Central Government, State Government, Statutory Authorities or the parties concerned, but also to provide an opportunity of hearing to the parties before arriving at any final conclusion under Section 26(7) or 26(8) of the Act, as the case may be. This obviously means that wherever the legislature has intended that notice is to be served upon the other party, it has specifically so stated and we see no compelling reason to read into the provisions of Section 26(1) the requirement of notice, when it is conspicuous by its very absence. Once the proceedings before the Commission are completed, the parties have a right to appeal under Section 53A(1)(a) in regard to the orders termed as appealable under that provision. Section 53B requires that the Tribunal should give, parties to the appeal, notice and an opportunity of being heard before passing orders, as it may deem fit and proper, confirming, modifying or

setting aside the direction, decision or order appealed against. Some of the Regulations also throw light as to when and how notice is required to be served upon the parties including the affected party.

Regulation 14(7) states the powers and functions, which are vested with the Secretary of the Commission to ensure timely and efficient disposal of the matter and for achieving the objectives of the Act. Under Regulation 14(7)(f) the Secretary of the Commission is required to serve notice of the date of ordinary meeting of the Commission to consider the information or reference or document to decide if there exists a *prima facie* case and to convey the directions of the Commission for investigation, or to issue notice of an inquiry after receipt and consideration of the report of the Director General. In other words, this provision talks of issuing a notice for holding an ordinary meeting of the Commission. This notice is intended to be issued only to the members of the Commission who constitute 'preliminary conference' as they alone have to decide about the existence of a *prima facie* case. Then, it has to convey the direction of the Commission to the Director General. After the receipt of the report of the Director General, it has to issue notice to the parties concerned.

Regulation 17(2) empowers the Commission to invite the information provider and ***such other person,*** as is necessary, for the preliminary conference to aid in formation of a *prima facie* opinion, but this power to invite cannot be equated with requirement of statutory notice or hearing. Regulation 17(2), read in conjunction with other provisions of the Act and the Regulations, clearly demonstrates that this provision contemplates to invite the parties for collecting such information, as the Commission may feel necessary, for formation of an opinion by the preliminary conference. Thereafter, an inquiry commences in terms of Regulation 18(2) when the Commission directs the Director General to make the investigation, as desired. Regulation 21(8) also indicates that there is an obligation upon the Commission to consider the objections or suggestions from the Central Government or the State Government or the Statutory Authority or the parties concerned and then Secretary is required to give a notice to fix the meeting of the Commission, if it is of the opinion that further inquiry is called for. In that provision notice is contemplated not only to the respective Governments but even to the parties concerned. The notices are to be served in terms of Regulation 22 which specifies the mode of service of summons upon the concerned persons and the manner in which such service should be effected. The expression '***such other person',*** obviously, would include all persons, such as experts, as stated in Regulation 52 of the Regulations. There is no scope for the Court to arrive at the conclusion that such other person would exclude anybody including the informant or the affected parties, summoning of which or notice to whom, is considered to be appropriate by the Commission. With some significance, we may also notice the provision of Regulation 33(4) of the Regulations, which requires that on being satisfied that the reference is complete, the Secretary shall place it during an ordinary meeting of the Commission and seek necessary instructions regarding the parties to whom the notice of the meeting has to be issued. This provision read with Sections 26(1) and 26(5) shows that the Commission is expected to apply its mind as to whom the notice should be sent before the Secretary of the Commission can send notice to the parties concerned. In other words, issuance of notice is not an automatic or obvious consequence, but it is only upon application of mind by the authorities concerned that notice is expected to be

issued. Regulation 48, which deals with the procedure for imposition of penalty, requires under Sub-Regulation (2) that show cause notice is to be issued to any person or enterprise or a party to the proceedings, as the case may be, under Sub-Regulation (1), giving him not less than 15 days time to explain the conduct and even grant an oral hearing, then alone to pass an appropriate order imposing penalty or otherwise. Issue of notice to a party at the initial stage of the proceedings, which are not determinative in their nature and substance, can hardly be implied; wherever the legislature so desires it must say so specifically. This can be illustrated by referring to the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 under the Customs Tariff Act, 1975. Rule 5(5) provides that while dealing with an application submitted by aggrieved domestic producers accounting for not less than 25% of total production of the like article, the designated authority shall notify the government of exporting country before proceeding to initiate an investigation. Rule 6(1) also specifically requires the designated authority to issue a public notice of the decision to initiate investigation. In other words, notice prior to initiation of investigation is specifically provided for under the Anti-Dumping Rules, whereas, it is not so under the provisions of Section 26(1) of the Act.

Cumulative reading of these provisions, in conjunction with the scheme of the Act and the object sought to be achieved, suggests that it will not be in consonance with the settled rules of interpretation that a statutory notice or an absolute right to claim notice and hearing can be read into the provisions of Section 26(1) of the Act. Discretion to invite, has been vested in the Commission, by virtue of the Regulations, which must be construed in their plain language and without giving it undue expansion. It is difficult to state as an absolute proposition of law that in all cases, at all stages and in all events the right to notice and hearing is a mandatory requirement of principles of natural justice. Furthermore, that noncompliance thereof, would always result in violation of fundamental requirements vitiating the entire proceedings. Different laws have provided for exclusion of principles of natural justice at different stages, particularly, at the initial stage of the proceedings and such laws have been upheld by this Court. Wherever, such exclusion is founded on larger public interest and is for compelling and valid reasons, the Courts have declined to entertain such a challenge. It will always depend upon the nature of the proceedings, the grounds for invocation of such law

and the requirement of compliance to the principles of natural justice in light of the above noticed principles. In the case of Tulsiram Patel (supra), this Court took the view that *audi alteram partem* rule can be excluded where a right to a prior notice and an opportunity of being heard, before an order is passed, would obstruct the taking of prompt action or where the nature of the action to be taken, its object and purpose as well as the scheme of the relevant statutory provisions warrant its exclusion. This was followed with approval and also greatly expanded in the case of Delhi Transport Corporation vs. Delhi Transport Corporation Mazdoor Congress [(1991) Supp1 SCC 600], wherein the Court held that rule of *audi alteram partem* can be excluded, where having regard to the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provisions, fairness in action does not demand its application and even warrants its exclusion.

The exclusion of principles of natural justice by specific legislative provision is not unknown to law. Such exclusion would either be specifically provided or would have to be imperatively inferred from the language of the provision. There may be cases where post decisional hearing is contemplated. Still there may be cases where 'due process' is specified by offering a full hearing before the final order is made. Of course, such legislation may be struck down as offending due process if no safeguard is provided against arbitrary action. It is an equally settled principle that in cases of urgency, a post-decisional hearing would satisfy the principles of natural justice. Reference can be made to the cases of Maneka Gandhi v. Union of India [(1978) 1 SCC 48] and State of Punjab v. Gurdayal [AIR 1980 SC 319]. The provisions of Section 26(1) clearly indicate exclusion of principles of natural justice, at least at the initial stages, by necessary implication. In cases where the conduct of an enterprise, association of enterprises, person or association of persons or any other legal entity, is such that it would cause serious prejudice to the public interest and also violates the provisions of the Act, the Commission will be well within its jurisdiction to pass *ex parte ad interim* injunction orders immediately in terms of Section 33 of the Act, while granting post decisional hearing positively, within a very short span in terms of Regulation 31(2). This would certainly be more than adequate compliance to the principles of natural justice. It is true that in administrative action, which entails civil consequences for a person, the principles of natural justice should be adhered to.

Wherever, this Court has dealt with the matters relating to complaint of violation of principles of natural justice, it has always kept in mind the extent to which such principles should apply. The application, therefore, would depend upon the nature of the duty to be performed by the authority under the statute. Decision in this regard is, in fact, panacea to the rival contentions which may be raised by the parties in a given case. Reference can be made to the judgment of this Court in the case of Canara Bank vs. Debasis Das [(2003) 4 SCC 557]. We may also notice that the scope of duty cast upon the authority or a body and the nature of the function to be performed cannot be rendered nugatory by imposition of unnecessary directions or impediments which are not postulated in the plain language of the section itself. 'Natural justice' is a term, which may have different connotation and dimension depending upon the facts of the case, while keeping in view, the provisions of the law applicable. It is not a codified concept, but are well defined principles enunciated by the Courts. Every quasi judicial order would require the concerned authority to act in conformity with these principles as well as ensure that the indicated legislative object is achieved. Exercise of power should be fair and free of arbitrariness.

Now, let us examine what kind of function the Commission is called upon to discharge while forming an opinion under Section 26(1) of the Act. At the face of it, this is an inquisitorial and regulatory power. A Constitution Bench of this Court in the case of Krishna Swami vs. Union of India [(1992) 4 SCC 605] explained the expression 'inquisitorial'. The Court held that the investigating power granted to the administrative agencies normally is inquisitorial in nature. The scope of such investigation has to be examined with reference to the statutory powers. In that case the Court found that the proceedings, before the High Power Judicial Committee constituted, were neither civil nor criminal but *sui generis.*

The exceptions to the doctrine of *audi alteram partem* are not unknown either to civil or criminal jurisprudence in our country where under the Code of Civil Procedure *ex-parte* injunction orders can be passed by the court of competent jurisdiction while the courts exercising criminal jurisdiction can take cognizance of an offence in absence of the accused and issue summons for his appearance. Not only this, the Courts even record pre-charge evidence in complaint cases in absence of the accused under the provisions of the Code of Criminal Procedure. Similar approach is adopted under different systems in different countries.

The jurisdiction of the Commission, to act under this provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties, i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and therefore, application of *audi alteram partem* is not called for. Formation of a *prima facie* opinion departmentally (Director General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of Section 26(2) of the Act, which order itself is appealable before the Tribunal and only after this stage, there is a specific right of notice and hearing available to the aggrieved/affected party. Thus, keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1), we are of the considered view that the right of notice of hearing is not contemplated under the provisions of Section 26(1) of the Act. However, Regulation 17(2) gives right to Commission for seeking information, or in other words, the Commission is vested with the power of inviting such persons, as it may deem necessary, to render required assistance or produce requisite information or documents as per the direction of the Commission. This discretion is exclusively vested in the Commission by the legislature. The investigation is directed with dual purpose; (a) to collect material and verify the information, as may be, directed by the Commission, (b) to enable the Commission to examine the report upon its submission by the Director General and to pass appropriate orders after hearing the parties concerned. No inquiry commences prior to the direction issued to the Director General for conducting the investigation. Therefore, even from the practical point of view, it will be required that undue time is not spent at the preliminary stage of formation of *prima facie* opinion and the matters are dealt with effectively and expeditiously. We may also usefully note that the functions performed by the Commission under Section 26(1) of the Act are in the nature of preparatory measures in contrast to the decision making process. That is the precise reason that the legislature has used the word ‘direction’ to be issued to the Director General for investigation in that provision and not that the Commission shall take a decision or pass an order directing inquiry into the allegations made in the reference to the Commission. The Tribunal, in the impugned judgment, has taken the view that there is a requirement to record reasons which can be express, or, in any case, followed by necessary implication and therefore, the authority is required to record reasons for coming to the conclusion. The proposition of law whether an administrative or quasi judicial body, particularly judicial courts, should record reasons in support of their decisions or orders is no

more *res integra* and has been settled by a recent judgment of this Court in the case of Assistant Commissioner, C.T.D.W.C. v. M/s Shukla & Brothers [JT 2010 (4) SC 35].

12. At the cost of repetition, we may notice, that this Court has consistently taken the view that recording of reasons is an essential feature of dispensation of justice. A litigant who approaches the Court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements. A judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the Court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher Court in the event of challenge to that judgment…

13. The principle of natural justice has twin ingredients; firstly, the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the given facts and circumstances of the case, vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that the judgment of the Court should meet with this requirement with higher degree of satisfaction. The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of rationality. The distinction between passing of an order by an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orders.

The above reasoning and the principles enunciated, which are consistent with the settled canons of law, we would adopt even in this case. In the backdrop of these determinants, we may refer to the provisions of the Act. Section 26, under its different sub-sections, requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal. Even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the Commission, it is expected that the same would be supported by some reasoning. At the stage of forming a *prima facie* view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that *prima facie* case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as afore-referred. However, other decisions and orders, which are not directions *simpliciter* and determining the rights of the parties, should be well reasoned analyzing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express *prima facie* view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum

reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned. Such an approach can also be justified with reference to Regulation 20(4), which requires the Director General to record, in his report, findings on each of the allegations made by a party in the intimation or reference submitted to the Commission and sent for investigation to the Director General, as the case may be, together with all evidence and documents collected during investigation. The inevitable consequence is that the Commission is similarly expected to write appropriate reasons on every issue while passing an order under Sections 26 to 28 of the Act.

Submissions made and findings in relation to Point No.4

Under this issue we have to discuss the ambit and scope of the powers vested in the Commission under Section 33 of the Act. (Refer to Section 33 of the Act).

A bare reading of the above provision shows that the most significant expression used by the legislature in this provision is 'during inquiry'. 'During inquiry', if the Commission is satisfied that an act in contravention of the stated provisions has been committed, continues to be committed or is about to be committed, it may temporarily restrain any party 'without giving notice to such party', where it deems necessary. The first and the foremost question that falls for consideration is, what is 'inquiry'? The word 'inquiry' has not been defined in the Act, however, Regulation 18(2) explains what is 'inquiry'. 'Inquiry' shall be deemed to have commenced when direction to the Director General is issued to conduct investigation in terms of Regulation 18(2). In other words, the law shall presume that an 'inquiry' is commenced when the Commission, in exercise of its powers under Section 26(1) of the Act, issues a direction to the Director General. Once the Regulations have explained 'inquiry' it will not be permissible to give meaning to this expression contrary to the statutory explanation. Inquiry and investigation are quite distinguishable, as is clear from various provisions of the Act as well as the scheme framed thereunder. The Director General is expected to conduct an investigation ***only*** in terms of the directive of the Commission and thereafter, inquiry shall be deemed to have commenced, which continues with the submission of the report by the Director General, unlike the investigation under the MRTP Act, 1969, where the Director General can initiate investigation *suo moto*. Then the Commission has to consider such report as well as consider the objections and submissions made by other party. Till the time final order is passed by the Commission in accordance with law, the inquiry under this Act continues. Both these expressions cannot be treated as synonymous. They are distinct, different in expression and operate in different areas. Once the inquiry has begun, then alone the Commission is expected to exercise its powers vested under Section 33 of the Act. That is the stage when jurisdiction of the Commission can be invoked by a party for passing of an *ex parte* order. Even at that stage, the Commission is required to record a satisfaction that there has been contravention of the provisions mentioned under Section 33 and that such contravention has been committed, continues to be committed or is about to be committed.

This satisfaction has to be understood differently from what is required while expressing a *prima facie* view in terms of Section 26(1) of the Act. The former is a definite expression of the satisfaction recorded by the Commission upon due application of mind while the latter is a tentative view at that stage. Prior to any direction, it could be a general examination or

enquiry of the information/reference received by the Commission, but after passing the direction the inquiry is more definite in its scope and may be directed against a party. Once such satisfaction is recorded, the Commission is vested with the power and the informant is entitled to claim *ex parte* injunction. The legislature has intentionally used the words not only '*ex parte'* but also 'without notice to such party'. Again for that purpose, it has to apply its mind, whether or not it is necessary to give such a notice. The intent of the rule is to grant *ex parte* injunction, but it is more desirable that upon passing an order, as contemplated under Section 33, it must give a short notice to the other side to appear and to file objections to the continuation or otherwise of such an order. Regulation 31(2) of the Regulations clearly mandates such a procedure. Wherever the Commission has passed interim order, it shall hear the parties 71against whom such an order has been made, thereafter, ***as soon as possible***. The expression '***as soon as possible'*** appearing in Regulation 31(2) has some significance and it will be obligatory upon the fora dealing with the matters to ensure compliance to this legislative mandate. Restraint orders may be passed in exercise of its jurisdiction in terms of Section 33 but it must be kept in mind that the *ex parte* restraint orders can have far reaching consequences and, therefore, it will be desirable to pass such order in exceptional circumstances and deal with these matters most expeditiously. During an inquiry and where the Commission is satisfied that the act has been committed and continues to be committed or is about to be committed, in contravention of the provisions stated in Section 33 of the Act, it may issue an order temporarily restraining the party from carrying on such act, until the conclusion of such inquiry or until further orders, without giving notice to such party where it deems it necessary. This power has to be exercised by the Commission sparingly and under compelling and exceptional circumstances. The Commission, while recording a reasoned order, *inter alia,* should : (a) record its satisfaction (which has to be of much higher degree than formation of a *prima facie* view under Section 26(1) of the Act) in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed; (b) it is necessary to issue order of restraint and (c) from the record before the Commission, there is every likelihood that the party to the *lis* would suffer irreparable and irretrievable damage, or there is definite apprehension that it would have adverse effect on competition in the market. The power under Section 33 of the Act, to pass a temporary restraint order, can only be exercised by the Commission when it has formed *prima facie* opinion and directed investigation in terms of Section 26(1) of the Act, as is evident from the language of this provision read with Regulation 18(2) of the Regulations. It will be useful to refer to the judgment of this Court in the case of Morgan Stanley Mutual Funds v. Kartick Das [(1994) 4 SCC 225], wherein this Court was concerned with Consumer Protection Act 1986, Companies Act 1956 and Securities and Exchange Board of India (Mutual Fund) Regulations, 1993. As it appears from the contents of the judgment, there is no provision for passing *ex-parte* interim orders under the Consumer Protection Act, 1986 but the Court nevertheless dealt with requirements for the grant of an *ad interim* injunction, keeping in mind the expanding nature of the corporate sector as well as the increase in vexatious litigation. The Court spelt out the following principles:

> "36. As a principle, *ex parte* injunction could be granted only under exceptional circumstances. The factors which should weigh with the court in the grant of *ex parte* injunction are—

(a) whether irreparable or serious mischief will ensue to the plaintiff;

(b) whether the refusal or *ex parte* injunction would involve greater injustice than the grant of it would involve;

(c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented;

(d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant *ex parte* injunction;

(e) the court would expect a party applying for *ex parte* injunction to show utmost good faith in making the application;

(f) even if granted, the *ex parte* injunction would be for a limited period of time.

(g) General principles like prima facie case, balance of convenience and irreparable loss would also be considered by the court."

In the case in hand, the provisions of Section 33 are specific and certain criteria have been specified therein, which need to be satisfied by the Commission, before it passes an *ex parte ad interim* order. These three ingredients we have already spelt out above and at the cost of repetition we may notice that there has to be application of mind of higher degree and definite reasons having nexus to the necessity for passing such an order need be stated. Further, it is required that the case of the informant-applicant should also be stronger than a mere *prima facie* case. Once these ingredients are satisfied and where the Commission deems it necessary, it can pass such an order without giving notice to the other party. The scope of this power is limited and is expected to be exercised in appropriate circumstances. These provisions can hardly be invoked in each and every case except in a reasoned manner. Wherever, the applicant is able to satisfy the Commission that from the information received and the documents in support thereof, or even from the report submitted by the Director General, a strong case is made out of contravention of the specified provisions relating to anti-competitive agreement or an abuse of dominant position and it is in the interest of free market and trade that injunctive orders are called for, the Commission, in its discretion, may pass such order *ex parte* or even after issuing notice to the other side. For these reasons, we may conclude that the Commission can pass *ex parte ad interim* restraint orders in terms of Section 33, only after having applied its mind as to the existence of a *prima facie* case and issue direction to the Director General for conducting an investigation in terms of Section 26(1) of the Act. It has the power to pass *ad interim ex parte* injunction orders, but only upon recording its due satisfaction as well as its view that the Commission deemed it necessary not to give a notice to the other side. In all cases where *ad interim ex parte* injunction is issued, the Commission must ensure that it makes the notice returnable within a very short duration so that there is no abuse of the process of law and the very purpose of the Act is not defeated.

Submissions made and findings in relation to Point No.6

In light of the above discussion, the next question that we are required to consider is, whether the Court should issue certain directions while keeping in mind the scheme of the Act, legislative intent and the object sought to be achieved by enforcement of these provisions. We

have already noticed that the principal objects of the Act, in terms of its Preamble and Statement of Objects and Reasons, are to eliminate practices having adverse effect on the competition, to promote and sustain competition in the market, to protect the interest of the consumers and ensure freedom of trade carried on by the participants in the market, in view of the economic developments in the country. In other words, the Act requires not only protection of free trade but also protection of consumer interest. The delay in disposal of cases, as well as undue continuation of interim restraint orders, can adversely and prejudicially affect the free economy of the country. Efforts to liberalize the Indian Economy to bring it at par with the best of the economies in this era of globalization would be jeopardised if time bound schedule and, in any case, expeditious disposal by the Commission is not adhered to. The scheme of various provisions of the Act which we have already referred to including Sections 26, 29, 30, 31, 53B(5) and 53T and Regulations 12, 15, 16, 22, 32, 48 and 31 clearly show the legislative intent to ensure time bound disposal of such matters. The Commission performs various functions including regulatory, inquisitorial and adjudicatory. The powers conferred by the Legislature upon the Commission under Sections 27(d) and 31(3) are of wide magnitude and of serious ramifications. The Commission has the jurisdiction even to direct that an agreement entered into between the parties shall stand modified to the extent and in the manner, as may be specified. Similarly, where it is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination, the Commission is empowered to direct such modification. These powers of the Commission, read with provisions mentioned earlier, certainly require issuance of certain directions in order to achieve the object of the Act and to ensure its proper implementation. The power to restructure the agreement can be brought into service and matters dealt with expeditiously, rather than passing of *ad interim* orders in relation to such agreements, which may continue for indefinite periods. To avoid this mischief, it is necessary that wherever the Commission exercises its jurisdiction to pass *ad interim* restraint orders, it must do so by issuing notices for a short date and deal with such applications expeditiously. Order XXXIX, Rules 3 and 3A of the Code of Civil Procedure also have similar provisions. Certain procedural directions will help in avoiding prejudicial consequences, against any of the parties to the proceedings and the possibility of abuse of jurisdiction by the parties can be eliminated by proper exercise of discretion and for valid reasons. Courts have been issuing directions in appropriate cases and wherever the situation has demanded so. Administration of justice does not depend on individuals, but it has to be a collective effort at all levels of the judicial hierarchy, i.e. the hierarchy of the Courts or the for a before whom the matters are *sub-judice*, so that the persons awaiting justice can receive the same in a most expeditious and effective manner. The approach of the Commission even in its procedural matters, therefore, should be macro level rather than micro level. It must deal with all such references or applications expeditiously in accordance with law and by giving appropriate reasons. Thus, we find it necessary to issue some directions which shall remain in force till appropriate regulations in that regard are framed by the competent authority.

CONCLUSION AND DIRECTIONS

Having discernibly stated our conclusions/ answers in the earlier part of the judgment, we are of the considered opinion that this is a fit case where this Court should also issue certain directions in the larger interest of justice administration. The scheme of the Act and the Regulations framed thereunder clearly demonstrate the legislative intent that the investigations and inquiries under the provisions of the Act should be concluded as expeditiously as possible. The various provisions and the Regulations, particularly Regulations 15 and 16, direct conclusion of the investigation/inquiry or proceeding within a "reasonable time". The concept of "reasonable time" thus has to be construed meaningfully, keeping in view the object of the Act and the larger interest of the domestic and international trade. In this backdrop, we are of the considered view that the following directions need to be issued:

A) Regulation 16 prescribes limitation of 15 days for the Commission to hold its first ordinary meeting to consider whether *prima facie* case exists or not and in cases of alleged anti-competitive agreements and/or abuse of dominant position, the opinion on existence of *prima facie* case has to be formed within 60 days. Though the time period for such acts of the Commission has been specified, still it is expected of the Commission to hold its meetings and record its opinion about existence or otherwise of a *prima facie* case within a period much shorter than the stated period.

B) All proceedings, including investigation and inquiry should be completed by the Commission/Director General most expeditiously and while ensuring that the time taken in completion of such proceedings does not adversely affect any of the parties as well as the open market in purposeful implementation of the provisions of the Act.

C) Wherever during the course of inquiry the Commission exercises its jurisdiction to pass interim orders, it should pass a final order in that behalf as expeditiously as possible and in any case not later than 60 days.

D) The Director General in terms of Regulation 20 is expected to submit his report within a reasonable time. No inquiry by the Commission can proceed any further in absence of the report by the Director General in terms of Section 26(2) of the Act. The reports by the Director General should be submitted within the time as directed by the Commission but in all cases not later than 45 days from the date of passing of directions in terms of Section 26(1) of the Act.

E) The Commission as well as the Director General shall maintain complete 'confidentiality' as envisaged under Section 57 of the Act and Regulation 35 of the Regulations. Wherever the 'confidentiality' is breached, the aggrieved party certainly has the right to approach the Commission for issuance of appropriate directions in terms of the provisions of the Act and the Regulations in force.

In our considered view the scheme and essence of the Act and the Regulations are clearly suggestive of speedy and expeditious disposal of the matters. Thus, it will be desirable that the Competent Authority frames Regulations providing definite time frame for completion of investigation, inquiry and final disposal of the matters pending before the Commission. Till such Regulations are framed, the period specified by us *supra* shall remain in force and we expect all the concerned authorities to adhere to the period specified. Resultantly, this appeal

is partially allowed. The order dated 15th February, 2010 passed by the Tribunal is modified to the above extent. The Commission shall proceed with the case in accordance with law and the principles enunciated *supra*.

In the circumstances there will be no order as to costs.

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THE CONSUMER PROTECTION ACT, 1986

Lucknow Development Authority v. *M.K. Gupta*

(1994) 1 SCC 243

R.M. SAHAI, J. - The question of law that arises for consideration in these appeals, directed against orders passed by the National Consumer Disputes Redressal Commission (referred hereinafter as National Commission), New Delhi is if the statutory authorities such as Lucknow Development Authority or Delhi Development Authority or Bangalore Development Authority constituted under State Acts to carry on planned development of the cities in the State are amenable to Consumer Protection Act, 1986 (hereinafter referred to as 'the Act') for any act or omission relating to housing activity such as delay in delivery of possession of the houses to the allottees, non-completion of the flat within the stipulated time, or defective and faulty construction etc. Another aspect of this issue is if the housing activity carried on by the statutory authority or private builder or contractor came within the purview of the Act only after its amendment by the Ordinance No. 24 in 1993 or the Commission could entertain a complaint for such violations even before.

3. Although the legislation is a milestone in the history of socio-economic legislation and is directed towards achieving public benefit we shall first examine if on a plain reading of the provisions unaided by any external aid of interpretation it applies to building or construction activity carried on by the statutory authority or private builder or contractor and extends even to such bodies whose ancillary function is to allot a plot or construct a flat. In other words could the authorities constituted under the Act entertain a complaint by a consumer for any defect or deficiency in relation to construction activity against a private builder or statutory authority. That shall depend on ascertaining the jurisdiction of the Commission. How extensive it is? A National or a State Commission under Sections 21 and 16 and a Consumer Forum under Section 11 of the Act is entitled to entertain a complaint depending on valuation of goods or services and compensation claimed. The nature of 'complaint' which can be filed, according to clause (*c*) of Section 2 of the Act is for unfair trade practice or restrictive trade practice adopted by any trader or for the defects suffered for the goods bought or agreed to be bought and for deficiency in the service hired or availed of or agreed to be hired or availed of, by a 'complainant' who under clause (*b*) of the definition clause means a consumer or any voluntary consumer association registered under the Companies Act, 1956 or under any law for the time being in force or the Central Government or any State Government or where there are one or more consumers having the same interest, then a complaint by such consumers. The right thus to approach the Commission or the Forum vests in consumer for unfair trade practice or defect in supply of goods or deficiency in service. The word 'consumer' is a comprehensive expression. It extends from a person who buys any commodity to consume either as eatable or otherwise from a shop, business house, corporation, store, fair price shop to use of private or public services. In *Oxford Dictionary* a consumer is defined as, "a purchaser of goods or services". In *Black's Law Dictionary* it is explained to mean, "one who consumes. Individuals who purchase, use, maintain, and dispose of products and services. A member of that broad class of people who are affected by pricing policies, financing practices, quality of goods and services, credit reporting, debt collection, and other trade practices for

which state and federal consumer protection laws are enacted." The Act opts for no less wider definition. It is in two parts. The first deals with goods and the other with services. Both parts first declare the meaning of goods and services by use of wide expressions. Their ambit is further enlarged by use of inclusive clause. For instance, it is not only purchaser of goods or hirer of services but even those who use the goods or who are beneficiaries of services with approval of the person who purchased the goods or who hired services are included in it. The legislature has taken precaution not only to define 'complaint', 'complainant', 'consumer' but even to mention in detail what would amount to unfair trade practice by giving an elaborate definition in clause (*r*) and even to define 'defect' and 'deficiency' by clauses (*f*) and (*g*) for which a consumer can approach the Commission. The Act thus aims to protect the economic interest of a consumer as understood in commercial sense as a purchaser of goods and in the larger sense of user of services. The common characteristics of goods and services are that they are supplied at a price to cover the costs and generate profit or income for the seller of goods or provider of services. But the defect in one and deficiency in other may have to be removed and compensated differently. The former is, normally, capable of being replaced and repaired whereas the other may be required to be compensated by award of the just equivalent of the value or damages for loss. 'Goods' have been defined by clause (*i*) and have been assigned the same meaning as in Sale of Goods Act, 1930. It was therefore urged that the applicability of the Act having been confined to moveable goods only a complaint filed for any defect in relation to immoveable goods such as a house or building or allotment of site could not have been entertained by the Commission. The submission does not appear to be well founded. The respondents were aggrieved either by delay in delivery of possession of house or use of substandard material etc. and therefore they claimed deficiency in service rendered by the appellants. Whether they were justified in their complaint and if such act or omission could be held to be denial of service in the Act shall be examined presently but the jurisdiction of the Commission could not be ousted (*sic* merely) because even though it was service it related to immoveable property.

4. What is the meaning of the word 'service'? Does it extend to deficiency in the building of a house or flat? Can a complaint be filed under the Act against the statutory authority or a builder or contractor for any deficiency in respect of such property. The answer to all this shall depend on understanding of the word 'service'. The term has variety of meanings. It may mean any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal, statutory etc. The concept of service thus is very wide. How it should be understood and what it means depends on the context in which it has been used in an enactment.

It is in three parts. The main part is followed by inclusive clause and ends by exclusionary clause. The main clause itself is very wide. It applies to any service made available to potential users. The words 'any' and 'potential' are significant. Both are of wide amplitude. The word 'any' dictionarily means 'one or some or all'. In *Black's Law Dictionary* it is explained thus, "word 'any' has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject-matter of the statute". The use of the word 'any' in the context it has been used in clause (*o*) indicates that it has been used in wider sense extending from one to all. The other word 'potential' is again very wide. In ***Oxford Dictionary*** it is defined as

'capable of coming into being, possibility'. In ***Black's Law Dictionary*** it is defined as "existing in possibility but not in act. Naturally and probably expected to come into existence at some future time, though not now existing; for example, the future product of grain or trees already planted, or the successive future installments or payments on a contract or engagement already made." In other words service which is not only extended to actual users but those who are capable of using it are covered in the definition. The clause is thus very wide and extends to any or all actual or potential users. But the legislature did not stop there. It expanded the meaning of the word further in modern sense by extending it to even such facilities as are available to a consumer in connection with banking, financing etc. Each of these are wide-ranging activities in day to day life. They are discharged both by statutory and private bodies. In absence of any indication, express or implied there is no reason to hold that authorities created by the statute are beyond purview of the Act. When banks advance loan or accept deposit or provide facility of locker they undoubtedly render service. A State Bank or nationalised bank renders as much service as private bank. No distinction can be drawn in private and public transport or insurance companies. Even the supply of electricity or gas which throughout the country is being made, mainly, by statutory authorities is included in it. The legislative intention is thus clear to protect a consumer against services rendered even by statutory bodies. The test, therefore, is not if a person against whom complaint is made is a statutory body but whether the nature of the duty and function performed by it is service or even facility.

5. This takes us to the larger issue if the public authorities under different enactments are amenable to jurisdiction under the Act. It was vehemently argued that the local authorities or government bodies develop land and construct houses in discharge of their statutory function, therefore, they could not be subjected to the provisions of the Act. The learned counsel urged that if the ambit of the Act would be widened to include even such authorities it would vitally affect the functioning of official bodies. The learned counsel submitted that the entire objective of the Act is to protect a consumer against malpractices in business. The argument proceeded on complete misapprehension of the purpose of Act and even its explicit language. In fact the Act requires provider of service to be more objective and caretaking. It is still more so in public services. When private undertakings are taken over by the Government or corporations are created to discharge what is otherwise State's function, one of the inherent objectives of such social welfare measures is to provide better, efficient and cheaper services to the people. Any attempt, therefore, to exclude services offered by statutory or official bodies to the common man would be against the provisions of the Act and the spirit behind it. It is indeed unfortunate that since enforcement of the Act there is a demand and even political pressure is built up to exclude one or the other class from operation of the Act. How ironical it is that official or semi-official bodies which insist on numerous benefits, which are otherwise available in private sector, succeed in bargaining for it on threat of strike mainly because of larger income accruing due to rise in number of consumers and not due to better and efficient functioning claim exclusion when it comes to accountability from operation of the Act. The spirit of consumerism is so feeble and dormant that no association, public or private spirited, raises any finger on regular hike in prices not because it is necessary but either because it has not been done for sometime or because the operational cost has gone up irrespective of the efficiency without any regard to its impact on the common man. In our opinion, the entire

argument found on being statutory bodies does not appear to have any substance. A government or semi-government body or a local authority is as much amenable to the Act as any other private body rendering similar service. Truly speaking it would be a service to the society if such bodies instead of claiming exclusion subject themselves to the Act and let their acts and omissions be scrutinised as public accountability is necessary for healthy growth of society.

6. What remains to be examined is if housing construction or building activity carried on by a private or statutory body was service within the meaning of clause (*o*) of Section 2 of the Act as it stood prior to inclusion of the expression 'housing construction' in the definition of "service" by Ordinance No. 24 of 1993. As pointed out earlier the entire purpose of widening the definition is to include in it not only day to day buying and selling activity undertaken by a common man but even such activities which are otherwise not commercial in nature yet they partake of a character in which some benefit is conferred on the consumer. Construction of a house or flat is for the benefit of person for whom it is constructed. He may do it himself or hire services of a builder or contractor. The latter being for consideration is service as defined in the Act. Similarly when a statutory authority develops land or allots a site or constructs a house for the benefit of common man it is as much service as by a builder or contractor. The one is contractual service and other statutory service. If the service is defective or it is not what was represented then it would be unfair trade practice as defined in the Act. Any defect in construction activity would be denial of comfort and service to a consumer. When possession of property is not delivered within stipulated period the delay so caused is denial of service. Such disputes or claims are not in respect of immoveable property as argued but deficiency in rendering of service of particular standard, quality or grade. Such deficiencies or omissions are defined in sub-clause (*ii*) of clause (*r*) of Section 2 as unfair trade practice. If a builder of a house uses substandard material in construction of a building or makes false or misleading representation about the condition of the house then it is denial of the facility or benefit of which a consumer is entitled to claim value under the Act. When the contractor or builder undertakes to erect a house or flat then it is inherent in it that he shall perform his obligation as agreed to. A flat with a leaking roof, or cracking wall or substandard floor is denial of service. Similarly when a statutory authority undertakes to develop land and frame housing scheme, it, while performing statutory duty renders service to the society in general and individual in particular. The entire approach of the learned counsel for the development authority in emphasising that power exercised under a statute could not be stretched to mean service proceeded on misconception. It is incorrect understanding of the statutory functions under a social legislation. A development authority while developing the land or framing a scheme for housing discharges statutory duty the purpose and objective of which is service to the citizens. As pointed out earlier the entire purpose of widening the definitions is to include in it not only day to day buying of goods by a common man but even such activities which are otherwise not commercial but professional or service-oriented in nature. The provisions in the Acts, namely, Lucknow Development Act, Delhi Development Act or Bangalore Development Act clearly provide for preparing plan, development of land, and framing of scheme etc. Therefore if such authority undertakes to construct building or allot houses or building sites to citizens of the State either as amenity or as benefit then it amounts to rendering of service and will be covered in the expression 'service made available

to potential users'. A person who applies for allotment of a building site or for a flat constructed by the development authority or enters into an agreement with a builder or a contractor is a potential user and nature of transaction is covered in the expression 'service of any description'. It further indicates that the definition is not exhaustive. The inclusive clause succeeded in widening its scope but not exhausting the services which could be covered in earlier part. So any service except when it is free of charge or under a constraint of personal service is included in it. Since housing activity is a service it was covered in the clause as it stood before 1993.

7. In Civil Appeal No. 2954 filed by a builder it was urged that inclusion of 'housing construction' in clause (*o*) and 'avail' in clause (*d*) in 1993 would indicate that the Act as it stood prior to the amendment did not apply to hiring of services in respect of housing construction. Learned counsel submitted that in absence of any expression making the amendment retrospective it should be held to be prospective as it is settled that any law including amendments which materially affect the vested rights or duties or obligations in respect of past transactions should remain untouched. True, the ordinance does not make the definition retrospective in operation. But it was not necessary. In fact it appears to have been added by way of abundant caution as housing construction being service was included even earlier. Apart from that what was the vested right of the contractor under the agreement to construct the defective house or to render deficient service? A legislation which is enacted to protect public interest from undesirable activities cannot be construed in such narrow manner as to frustrate its objective. Nor is there any merit in the submission that in absence of the word 'avail of' in the definition of 'consumer' such activity could not be included in service. A perusal of the definition of 'service' as it stood prior to 1993 would indicate that the word 'facility' was already there. Therefore the legislature while amending the law in 1993 added the word in clause (*d*) to dispel any doubt that consumer in the Act would mean a person who not only hires but avails of any facility for consideration. It in fact indicates that these words were added more to clarify than to add something new.

8. Having examined the wide reach of the Act and jurisdiction of the Commission to entertain a complaint not only against business or trading activity but even against service rendered by statutory and public authorities the stage is now set for determining if the Commission in exercise of its jurisdiction under the Act could award compensation and if such compensation could be for harassment and agony to a consumer. Both these aspects specially the latter are of vital significance in the present day context. Still more important issue is the liability of payment. That is, should the society or the tax payer be burdened for oppressive and capricious act of the public officers or it be paid by those responsible for it. The administrative law of accountability of public authorities for their arbitrary and even ultra vires actions has taken many strides. It is now accepted both by this Court and English Courts that the State is liable to compensate for loss or injury suffered by a citizen due to arbitrary actions of its employees.

Even ***Kasturi Lal Ralia Ram Jain*** v. ***State of U.P.*** [AIR 1965 SC 1039] did not provide any immunity for tortuous acts of public servants committed in discharge of statutory function if it was not referable to sovereign power. Since house construction or for that matter any

service hired by a consumer or facility availed by him is not a sovereign function of the State the ratio of ***Kasturi Lal*** could not stand in way of the Commission awarding compensation.

Under our Constitution sovereignty vests in the people. Every limb of the constitutional machinery is obliged to be people oriented. No functionary in exercise of statutory power can claim immunity, except to the extent protected by the statute itself. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour before authorities created under the statute like the commission or the courts entrusted with responsibility of maintaining the rule of law. Each hierarchy in the Act is empowered to entertain a complaint by the consumer for value of the goods or services and compensation. The word 'compensation' is again of very wide connotation. It has not been defined in the Act. According to dictionary it means, 'compensating or being compensated; thing given as recompense;'. In legal sense it may constitute actual loss or expected loss and may extend to physical, mental or even emotional suffering, insult or injury or loss. Therefore, when the Commission has been vested with the jurisdiction to award value of goods or services and compensation it has to be construed widely enabling the Commission to determine compensation for any loss or damage suffered by a consumer which in law is otherwise included in wide meaning of compensation. The provision in our opinion enables a consumer to claim and empowers the Commission to redress any injustice done to him. Any other construction would defeat the very purpose of the Act. The Commission or the Forum in the Act is thus entitled to award not only value of the goods or services but also to compensate a consumer for injustice suffered by him.

9. Facts in Civil Appeal No. 6237 of 1990 may now be adverted to as it is the only appeal in which the National Commission while exercising its appellate power under the Act not only affirmed the finding of State Commission directing the appellant to pay the value of deficiency in service but even directed to pay compensation for harassment and agony to the respondent. The Lucknow Development Authority with a view to ease the acute housing problem in the city of Lucknow undertook development of land and formed plots of different categories/sizes and constructed dwelling units for people belonging to different income groups. After the construction was complete the authority invited applications from persons desirous of purchasing plots or dwelling houses. The respondent applied on the prescribed form for registration for allotment of a flat in the category of Middle Income Group (MIG) in Gomti Nagar Scheme in Lucknow on cash down basis. Since the number of applicants was more, the authority decided to draw lots in which flat No. II/75 in Vinay Khand-II was allotted to the respondent on April 26, 1988. He deposited a sum of Rs 6132 on July 2, 1988 and a sum of Rs 1,09,975 on July 29, 1988. Since the entire payment was made in July 1988 the flat was registered on August 18, 1988. Thereafter the appellant by a letter dated August 23, 1988 directed its Executive Engineer-VII to hand over the possession of the flat to the respondent. This information was given to him on November 30, 1988, yet the flat was not delivered as the construction work was not complete. The respondent approached the authority but no steps were taken nor possession was handed over. Consequently he filed a complaint before the District Forum that even after payment of entire amount in respect of cash down scheme the appellant was not handing over possession nor they were completing the formalities and the work was still incomplete. The State Commission by its order dated February 15, 1990 directed the appellant to pay 12% annual simple interest upon the deposit

made by the respondent for the period January 1, 1989 to February 15, 1990. The appellant was further directed to hand over possession of the flat without delay after completing construction work up to June 1990. The Commission further directed that if it was not possible for the appellant to complete the construction then it should hand over possession of the flat to the respondent by April 5, 1990 after determining the deficiencies and the estimated cost of such deficient construction shall be refunded to the respondent latest by April 20, 1990. The appellant instead of complying with the order approached the National Commission and raised the question of jurisdiction. It was overruled. And the appeal was dismissed. But the cross-appeal of the respondent was allowed and it was directed that since the architect of the appellant had estimated in October 1989 the cost of completing construction at Rs 44,615 the appellant shall pay the same to the respondent. The Commission further held that the action of the appellant amounted to harassment, mental torture and agony of the respondent, therefore, it directed the appellant to pay a sum of Rs 10,000 as compensation.

10. Who should pay the amount determined by the Commission for harassment and agony, the statutory authority or should it be realised from those who were responsible for it? Compensation as explained includes both the just equivalent for loss of goods or services and also for sufferance of injustice. For instance in Civil Appeal No. ... of 1993 arising out of SLP (Civil) No. 659 of 1991 the Commission directed the Bangalore Development Authority to pay Rs 2446 to the consumer for the expenses incurred by him in getting the lease-cum-sale agreement registered as it was additional expenditure for alternative site allotted to him. No misfeasance was found. The moment the authority came to know of the mistake committed by it, it took immediate action by alloting alternative site to the respondent. It was compensation for exact loss suffered by the respondent. It arose in due discharge of duties. For such acts or omissions the loss suffered has to be made good by the authority itself. But when the sufferance is due to mala fide or oppressive or capricious acts etc. of a public servant, then the nature of liability changes. The Commission under the Act could determine such amount if in its opinion the consumer suffered injury due to what is called misfeasance of the officers by the English Courts. Even in England where award of exemplary or aggravated damages for insult etc. to a person has now been held to be punitive, exception has been carved out if the injury is due to, 'oppressive, arbitrary or unconstitutional action by servants of the Government' (Salmond and Heuston on the *Law of Torts*). Misfeasance in public office is explained by Wade in his book on *Administrative Law* thus:

> Even where there is no ministerial duty as above, and even where no recognised tort such as trespass, nuisance, or negligence is committed, public authorities or officers may be liable in damages for malicious, deliberate or injurious wrong-doing. There is thus a tort which has been called misfeasance in public office, and which includes malicious abuse of power, deliberate maladministration, and perhaps also other unlawful acts causing injury.

The jurisdiction and power of the courts to indemnify a citizen for injury suffered due to abuse of power by public authorities is founded as observed by Lord Hailsham in ***Cassell & Co. Ltd.*** v. ***Broome*** [1972 AC 1027] on the principle that, 'an award of exemplary damages can serve a useful purpose in vindicating the strength of law'. An ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the

rule of law. It acts as a check on arbitrary and capricious exercise of power. In ***Rookes*** v. ***Barnard*** [1964 AC 1129] it was observed by Lord Devlin, 'the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service'. A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it. Compensation or damage as explained earlier may arise even when the officer discharges his duty honestly and bona fide. But when it arises due to arbitrary or capricious behaviour then it loses its individual character and assumes social significance. Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous. Crime and corruption thrive and prosper in the society due to lack of public resistance. Nothing is more damaging than the feeling of helplessness. An ordinary citizen instead of complaining and fighting succumbs to the pressure of undesirable functioning in offices instead of standing against it. Therefore the award of compensation for harassment by public authorities not only compensates the individual, satisfies him personally but helps in curing social evil. It may result in improving the work culture and help in changing the outlook. Wade in his book ***Administrative Law*** has observed that it is to the credit of public authorities that there are simply few reported English decisions on this form of malpractice, namely, misfeasance in public offices which includes malicious use of power, deliberate maladministration and perhaps also other unlawful acts causing injury. One of the reasons for this appears to be development of law which, apart, from other factors succeeded in keeping a salutary check on the functioning in the government or semi-government offices by holding the officers personally responsible for their capricious or even ultra vires action resulting in injury or loss to a citizen by awarding damages against them. Various decisions rendered from time to time have been referred to by Wade on *Misfeasance by Public Authorities*.

11. Today the issue thus is not only of award of compensation but who should bear the brunt. The concept of authority and power exercised by public functionaries has many dimensions. It has undergone tremendous change with passage of time and change in socio-economic outlook. The authority empowered to function under a statute while exercising power discharges public duty. It has to act to subserve general welfare and common good. In discharging this duty honestly and bona fide, loss may accrue to any person. And he may claim compensation which may in circumstances be payable. But where the duty is performed capriciously or the exercise of power results in harassment and agony then the responsibility to pay the loss determined should be whose? In a modern society no authority can arrogate to itself the power to act in a manner which is arbitrary. It is unfortunate that matters which require immediate attention linger on and the man in the street is made to run from one end to other with no result. The culture of window clearance appears to be totally dead. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated and it erodes the credibility in the system. Public administration, no doubt involves a vast amount of administrative discretion which shields the action of administrative authority. But where it is found that exercise of discretion was mala fide and the complainant is entitled to compensation for mental and physical harassment then the officer can no more claim to be under protective cover. When a citizen seeks to recover compensation from a public authority in respect of injuries suffered by him for capricious exercise of power and the National Commission finds it duly proved then it has a statutory obligation to award the same. It was never more necessary than today when even social obligations are regulated by grant of statutory powers. The test of

permissive form of grant is over. It is now imperative and implicit in the exercise of power that it should be for the sake of society. When the court directs payment of damages or compensation against the State the ultimate sufferer is the common man. It is the tax payers' money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law. It is, therefore, necessary that the Commission when it is satisfied that a complainant is entitled to compensation for harassment or mental agony or oppression, which finding of course should be recorded carefully on material and convincing circumstances and not lightly, then it should further direct the department concerned to pay the amount to the complainant from the public fund immediately but to recover the same from those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one functionaries.

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Indian Medical Association v. *V.P. Shantha*

(1995) 6 SCC 651 : AIR 1996 SC 550

S.C. AGRAWAL, J. - 2. These appeals, special leave petitions and the writ petition raise a common question, viz., whether and, if so, in what circumstances, a medical practitioner can be regarded as rendering 'service' under Section 2(1)(*o*) of the Consumer Protection Act, 1986 (hereinafter referred to as 'the Act'). Connected with this question is the question whether the service rendered at a hospital/nursing home can be regarded as 'service' under Section 2(1)(*o*) of the Act. These questions have been considered by various High Courts as well as by the National Consumer Disputes Redressal Commission (hereinafter referred to as 'the National Commission').

3. In ***Dr A.S. Chandra*** **v.** ***Union of India*** [(1992) 1 Andh LT 713 (DB)], a Division Bench of the Andhra Pradesh High Court has held that service rendered for consideration by private medical practitioners, private hospitals and nursing homes must be construed as 'service' for the purpose of Section 2(1)(*o*) of the Act and the persons availing such services are 'consumers' within the meaning of Section 2(1)(*d*) of the Act.

4. In ***Dr C.S. Subramanian*** **v.** ***Kumarasamy*** [(1994) 1 MLJ 438 (DB)], a Division Bench of the Madras High Court has, however, taken a different view. It has been held that the services rendered to a patient by a medical practitioner or by a hospital by way of diagnosis and treatment, both medicinal and surgical, would not come within the definition of 'service' under Section 2(1)(*o*) of the Act and a patient who undergoes treatment under a medical practitioner or a hospital by way of diagnosis and treatment, both medicinal and surgical, cannot be considered to be a 'consumer' within the meaning of Section 2(1)(*d*) of the Act; but the medical practitioners or hospitals undertaking and providing paramedical services of all kinds and categories cannot claim similar immunity from the provisions of the Act and that they would fall, to the extent of such paramedical services rendered by them, within the definition of 'service' and a person availing of such service would be a 'consumer' within the meaning of the Act. CAs Nos. 4664-65 of 1994 and Civil Appeal arising out of SLP (C) No. 21775 of 1994 filed by the complainants and Civil Appeals arising out of SLPs (C) Nos. 18445-73 of 1994 filed by the Union of India are directed against the said judgment of the Madras High Court.

5. The National Commission by its judgment and order in ***Consumer Unity & Trust Society*** **v.** ***State of Rajasthan*** [(1992) 1 CPJ 259 (NC)] has held that persons who avail themselves of the facility of medical treatment in government hospitals are not 'consumers' and the said facility offered in the government hospitals cannot be regarded as service 'hired' for 'consideration'. It has been held that the payment of direct or indirect taxes by the public does not constitute 'consideration' paid for hiring the services rendered in the government hospitals. It has also been held that contribution made by a government employee in the Central Government Health Scheme or such other similar Scheme does not make him a 'consumer' within the meaning of the Act. Civil Appeal arising out of SLP (C) No. 18497 of 1993 has been filed by Consumer Unity Trust Society, a recognised consumer association, against this judgment of the National Commission.

6. By judgment ***Cosmopolitan Hospitals* v. *Vasantha P. Nair*** [(1992) 1 CPJ 302: (1995) 1 CPR 820 (NC)], the National Commission has held that the activity of providing medical assistance for payment carried on by hospitals and members of the medical profession falls within the scope of the expression 'service' as defined in Section 2(1)(*o*) of the Act and that in the event of any deficiency in the performance of such service, the aggrieved party can invoke the remedies provided under the Act by filing a complaint before the Consumer Forum having jurisdiction. It has also been held that the legal representatives of the deceased patients who were undergoing treatment in the hospital are 'consumers' under the Act and are competent to maintain the complaint. CAs Nos. 688 of 1993 and 689 of 1993 filed by the Indian Medical Association and SLPs (C) Nos. 6885 and 6950 of 1992 filed by M/s Cosmopolitan Hospitals are directed against the said judgment of the National Commission. The said judgment dated 21-4-1992 was followed by the National Commission in its judgment in ***Dr Sr. Louie* v. *Kannolil Pathumma*** [(1993) 1 CPJ 30 (NC)]. SLP No. 351 of 1993 has been filed by Josgiri Hospital and Nursing Home against the said judgment of the National Commission.

7. By judgment dated 3-5-1993 in OP No. 93 of 1992, the National Commission has held that since the treatment that was given to the complainant's deceased husband in the nursing home belonging to the opposite party was totally free of any charge, it did not constitute 'service' as defined under the Act and the complainant was not entitled to seek any relief under the Act. CA No. 254 of 1994 has been filed by the complainant against the said judgment of the National Commission.

8. Writ Petition No. 16 of 1994 has been filed under Article 32 of the Constitution by Cosmopolitan Hospital (P) Ltd., and Dr K. Venugopalan Nair [petitioners in SLPs (C) Nos. 6885 and 6950 of 1992] wherein the said petitioners have assailed the validity of the provisions of the Act, insofar as they are held to be applicable to the medical profession, as being violative of Articles 14 and 19(1)(*g*) of the Constitution.

9. Shri K. Parasaran, Shri Harish Salve, Shri A.M. Singhvi, Shri Krishnamani and Shri S. Balakrishnan have addressed the Court on behalf of the medical profession and the hospitals and Shri Rajeev Dhavan has presented the case of the complainants. Before we proceed to deal with their contentions, we would briefly take note of the background and the scheme of the Act.

10. On 9-4-1985, the General Assembly of the United Nations, by Consumer Protection Resolution No. 39/248, adopted the guidelines to provide a framework for Governments, particularly those of developing countries, to use in elaborating and strengthening consumer protection policies and legislation. The objectives of the said guidelines include assisting countries in achieving or maintaining adequate protection for their population as consumers and encouraging high levels of ethical conduct for those engaged in the production and distribution of goods and services to the consumers. The legitimate needs which the guidelines are intended to meet include the protection of consumers from hazards to their health and safety and availability of effective consumer redress. Keeping in view the said guidelines, the Act was enacted by Parliament to provide for better protection of the interests of consumers and for that purpose, to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters

connected therewith. The Act sets up a three-tier structure for the redressal of consumer grievances. At the lowest level, i.e., the District level, is the Consumer Disputes Redressal Forum known as "the District Forum"; at the next higher level, i.e., the State level, is the Consumer Disputes Redressal Commission known as "the State Commission" and at the highest level is the National Commission. (Section 9). The jurisdiction of these three Consumer Disputes Redressal Agencies is based on the pecuniary limit of the claim made by the complainant. An appeal lies to the State Commission against an order made by the District Forum (Section 15) and an appeal lies to the National Commission against an order made by the State Commission on a complaint filed before it or in an appeal against the order passed by the District Forum. (Section 19). The State Commission can exercise revisional powers on grounds similar to those contained in Section 115 CPC in relation to a consumer dispute pending before or decided by a District Forum [Section 17(*b*)] and the National Commission has similar revisional jurisdiction in respect of a consumer dispute pending before or decided by a State Commission. [Section 21(*b*)]. Further, there is a provision for appeal to this Court from an order made by the National Commission on a complaint or on an appeal against the order of a State Commission. (Section 23). By virtue of the definition of the complainant in Section 2(1)(*c*), the Act affords protection to the consumer against unfair trade practice or a restrictive trade practice adopted by any trader, defect in the goods bought or agreed to be bought by the consumer, deficiency in the service hired or availed of or agreed to be hired or availed of by the consumer, charging by a trader price in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods and offering for sale to public, goods which will be hazardous to life and safety when used, in contravention of the provisions of any law for the time being in force requiring traders to display information in regard to the contents, manner and effect of use of such goods. The expression 'complainant', as defined in Section 2(1)(*b*), is comprehensive to enable the consumer as well as any voluntary consumer association registered under the Companies Act, 1956 or under any other law for the time being in force, or the Central Government or any State Government or one or more consumers where there are numerous consumers having the same interest, to file a complaint before the appropriate Consumer Disputes Redressal Agency and the consumer dispute raised in such complaint is settled by the said Agency in accordance with the procedure laid down in Section 13 of the Act which prescribes that the District Forum (as well as the State Commission and the National Commission) shall have the same power as are vested in a civil court under the Code of Civil Procedure in respect of summoning and enforcing attendance of any defendant or witness and examining the witness on oath; discovery and production of any document or other material object producible as evidence; the reception of evidence on affidavits; the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source; issuing of any commission for the examination of any witness; and any other matter which may be prescribed. Section 14 makes provisions for the nature of reliefs that can be granted to the complainant on such a complaint. The provisions of the Act are in addition to and not in derogation of the provisions of any other law for the time being in force. (Section 3)**.**

11. In this group of cases we are not concerned with goods, we are only concerned with rendering of services. Since the Act gives protection to the consumer in respect of service

rendered to him, the expression 'service' in the Act has to be construed keeping in view the definition of 'consumer' in the Act. It is, therefore, necessary to set out the definition of the expression 'consumer' contained in Section 2(1)(*d*) insofar as it relates to services and the definition of the expression 'service' contained in Section 2(1)(*o*) of the Act.

12. The words "or avails of" after the word 'hires' in Section 2(1)(*d*)(*ii*) and the words "housing construction" in Section 2(1)(*o*) were inserted by Act 50 of 1993.

13. The definition of 'service' in Section 2(1)(*o*) of the Act can be split up into three parts — the main part, the inclusionary part and the exclusionary part. The main part is explanatory in nature and defines service to mean service of any description which is made available to the potential users. The inclusionary part expressly includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information. The exclusionary part excludes rendering of any service free of charge or under a contract of personal service.

14. The definition of 'service' as contained in Section 2(1)(*o*) of the Act has been construed by this Court in ***Lucknow Development Authority* v. *M.K. Gupta***.

15. The contention that the entire objective of the Act is to protect the consumer against malpractices in business was rejected with the observations:

> "The argument proceeded on complete misapprehension of the purpose of Act and even its explicit language. In fact the Act requires provider of service to be more objective and caretaking."

Referring to the inclusive part of the definition it was said:

> The inclusive clause succeeded in widening its scope but not exhausting the services which could be covered in earlier part. So any service except when it is free of charge or under a constraint of personal service is included in it.

16. In that case, the Court was dealing with the question whether housing construction could be regarded as service under Section 2(1)(*o*) of the Act. While the matter was pending in this Court, "housing construction" was inserted in the inclusive part by Ordinance No. 24 of 1993. Holding that housing activity is a service and was covered by the main part of the definition, the Court observed:

> (T)he entire purpose of widening the definition is to include in it not only day-to-day buying and selling activity undertaken by a common man but even such activities which are otherwise not commercial in nature yet they partake of a character in which some benefit is conferred on the consumer.

17. In the present case the inclusive part of the definition of 'service' is not applicable and we are required to deal with the questions falling for consideration in the light of the main part and the exclusionary part of the definition. The exclusionary part will require consideration only if it is found that in the matter of consultation, diagnosis and treatment, a medical practitioner or a hospital/nursing home renders a service falling within the main part of the definition contained in Section 2(1)(*o*) of the Act. We have, therefore, to determine whether medical practitioners and hospitals/nursing homes can be regarded as rendering a 'service' as contemplated in the main part of Section 2(1)(*o*). This determination has to be

made in the light of the observations in ***Lucknow Development Authority***. We will first examine this question in relation to medical practitioners.

18. It has been contended that in law there is a distinction between a profession and an occupation and that while a person engaged in an occupation renders service which falls within the ambit of Section 2(1)(*o*), the service rendered by a person belonging to a profession does not fall within the ambit of the said provision and, therefore, medical practitioners who belong to the medical profession are not covered by the provisions of the Act. It has been urged that medical practitioners are governed by the provisions of the Indian Medical Council Act, 1956 and the Code of Medical Ethics made by the Medical Council of India, as approved by the Government of India under Section 3 of the Indian Medical Council Act, 1956 which regulates their conduct as members of the medical profession and provides for disciplinary action by the Medical Council of India and/or State Medical Councils against a person for professional misconduct.

19. While expressing his reluctance to propound a comprehensive definition of a 'profession', Scrutton L.J. has said

> " 'profession' in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangement for the production or sale of commodities. The line of demarcation may vary from time to time. The word 'profession' used to be confined to the three learned professions, the Church, Medicine and Law. It has now, I think, a wider meaning." (See: ***IRC* v. *Maxse*** [(1919) 1 KB 647, 657].

20. According to Rupert M. Jackson and John L. Powell, the occupations which are regarded as professions have four characteristicsrather than manual;

(*i*) the nature of the work which is skilled and specialized and a substantial part is mental;

(*ii*) commitment to moral principles which go beyond the general duty of honesty and a wider duty to community which may transcend the duty to a particular client or patient;

(*iii*) professional association which regulates admission and seeks to uphold the standards of the profession through professional codes on matters of conduct and ethics; and,

(*iv*) high status in the community.

21. The learned authors have stated that during the twentieth century, an increasing number of occupations have been seeking and achieving 'professional' status and that this has led inevitably to some blurring of the features which traditionally distinguish the professions from other occupations. In the context of the law relating to Professional Negligence, the learned authors have accorded professional status to seven specific occupations, namely, (*i*) architects, engineers and quantity surveyors, (*ii*) surveyors, (*iii*) accountants, (*iv*) solicitors, (*v*) barristers, (*vi*) medical practitioners and (*vii*) insurance brokers.

22. In the matter of professional liability professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control. In

devising a rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors mentioned above, the approach of the courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services. Immunity from suit was enjoyed by certain professions on the grounds of public interest. The trend is towards narrowing of such immunity and it is no longer available to architects in respect of certificates negligently given and to mutual valuers. Earlier, barristers were enjoying complete immunity but now even for them the field is limited to work done in court and to a small category of pre-trial work which is directly related to what transpires in court. Medical practitioners do not enjoy any immunity and they can be sued in contract or tort on the ground that they have failed to exercise reasonable skill and care.

23. It would thus appear that medical practitioners, though belonging to the medical profession, are not immune from a claim for damages on the ground of negligence. The fact that they are governed by the Indian Medical Council Act and are subject to the disciplinary control of Medical Council of India and/or State Medical Councils is no solace to the person who has suffered due to their negligence and the right of such person to seek redress is not affected.

24. Referring to the changing position with regard to the relationship between the medical practitioners and the patients in the United Kingdom, it has been said:

> "Where, then, does the doctor stand today in relation to society? To some extent, he is a servant of the public, a public which is widely (though not always well) informed on medical matters. Society is conditioned to distrust paternalism and the modern medical practitioner has little wish to be paternalistic. The new talk is of 'producers and consumers' and the concept that 'he who pays the piper calls the tune' is established both within the profession and in its relationships with patients. The competent patient's inalienable rights to understand his treatment and to accept or refuse it are now well established. (pp. 16-17)
>
> Consumerism is now firmly established in medical practice — and this has been encouraged on a wide scale by Government in the United Kingdom through the introduction of 'charters'. Complaint is central to this ethos - and the notion that blame must be attributed, and compensated, has a high priority." (p.192) (Mason and McCall Smith: ***Law and Medical Ethics,*** 4th Edn.)

25. In ***Arizona* v. *Maricopa County Medical Society*** [457 US 332], two Arizona county medical societies formed two foundations for medical care to promote fee-for-service medicine and to provide the community with a competitive alternative to existing health insurance plans and by agreement amongst the doctors established the schedule of maximum fees that participating doctors agreed to accept as payment in full for services performed for patients insured under plans. It was held that the maximum fee agreement, as price-fixing agreements, are per se unlawful under the Sherman Act. It was observed:

> Nor does the fact doctors - rather than non-professionals - are the parties to the price-fixing agreements support the respondents' position. ... The respondents' claim for relief from the per se rule is simply that the doctors' agreement not to charge certain insureds

more than a fixed price facilitates the successful marketing of an attractive insurance plan. But the claim that the price restraint will make it easier for customers to pay does not distinguish the medical profession from any other provider of goods or services. (pp. 348-49, 61-62)

26. We are, therefore, unable to subscribe to the view that merely because medical practitioners belong to the medical profession they are outside the purview of the provisions of the Act and the services rendered by medical practitioners are not covered by Section 2(1)(*o*) of the Act.

27. Shri Harish Salve, appearing for the Indian Medical Association, has urged that having regard to the expression "which is made available to potential users" contained in Section 2(1)(*o*) of the Act, medical practitioners are not contemplated by Parliament to be covered within the provisions of the Act. He has urged that the said expression is indicative of the kind of service the law contemplates, namely, service of an institutional type which is really a commercial enterprise and open and available to all who seek to avail thereof. In this context, reliance has also been placed on the word 'hires' in sub-clause (*ii*) of the definition of 'consumer' contained in Section 2(1)(*d*) of the Act. We are unable to uphold this contention. The word 'hires' in Section 2(1)(*d*)(*ii*) has been used in the same sense as "avails of" as would be evident from the words "when such services are availed of" in the latter part of Section 2(1)(*d*)(*ii*). By inserting the words "or avails of" after the word 'hires' in Section 2(1)(*d*)(*ii*) by the Amendment Act of 1993, Parliament has clearly indicated that the word 'hires' has been used in the same sense as "avails of". The said amendment only clarifies what was implicit earlier. The word 'use' also means "to avail oneself of". The word 'user' in the expression "which is made available to potential users" in the definition of 'service' in Section 2(1)(*o*) has to be construed having regard to the definition of 'consumer' in Section 2(1)(*d*)(*ii*) and, if so construed, it means "availing of services". From the use of the words "potential users" it cannot, therefore, be inferred that the services rendered by medical practitioners are not contemplated by Parliament to be covered within the expression 'service' as contained in Section 2(1)(*o*).

28. Shri Harish Salve has also placed reliance on the definition of the expression 'deficiency' as contained in Section 2(1)(*g*) of the Act.

29. The submission of Shri Salve is that under the said clause, the deficiency with regard to fault, imperfection, shortcoming or inadequacy in respect of a service has to be ascertained on the basis of certain norms relating to quality, nature and manner of performance and that medical services rendered by a medical practitioner cannot be judged on the basis of any fixed norms and, therefore, a medical practitioner cannot be said to have been covered by the expression 'service' as defined in Section 2(1)(*o*). We are unable to agree. While construing the scope of the provisions of the Act in the context of deficiency in service it would be relevant to take note of the provisions contained in Section 14 of the Act which indicate the reliefs that can be granted on a complaint filed under the Act. In respect of deficiency in service, the following reliefs can be granted:

(*i*) return of the charges paid by the complainant. [clause (*c*)]

(*ii*) payment of such amount as may be awarded as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party. [clause (*d*)]

(*iii*) removal of the defects or deficiencies in the services in question. [clause (*e*)]

30. Section 14(1)(*d*) would, therefore, indicate that the compensation to be awarded is for loss or injury suffered by the consumer due to the negligence of the opposite party. A determination about deficiency in service for the purpose of Section 2(1)(*g*) has, therefore, to be made by applying the same test as is applied in an action for damages for negligence. The standard of care which is required from medical practitioners as laid down by McNair, J. in his direction to the jury in ***Bolam* v. *Friern Hospital Management Committee*** [(1957) 2 All ER 118], has been accepted by the House of Lords in a number of cases. McNair, J. has said: (All ER p. 121)

> But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well-established law that it is sufficient if

31. In an action for negligence in tort against a surgeon this Court, in ***Laxman Balkrishna Joshi* v. *Trimbak Bapu Godbole*** [AIR 1969 SC 128] has held:

> The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law require.

32. It is, therefore, not possible to hold that in view of the definition of 'deficiency' as contained in Section 2(1)(*g*), medical practitioners must be treated to be excluded from the ambit of the Act and the service rendered by them is not covered under Section 2(1)(*o*).

33. Another contention that has been urged by learned counsel appearing for the medical profession to exclude medical practitioners from the ambit of the Act is that the composition of the District Forum, the State Commission and the National Commission is such that they cannot fully appreciate the complex issues which may arise for determination and further that the procedure that is followed by these bodies for determination of issues before them is not suitable for the determination of the complicated questions which arise in respect of claims for negligence in respect of the services rendered by medical practitioners. The provisions with regard to the composition of the District Forum are contained in Section 10 of the Act which provides that the President of the Forum shall be a person who is or who has been or is qualified to be a District Judge and the other two members shall be persons of ability,

integrity and standing, having adequate knowledge or experience of, or having shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration and one of them shall be a woman. Similarly, with regard to the composition of the State Commission, it is provided in Section 16 of the Act that the President of the Commission shall be a person who is or who has been a Judge of a High Court appointed by the State Government in consultation with the Chief Justice of the High Court and that the other two members shall be persons of ability, integrity and standing, having adequate knowledge or experience of, or having shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, and one of them shall be a woman. The composition of the National Commission is governed by Section 20 of the Act which provides that the President of the Commission shall be a person who is or who has been a Judge of the Supreme Court, to be appointed by the Central Government after consultation with the Chief Justice of India and four other members shall be persons of ability, integrity and standing having adequate knowledge or experience of, or having shown capacity in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration and one of them shall be a woman. It will thus be seen that the President of the District Forum is required to be a person who is or who has been or is qualified to be a District Judge and the President of the State Commission is required to be a person who is or who has been the Judge of the High Court and the President of the National Commission is required to be a person who is or who has been a Judge of the Supreme Court, which means that all the Consumer Disputes Redressal Agencies are headed by a person who is well-versed in law and has considerable judicial or legal experience. It has, however, been submitted that in case there is difference of opinion, the opinion of the majority is to prevail and, therefore, the President may be outvoted by the other members and that there is no requirement that the members should have adequate knowledge or experience in dealing with problems relating to medicine. It is no doubt true that the decisions of the District Forum as well as the State Commission and the National Commission have to be taken by majority and it may be possible in some cases that the President may be in minority. But the presence of a person well-versed in law as the President will have a bearing on the deliberations of these Agencies and their decisions. As regards the absence of a requirement about a member having adequate knowledge or experience in dealing with the problems relating to medicine it may be stated that the persons to be chosen as members are required to have knowledge and experience in dealing with problems relating to various fields connected with the object and purpose of the Act, viz., protection and interests of the consumers. The said knowledge and experience would enable them to handle the consumer disputes coming up before them for settlement in consonance with the requirement of the Act. To say that the members must have adequate knowledge or experience in the field to which the goods or services, in respect of which the complaint is made, are related would lead to impossible situations. At one time, there will be two members in the District Forum and they would have knowledge or experience in two fields which would mean that complaints in respect of goods or services relating to other fields would be beyond the purview of the District Forum. Similarly, in the State Commission there may be members having knowledge or experience in fields other than the fields in which the members of the District Forum have knowledge or experience. It would mean that the goods or services

in respect of which the District Forum can entertain a complaint will be outside the purview of the State Commission. Same will be the position in respect of the National Commission. Since the goods or services in respect of which complaint can be filed under the Act may relate to number of fields it cannot be expected that the members of the Consumer Disputes Redressal Agencies must have expertise in the field to which the goods or services in respect of which complaint is filed, are related. It will be for the parties to place the necessary material and the knowledge and experience which the members will have in the fields indicated in the Act would enable them to arrive at their findings on the basis of that material. It cannot, therefore, be said that since the members of the Consumer Disputes Redressal Agencies are not required to have knowledge and experience in medicine, they are not in a position to deal with issues which may arise before them in proceedings arising out of complaints about the deficiency in service rendered by medical practitioners.

34. Discussing the role of lay persons in decision-making, Professor White has referred to two divergent views. One view holds that lay adjudicators are superior to professional judges in the application of general standards of conduct, in their notions of reasonableness, fairness and good faith and that they act as "an antidote against excessive technicality" and "some guarantee that the law does not diverge too far from reality". The other view, however, is that since they are not experts, lay decision-makers present a very real danger that the dispute may not be resolved in accordance with the prescribed rules of law and the adjudication of claims may be based on whether the claimant is seen as deserving rather than on the legal rules of entitlement. Professor White has indicated his preference for a tribunal composed of a lawyer, as Chairman, and two lay members. Such a tribunal, according to Professor White, would present an opportunity to develop a model of adjudication that combines the merits of lay decision-making with legal competence and participation of lay members would lead to general public confidence in the fairness of the process and widen the social experience represented by the decision-makers. Professor White says that apart from their breadth of experience, the key role of lay members would be in ensuring that procedures do not become too full of mystery and ensure that litigants before them are not reduced to passive spectators in a process designed to resolve their disputes.

35. In the matter of constitution of the District Forum, the State Commission and the National Commission, the Act combines with legal competence the merits of lay decision-making by members having knowledge and experience in dealing with problems relating to various fields which are connected with the object and purpose of the Act, namely, protection and interests of the consumers.

36. Moreover, there is a further safeguard of an appeal against the order made by the District Forum to the State Commission and against the order made by the State Commission to the National Commission and a further appeal to this Court against the order made by the National Commission. It cannot, therefore, be said that the composition of the Consumer Disputes Redressal Agencies is such as to render them unsuitable for adjudicating on issues arising in a complaint regarding deficiency in service rendered by a medical practitioner.

37. As regards the procedure to be followed by these agencies in the matter of determination of the issues coming up for consideration, it may be stated that under Section 13(2)(*b*), it is provided that the District Forum shall proceed to settle the consumer disputes

(*i*) on the basis of evidence brought to its notice by the complainant and the opposite party, where the opposite party denies or disputes the allegations contained in the complaint, or (*ii*) on the basis of evidence brought to its notice by the complainant where the opposite party omits or fails to take any action to represent his case within the time given by the Forum. In Section 13(4) of the Act it is further provided that the District Forum shall have the same powers as are vested in the civil court under the Code of Civil Procedure while trying a suit in respect of the following matters—

> "(*i*) the summoning and enforcing attendance of any defendant or witness and examining the witness on oath;
> (*ii*) the discovery and production of any document or other material object producible as evidence;
> (*iii*) the reception of evidence on affidavits;
> (*iv*) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;
> (*v*) issuing of any commission for the examination of any witness and
> (*vi*) any other matter which may be prescribed."

The same provisions apply to proceedings before the State Commission and the National Commission. It has been urged that proceedings involving negligence in the matter of rendering services by a medical practitioner would raise complicated questions requiring evidence of experts to be recorded and that the procedure which is followed for determination of consumer disputes under the Act is summary in nature involving trial on the basis of affidavits and is not suitable for determination of complicated questions. It is no doubt true that sometimes complicated questions requiring recording of evidence of experts may arise in a complaint about deficiency in service based on the ground of negligence in rendering medical services by a medical practitioner; but this would not be so in all complaints about deficiency in rendering services by a medical practitioner. There may be cases which do not raise such complicated questions and the deficiency in service may be due to obvious faults which can be easily established such as removal of the wrong limb or the performance of an operation on the wrong patient or giving injection of a drug to which the patient is allergic without looking into the out-patient card containing the warning or use of wrong gas during the course of an anaesthetic or leaving inside the patient swabs or other items of operating equipment after surgery. One often reads about such incidents in the newspapers. The issues arising in the complaints in such cases can be speedily disposed of by the procedure that is being followed by the Consumer Disputes Redressal Agencies and there is no reason why complaints regarding deficiency in service in such cases should not be adjudicated by the Agencies under the Act. In complaints involving complicated issues requiring recording of evidence of experts, the complainant can be asked to approach the civil court for appropriate relief. Section 3 of the Act which prescribes that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force, preserves the right of the consumer to approach the civil court for necessary relief. We are, therefore, unable to hold that on the ground of composition of the Consumer Disputes Redressal Agencies or on the ground of the procedure which is followed by the said Agencies for determining the issues arising before them, the service rendered by the medical

practitioners are not intended to be included in the expression 'service' as defined in Section 2(1)(*o*) of the Act.

38. Keeping in view the wide amplitude of the definition of 'service' in the main part of Section 2(1)(*o*) as construed by this Court in ***Lucknow Development Authority*** [(1994) 1 SCC 243], we find no plausible reason to cut down the width of that part so as to exclude the services rendered by a medical practitioner from the ambit of the main part of Section 2(1)(*o*).

39. We may now proceed to consider the exclusionary part of the definition to see whether such service is excluded by the said part. The exclusionary part excludes from the main part service rendered (*i*) free of charge; or (*ii*) under a contract of personal service.

40. Shri Salve has urged that the relationship between a medical practitioner and the patient is of trust and confidence and, therefore, it is in the nature of a contract of personal service and the service rendered by the medical practitioner to the patient is not 'service' under Section 2(1)(*o*) of the Act. This contention of Shri Salve ignores the well-recognised distinction between a "contract *of* service" and a "contract *for* services". A "contract for services" implies a contract whereby one party undertakes to render services e.g. professional or technical services, to or for another in the performance of which he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion. A "contract of service" implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance. We entertain no doubt that Parliamentary draftsman was aware of this well-accepted distinction between "contract of service" and "contract for services" and has deliberately chosen the expression "contract of service" instead of the expression "contract for services", in the exclusionary part of the definition of 'service' in Section 2(1)(*o*). The reason being that an employer cannot be regarded as a consumer in respect of the services rendered by his employee in pursuance of a contract of employment. By affixing the adjective 'personal' to the word 'service', the nature of the contracts which are excluded is not altered. The said adjective only emphasises that what is sought to be excluded is personal service only. The expression "contract of personal service" in the exclusionary part of Section 2(1)(*o*) must, therefore, be construed as excluding the services rendered by an employee to his employer under the contract of personal service from the ambit of the expression 'service'

41. It is no doubt true that the relationship between a medical practitioner and a patient carries within it a certain degree of mutual confidence and trust and, therefore, the services rendered by the medical practitioner can be regarded as services of personal nature but since there is no relationship of master and servant between the doctor and the patient, the contract between the medical practitioner and his patient cannot be treated as a contract of personal service but is a contract for services and the service rendered by the medical practitioner to his patient under such a contract is not covered by the exclusionary part of the definition of 'service' contained in Section 2(1)(*o*) of the Act.

42. Shri Rajeev Dhavan has, however, submitted that the expression "contract of personal service" contained in Section 2(1)(*o*) of the Act has to be confined to employment of domestic servants only. We do not find any merit in this submission. The expression "personal service" has a well-known legal connotation and has been construed in the context of the right to seek enforcement of such a contract under the Specific Relief Act. For that

purpose a contract of personal service has been held to cover a civil servant, the managing agents of a company and a professor in the University. There can be a contract of personal service if there is relationship of master and servant between a doctor and the person availing of his services and in that event the services rendered by the doctor to his employer would be excluded from the purview of the expression 'service' under Section 2(1)(*o*) of the Act by virtue of the exclusionary clause in the said definition.

43. The other part of exclusionary clause relates to services rendered "free of charge". The medical practitioners, government hospitals/nursing homes and private hospitals/nursing homes ("doctors and hospitals") broadly fall in three categories:

(*i*) where services are rendered free of charge to everybody availing of the said services.

(*ii*) where charges are required to be paid by everybody availing of the services and

(*iii*) where charges are required to be paid by persons availing of services but certain categories of persons who cannot afford to pay are rendered service free of charges.

There is no difficulty in respect of the first two categories. Doctors and hospitals who render service without any charge whatsoever to every person availing of the service would not fall within the ambit of 'service' under Section 2(1)(*o*) of the Act. The payment of a token amount for registration purposes only would not alter the position in respect of such doctors and hospitals. So far as the second category is concerned, since the service is rendered on payment basis to all the persons they would clearly fall within the ambit of Section 2(1)(*o*) of the Act. The third category of doctors and hospitals do provide free service to some of the patients belonging to the poor class but the bulk of the service is rendered to the patients on payment basis. The expenses incurred for providing free service are met out of the income from the service rendered to the paying patients. The service rendered by such doctors and hospitals to paying patients undoubtedly falls within the ambit of Section 2(1)(*o*) of the Act.

44. The question for our consideration is whether the service rendered to patients free of charge by the doctors and hospitals in category (*iii*) is excluded by virtue of the exclusionary clause in Section 2(1)(*o*) of the Act. In our opinion, the question has to be answered in the negative. In this context, it is necessary to bear in mind that the Act has been enacted "to provide for the protection of the interests of '*consumers*' " in the background of the guidelines contained in the Consumer Protection Resolution passed by the U.N. General Assembly on 9-4-1985. These guidelines refer to "achieving or maintaining adequate protection for their population as consumers" and "encouraging high levels of ethical conduct for those engaged in the protection and distribution of goods and services to the consumers". The protection that is envisaged by the Act is, therefore, protection for consumers as a class. The word 'users' (in plural), in the phrase "potential users" in Section 2(1)(*o*) of the Act also gives an indication that consumers as a class are contemplated. The definition of 'complainant' contained in Section 2(1)(*b*) of the Act which includes, under clause (*ii*), any voluntary consumer association, and clauses (*b*) and (*c*) of Section 12 which enable a complaint to be filed by any recognised consumer association or one or more consumers where there are numerous consumers, having the same interest, on behalf of or for the benefit of all consumers so interested, also lend support to the view that the Act seeks to protect the interests of consumers as a class. To hold otherwise would mean that the protection of the Act would be

available to only those who can afford to pay and such protection would be denied to those who cannot so afford, though they are the people who need the protection more. It is difficult to conceive that the legislature intended to achieve such a result. Another consequence of adopting a construction, which would restrict the protection of the Act to persons who can afford to pay for the services availed of by them and deny such protection to those who are not in a position to pay for such services, would be that the standard and quality of service rendered at an establishment would cease to be uniform. It would be of a higher standard and of better quality for persons who are in a position to pay for such service while the standard and quality of such service would be inferior for a person who cannot afford to pay for such service and who avail of the service without payment. Such a consequence would defeat the object of the Act. All persons who avail of the services by doctors and hospitals in category (*iii*) are required to be treated on the same footing irrespective of the fact that some of them pay for the service and others avail of the same free of charge. Most of the doctors and hospitals work on commercial lines and the expenses incurred for providing services free of charge to patients who are not in a position to bear the charges are met out of the income earned by such doctors and hospitals from services rendered to paying patients. The government hospitals may not be commercial in that sense but on the overall consideration of the objectives and the scheme of the Act, it would not be possible to treat the government hospitals differently. We are of the view that in such a situation, the persons belonging to "poor class" who are provided services free of charge are the beneficiaries of the service which is hired or availed of by the "paying class". We are, therefore, of the opinion that service rendered by the doctors and hospitals falling in category (*iii*) irrespective of the fact that part of the service is rendered free of charge, would nevertheless fall within the ambit of the expression 'service' as defined in Section 2(1)(*o*) of the Act. We are further of the view that persons who are rendered free service are the 'beneficiaries' and as such come within the definition of 'consumer' under Section 2(1)(*d*) of the Act.

45. In respect of the hospitals/nursing homes (government and non-government) falling in category (*i*), i.e., where services are rendered free of charge to everybody availing of the services, it has been urged by Shri Dhavan that even though the service rendered at the hospital, being free of charge, does not fall within the ambit of Section 2(1)(*o*) of the Act insofar as the hospital is concerned, the said service would fall within the ambit of Section 2(1)(*o*) since it is rendered by a medical officer employed in the hospital who is not rendering the service free of charge because the said medical officer receives emoluments by way of salary for employment in the hospital. There is no merit in this contention. The medical officer who is employed in the hospital renders the service on behalf of the hospital administration and if the service, as rendered by the hospital, does not fall within the ambit of Section 2(1)(*o*), being free of charge, the same service cannot be treated as service under Section 2(1)(*o*) for the reason that it has been rendered by a medical officer in the hospital who receives salary for employment in the hospital. There is no direct nexus between the payment of the salary to the medical officer by the hospital administration and the person to whom service is rendered. The salary that is paid by the hospital administration to the employee medical officer cannot be regarded as payment made on behalf of the person availing of the service or for his benefit so as to make the person availing of the service a 'consumer' under Section 2(1)(*d*) in respect of the service rendered to him. The service

rendered by the employee-medical officer to such a person would, therefore, continue to be service rendered free of charge and would be outside the purview of Section 2(1)(*o*).

46. A contention has also been raised that even in the government hospitals/health centres/dispensaries where services are rendered free of charge to all the patients, the provisions of the Act shall apply because the expenses of running the said hospitals are met by appropriation from the Consolidated Fund which is raised from the taxes paid by the taxpayers. We do not agree.

47. The essential characteristics of a tax are that (*i*) it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law; (*ii*) it is an imposition made for public purpose *without reference to any special benefit to be conferred on the payer of the tax* and (*iii*) it is part of the common burden, the quantum of imposition upon the taxpayer depends generally upon his capacity to pay. The tax paid by the person availing of the service at a government hospital cannot be treated as a consideration or charge for the service rendered at the said hospital and such service, though rendered free of charge, does not cease to be so because the person availing of the service happens to be a taxpayer.

48. Adverting to the individual doctors employed and serving in the hospitals, we are of the view that such doctors working in the hospitals/nursing homes/dispensaries, whether government or private - belonging to categories (*ii*) and (*iii*) above would be covered by the definition of 'service' under the Act and as such are amenable to the provisions of the Act along with the management of the hospital, etc. jointly and severally.

49. There may, however, be a case where a person has taken an insurance policy for medicare whereunder all the charges for consultation, diagnosis and medical treatment are borne by the insurance company. In such a case, the person receiving the treatment is a beneficiary of the service which has been rendered to him by the medical practitioner, the payment for which would be made by the insurance company under the insurance policy. The rendering of such service by the medical practitioner cannot be said to be free of charge and would, therefore, fall within the ambit of the expression 'service' in Section 2(1)(*o*) of the Act. So also there may be cases where as a part of the conditions of service, the employer bears the expense of medical treatment of the employee and his family members dependent on him. The service rendered to him by a medical practitioner would not be free of charge and would, therefore, constitute service under Section 2(1)(*o*).

50. Shri A.M. Singhvi has invited our attention to the following observations of Lord Denning M.R. in ***Whitehouse* v. *Jordan*** [(1980) 1 All ER 650, 658]:

> Take heed of what has happened in the United States. 'Medical malpractice' cases there are very worrying, especially as they are tried by juries who have sympathy for the patient and none for the doctor, who is insured. The damages are colossal. The doctors insure but the premiums become very high: and these have to be passed on in fees to the patients. Experienced practitioners are known to have refused to treat patients for fear of being accused of negligence. Young men are even deterred from entering the profession because of the risks involved. In the interests of all, we must avoid such consequences in England. Not only must we avoid excessive damages. We must say, and say firmly, that, in a professional man, an error of judgment is not negligent.

51. Relying on these observations, learned counsel has painted a grim picture that if medical practitioners are brought within the purview of the Act, the consequence would be a huge increase in medical expenditure on account of insurance charges as well as tremendous increase in defensive medicine and that medical practitioners may refuse to attend to medical emergencies and there will be no safeguards against frivolous and vexatious complaints and consequent blackmail. We do not entertain such an apprehension. In the first place, it may be stated that the aforementioned observations of Lord Denning were made in the context of substantive law governing actions for damages on the ground of negligence against medical practitioners. There too the last sentence in the said observations that "an error of judgment is not negligent" has not been approved, in appeal, by the House of Lords. By holding that medical practitioners fall within the purview of the Act, no change is brought about in the substantive law governing claims for compensation on the ground of negligence and the principles which apply to determination of such a claim before the civil court would equally apply to consumer disputes before the Consumer Disputes Redressal Agencies under the Act. The Act only provides an inexpensive and a speedy remedy for adjudication of such claims. An analytical study of tort litigation in India during the period from 1975 to 1985 made by Professor Galanter reveals that a total number of 416 tort cases were decided by the High Courts and this Court, as reported in the *All India Reporter*, out of which 360 cases related to claims under the Motor Vehicles Act and cases relating to medical malpractice were only three in number. One of the factors inhibiting such claims is the requirement regarding court fee that must be paid by the plaintiff in an action for damages on the ground of negligence. Since no court fee is required to be paid on a complaint filed under the Act, it would be possible for persons who have suffered injury due to deficiency in service rendered by medical practitioners or at hospitals/nursing homes to seek redress. The conditions prevailing in India cannot, therefore, be compared with those in England and in the United States.

52. As regards the criticism of the American malpractice litigation by the British judiciary it has been said:

> Discussion of these important issues is sometimes clouded by an oversimplistic comparison between England and American 'malpractice' litigation. Professor Miller noted in 1986 that malpractice claims were brought in the United States nearly 10 times as often as in England, and that this is due to a complex combination of factors, including cultural differences, judicial attitudes, differences in the legal system and the rules about costs. She points to the deterrent value of malpractice litigation and resents some of the criticisms of the American system expressed by the British judiciary. Interestingly, in 1989 the number of medical negligence claims and the size of medical malpractice insurance premiums started to fall in New York, California and many other States. It is thought that this is due in part to legislation in a number of States limiting medical malpractice claims, and in part to improved patient care as a result of litigation. (*Jackson & Powell on* ***Professional Liability***, 3rd Edn., paras 6-25, p. 466)

53. Dealing with the present state of medical negligence cases in the United Kingdom it has been observed:

> "The legal system, then, is faced with the classic problem of doing justice to both parties. The fears of the medical profession must be taken into account while the legitimate claims of the patient cannot be ignored.

> Medical negligence apart, in practice, the courts are increasingly reluctant to interfere in clinical matters. What was once perceived as a legal threat to medicine has disappeared a decade later. While the court will accept the absolute right of a patient to refuse treatment, they will, at the same time, refuse to dictate to doctors what treatment they should give. Indeed, the fear could be that, if anything, the pendulum has swung too far in favour of therapeutic immunity. (p. 16)
>
> It would be a mistake to think of doctors and hospitals as easy targets for the dissatisfied patient. It is still very difficult to raise an action of medical negligence in Britain; some, such as the Association of the Victims of Medical Accidents, would say that it is unacceptably difficult. Not only are there practical difficulties in linking the plaintiff's injury to medical treatment, but the standard of care in medical negligence cases is still effectively defined by the profession itself. All these factors, together with the sheer expense of bringing legal action and the denial of legal aid to all but the poorest, operate to inhibit medical litigation in a way in which the American system, with its contingency fees and its sympathetic juries, does not.
>
> It is difficult to single out any one cause for what increase there has been in the volume of medical negligence actions in the United Kingdom. A common explanation is that there are, quite simply, more medical accidents occurring - whether this be due to increased pressure on hospital facilities, to falling standards of professional competence or, more probably, to the ever-increasing complexity of therapeutic and diagnostic methods." (p. 191)
>
> A patient who has been injured by an act of medical negligence has suffered in a way which is recognised by the law - and by the public at large - as deserving compensation. This loss may be continuing and what may seem like an unduly large award may be little more than that sum which is required to compensate him for such matters as loss of future earnings and the future cost of medical or nursing care. To deny a legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice. After all, there is no difference in legal theory between the plaintiff injured through medical negligence and the plaintiff injured in an industrial or motor accident."

54. We are, therefore, not persuaded to hold that in view of the consequences indicated by Lord Denning in ***Whitehouse* v. *Jordan*** medical practitioners should be excluded from the purview of the Act.

55. On the basis of the above discussion, we arrive at the following conclusions:

(1) Service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of 'service' as defined in Section 2(1)(*o*) of the Act.

(2) The fact that medical practitioners belong to the medical profession and are subject to the disciplinary control of the Medical Council of India and/or State Medical Councils constituted under the provisions of the Indian Medical Council Act would not exclude the services rendered by them from the ambit of the Act.

(3) A "contract *of* personal service" has to be distinguished from a "contract *for* personal services". In the absence of a relationship of master and servant between the patient and medical practitioner, the service rendered by a medical practitioner to the

patient cannot be regarded as service rendered under a 'contract *of* personal service'. Such service is service rendered under a "contract *for* personal services" and is not covered by exclusionary clause of the definition of 'service' contained in Section 2(1)(*o*) of the Act.

(4) The expression "contract of personal service" in Section 2(1)(*o*) of the Act cannot be confined to contracts for employment of domestic servants only and the said expression would include the employment of a medical officer for the purpose of rendering medical service to the employer. The service rendered by a medical officer to his employer under the contract of employment would be outside the purview of 'service' as defined in Section 2(1)(*o*) of the Act.

(5) Service rendered free of charge by a medical practitioner attached to a hospital/nursing home or a medical officer employed in a hospital/nursing home where such services are rendered free of charge to everybody, would not be 'service' as defined in Section 2(1)(*o*) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

(6) Service rendered at a non-government hospital/nursing home where no charge whatsoever is made from any person availing of the service and all patients (rich and poor) are given free service - is outside the purview of the expression 'service' as defined in Section 2(1)(*o*) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

(7) Service rendered at a non-government hospital/nursing home where charges are required to be paid by the persons availing of such services falls within the purview of the expression 'service' as defined in Section 2(1)(*o*) of the Act.

(8) Service rendered at a non-government hospital/nursing home where charges are required to be paid by persons who are in a position to pay and persons who cannot afford to pay are rendered service free of charge would fall within the ambit of the expression 'service' as defined in Section 2(1)(*o*) of the Act irrespective of the fact that the service is rendered free of charge to persons who are not in a position to pay for such services. Free service, would also be 'service' and the recipient a 'consumer' under the Act.

(9) Service rendered at a government hospital/health centre/ dispensary where no charge whatsoever is made from any person availing of the services and all patients (rich and poor) are given free service - is outside the purview of the expression 'service' as defined in Section 2(1)(*o*) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

(10) Service rendered at a government hospital/health centre/ dispensary where services are rendered on payment of charges and also rendered free of charge to other persons availing of such services would fall within the ambit of the expression 'service' as defined in Section 2(1)(*o*) of the Act, irrespective of the fact that the service is rendered free of charge to persons who do not pay for such service. Free service would also be 'service' and the recipient a 'consumer' under the Act.

(11) Service rendered by a medical practitioner or hospital/nursing home cannot be regarded as service rendered free of charge, if the person availing of the service has taken an insurance policy for medical care whereunder the charges for consultation, diagnosis

and medical treatment are borne by the insurance company and such service would fall within the ambit of 'service' as defined in Section 2(1)(*o*) of the Act.

(12) Similarly, where, as a part of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family members dependent on him, the service rendered to such an employee and his family members by a medical practitioner or a hospital/nursing home would not be free of charge and would constitute 'service' under Section 2(1)(*o*) of the Act.

56. In view of the conclusions aforementioned, the judgment of the National Commission dated 21-4-1992 in First Appeal No. 48 of 1991 and the judgment dated 16-11-1992 in First Appeal No. 97 of 1991 ***Dr Sr. Louie* v. *Kannolil Pathumma*** holding that the activity of providing medical assistance for payment carried on by hospitals and members of the medical profession falls within the scope of the expression 'service' as defined in Section 2(1)(*o*) of the Act and that in the event of any deficiency in the performance of such service, the aggrieved party can invoke the remedies provided under the Act by filing a complaint before the Consumer Forum having jurisdiction, must be upheld and Civil Appeals Nos. 688 and 689 of 1993 and SLPs (Civil) Nos. 6885, 6950 of 1992 and 351 of 1993 filed against the said judgment have to be dismissed. The National Commission in its judgment dated 3-5-1993 in OP No. 93 of 1992 has held that since the treatment that was given to the deceased husband of the complainant in the nursing home belonging to the opposite party was totally free of any charge it does not constitute 'service' as defined in Section 2(1)(*o*) of the Act. The Tribunal has not considered the question whether services are rendered free of charge to all the patients availing of services in the said nursing home or such services are rendered free of charge only to some of the patients and are rendered on payment of charges to the rest of the patients. Unless it is found that the services are rendered free of charge to all the patients availing of services at the nursing home, it cannot be held that the said services do not constitute 'service' as defined in Section 2(1)(*o*) of the Act. Civil Appeal No. 254 of 1994 has, therefore, to be allowed and the matter has to be remitted to the National Commission for consideration in the light of this judgment. The judgment of the Madras High Court in ***Dr C.S. Subramanian* v. *Kumarasamy*** holding that the services rendered to a patient by a medical practitioner or a hospital by way of diagnosis and treatment, both medicinal and surgical, would not come within the definition of 'service' in Section 2(1)(*o*) and a patient who undergoes treatment under a medical practitioner or a hospital by way of diagnosis and treatment, both medicinal and surgical, cannot be considered to be a 'consumer' within the meaning of Section 2(1)(*d*) of the Act cannot be sustained and Civil Appeals Nos. 4664-65 of 1994 as well as Civil Appeals arising out of SLPs (Civil) Nos. 21775 of 1994 and 18445-73 of 1994 have to be allowed and the said judgment of the Madras High Court has to be set aside and the writ petitions disposed of by the said judgment have to be dismissed. The judgment of the National Commission dated 15-12-1989 in First Appeal No. 2 of 1989 holding that services rendered in government hospitals are not covered by the expression 'service' as defined in Section 2(1)(*o*) of the Act cannot be upheld in its entirety but can be upheld only to the extent as indicated in Conclusion No. 9. Civil Appeal arising out of SLP (Civil) No. 18497 of 1993 has to be allowed and the complaint has to be remitted to the State Commission for consideration in the light of this judgment. SLPs (Civil) Nos. 21348-21349 of 1993 have been filed against the judgment of the Kerala High Court dated 6-10-1993 in writ petitions filed on

behalf of the hospitals claiming that the services rendered by the hospitals do not fall within the ambit of Section 2(1)(*o*) of the Act. The said writ petitions were dismissed by the High Court having regard to the decision of the National Commission in ***Cosmopolitan Hospitals*** and the pendency of appeal against the said decision before this Court. Since the decision of the National Commission in ***Cosmopolitan Hospitals*** is being upheld by us, SLPs (Civil) Nos. 21348-21349 of 1993 have to be dismissed.

* * ***

Maruti Suzuki India Ltd. v. *Rajiv Kumar Loomba & Anr.* (2009)

1. This appeal by special leave has been filed against the impugned judgment of the National Consumer Disputes Redressal Commission, New Delhi dated 26.07.2002 in RevisionPetitionNo. 523/1998 filed by the appellant herein.

2. Heard learned counsel for the appellant.

3. There is no representation on behalf of the respondents despite service of notice.

4. It appears that a complaint had been filed by the respondent No. 1 herein against the appellant herein before the District Consumer Disputes Redressal Forum, Chandigarh. The grievance of the complainant in the complaint was that although a catalytic converter was not fixed in the Maruti car which was sold to him by the appellant, yet he has been charged a sum of Rs.7,000/- for the same. The complainant claimed that he should be refunded the sum of Rs.7,000/-. The claim of the complainant-respondent No. 1 was allowed by the District Consumer Forum, Chandigarh vide order dated 3.12.1996. Against the said order of the District Forum, the appellant filed an appeal before the Consumer Disputes Redressal Commission, Union Territory, Chandigarh which was dismissed vide order dated 18th March, 1998. Thereafter the appellant preferred a revision before the National Consumer Disputes Redressal Commission which has been dismissed by the impugned order. Hence, this appeal by special leave.

5. Mr. Lalit Bhasin, learned counsel appearing for the appellant has invited our attention to a policy decision dated 22.3.1995 of the Central Government, which is annexed as Annexure/P-1 to this appeal. By the said decision the Central Government had directed that all 4 wheeler petrol vehicles sold in the cities of Delhi, Bombay, Calcutta and Madras shall be fitted with a catalytic converter. However, there was no mandatory requirement for a catalytic converter in such vehicles at the relevant time in respect of other cities in India.

6. The respondent No. 1, at the relevant time lived in Chandigarh. Hence, he alleged that he was under no legal obligation to get fitted a catalytic converter in his Maruti car nor did he actually get the same fitted in his car purchased from the appellant. Thus, he should not have been charged an extra Rs. 7,000/- for his Maruti car as a person living in the four Metropolitan Cities abovementioned alone have to have a catalytic converter in his car.

7. We are in agreement with the view taken by the Consumer Fora. Since, there was no mandatory obligation at the relevant time for a resident of Chandigarh to have a catalytic converter in his car, and the respondent No. 1 actually did not have the same fitted in his car, we are of the opinion that he should not have been charged an extra Rs.7,000/- for the catalytic converter which was charged from persons living in Delhi, Bombay, Calcutta and Madras. Of course, if he had opted for such catalytic converter he would have to pay the price

for the same, but he never opted for it. Hence, in our opinion charging him Rs. 7,000/- for the same was wholly arbitrary.

8. Mr. Bhasin then submitted that even a person living in any other city apart from the 4 metropolitan cities would have been given a catalytic converter in his Maruti car free of cost had he asked for it. There is no such averment in the written submission filed by the appellant before the National Consumer Commission or the other consumer fora and hence we are not inclined to accept this oral submission.

9. Mr. Bhasin further submitted that in pricing matters the consumer forum cannot interfere and in this behalf he has relied upon the decisions of this Court in the cases of State of Gujarat Vs. Rajesh Kumar Chimanlal Barot & Anr. 1996 (5) SCC 477, Tamil Nadu Housing Board & Ors. Vs. Sea Shore Apartments Owners' Welfare Association 2008 (3) SCC, 21 and Pallavi Refractories & Ors. Vs. Singareni Collieries Co. Ltd. & Ors. 2005 (2) SCC 227.

10. As regards the decision in State of Gujarat Vs. Rajesh Kumar Chimanlal Barot (supra), it is a very cursory order and has no application to the present case. 11. The decision in Pallavi Refractories (supra) in fact supports the case of the respondent. It has been observed in paragraph 19 of the said judgment that, "There is no such law that a particular commodity cannot have a dual fixation of price. Dual fixation of price based on reasonable classification from different types of customers has met with approval from the Courts."

12. The above observation clearly indicates that dual fixation of price can only be sustained if it is based on a reasonable classification. In the present case, as already mentioned above, the classification is not reasonable, since a person whose vehicle does not have a catalytic converter should not be made to pay for the same.

13. As regards the decision in the case of Tamil Nadu Housing Board (supra), it has been observed therein (in the last sentence of para 26) as under : "Normally, therefore, it would not be appropriate to enter into adequacy of price."

14. In this connection, two things may be noted. Firstly, use of the word 'normally' indicates that it is not a hard and fast rule. Secondly, in the present case we are not really concerned with adequacy of price. We are concerned with charging by the appellant for a converter which he has not supplied to the respondent. In our opinion, this is unfair trade practice as defined in Section 2(1)(r) of the Consumer Protection Act.

15. Mr. Bhasin also submitted that the Central Government had directed that the same price be charged for all cars, whether fitted with a converter or not. No such government directive is on the record of this case, but even if there is such a directive, in our opinion, it will be arbitrary and violative of Article 14 of the Constitution of India.

16. In the present case, the grievance of the complainant was that he was being overcharged for a catalytic converter which he neither demanded nor was it actually fitted in his car

purchased from the appellant. In our opinion, the complaint filed by respondent No. 1 is justified as the aforesaid act amounts to an unfair trade practice as defined in Section 2(1)(r) of the Consumer Protection act, 1986. It may be noted that the definition in Section 2(1)(r) is an inclusive one, and is not exhaustive of sub-clauses (i) to (x) therein.

17. For the reasons stated above, we find no force in this appeal. It is dismissed accordingly. No order as to the costs.

* * * * *

Arulmighu Dhandayudhapaniswamy v. *Director General of Post Offices (2011)*

1) This appeal is filed by the appellant-Temple through its Joint Commissioner against the final order dated

31.05.2006 passed by the National Consumer Disputes Redressal Commission (in short & quot; the National Commission & quot;) at New Delhi in First Appeal No. 411 of 1997 whereby the Commission dismissed their appeal.

2) Brief facts:

(a) The appellant is a temple situated in the State of Tamil Nadu. It is one of the ancient temples of Lord Kartikeya and is considered prime among the six holiest shrines of the Lord. Every year, lakhs of devotees throng the temple which is situated on a hill to receive the blessings of the Lord. The temple is being administered by the Hindu Religious and Charitable Endowments Department of the Government of Tamil

Nadu. The devotees make offering in cash and kind to the deity. The cash offerings are collected and invested in various forms. The income derived from such investments is utilized for charitable purposes such as prasadams, hospitals, schools and orphanages.

(b) According to the appellant, it had deposited a huge sum of money totaling to Rs.1,40,64,300/- with the Post Master, Post Office, Palani from 05.05.1995 to 16.08.1995 for a period of five years under the `Post Office Time 2 Deposit Scheme' (in short `the Scheme'). On 01.12.1995, the Temple received a letter from the Post Master, Post Office, Palani-3rd Respondent herein informing that the Scheme had been discontinued for investment by institutions from 01.04.1995, and therefore, all such accounts should be closed without interest. The amount deposited by the Temple was refunded only on 03.01.1996 without interest.

(c) Aggrieved by the decision of the Postal Authorities, the appellant, on 10.01.1996, sent a legal notice to the respondents calling upon them to pay a sum of Rs.9,13,951/- within a period of seven days, being the interest @ 12% p.a. on the sum of Rs.1,40,64,300/- from the dates of deposit till the dates of withdrawal. As nothing was forthcoming from the respondents, the appellant preferred a complaint before the State Consumer Disputes Redressal Commission (in short " the State Commission"). Vide order dated 08.08.1997, the 3 State Commission was divided over its opinion in the ratio of 2:1. The majority opinion comprising of the Chairman and Member II dismissed the complaint filed by the appellant.

(d) Aggrieved by the dismissal of the complaint by the State Commission, the appellant preferred an appeal to the National Commission which was also dismissed on 31.05.2006. Challenging the said order, the appellant has preferred this appeal by way of special leave before this Court.

3) Heard Mr. S. Aravindh, learned counsel for the appellant and Mr. A.S. Chandhiok, learned Additional Solicitor General for the respondents.

4) Points for consideration in this appeal are whether there was any deficiency in service on the part of the Post Master, Post Office, Palani-3rd Respondent herein and whether the appellant-complainant is entitled to any relief by way of interest?

Discussion

5) We have already adverted to the factual details. It is the case of the respondents that the Central Government had issued a Notification being No. G & SR 118(E) 119(E) 120(E) as per which no Time Deposit shall be made or accepted on behalf of any institution with effect from 01.04.1995. It is not in dispute that the appellant-Temple had deposited a huge sum of money amounting to Rs.1,40,64,300/- with the Post Master from 05.05.1995 to 16.08.1995. The said deposit was for a period of five years under the Scheme. Though the 3rd Respondent had accepted the amount under the said Scheme and issued a receipt for the same, later it was found that the deposits made on and from 01.04.1995 were against the said Notification which amounted to contravention of the Post Office Savings Bank General Rules, 1981 (in short `the Rules').

6) In exercise of the powers conferred by Section 15 of the Government Savings Banks Act, 1873, the Central Government framed the above mentioned Rules. The Rules are applicable to the following accounts in the Post Office Savings Bank, namely, a) Savings Account b) Cumulative Time Deposit Account c) Recurring Deposit Account d) Time Deposit Account and it came into force with effect from 01.04.1982. Among various Rules, we are concerned with Rules 16 & 17 which read as under:- "16. Accounts opened incorrectly.--(1) Where an account is found to have been opened incorrectly under a category other than the one applied for by the depositor, it shall be deemed to be an account of the category applied for if he was eligible to open such account on the date of his application and if he was not so eligible, the account may, if he so desires, be converted into an account of another category ab initio, if he was eligible to open an account of such category on the date of his application.

(2) In cases where the account cannot be so converted, the relevant Head Savings Bank may, at any time, cause the account to be closed and the deposits made in the accounts refunded to the depositor with interest at the rate applicable from time to time to a savings account of the type for which the depositor is eligible.

17. Accounts opened in contravention of rules.--Subject to the provisions of rule 16, where an account is found to have been opened in contravention of any relevant rule for the time being in force and applicable to the accounts kept in the Post Office Savings Bank, the relevant Head Savings Bank may, at any time, cause the account to be closed and the deposits made in the account refunded to the depositor without interest." Since the deposits in the case on hand relate to Post Office Time Deposit Account, Rule 17 of the Rules is squarely applicable. The reading of Rule 17 makes it clear that if any Account is found to have been opened in contravention of any Rule, the relevant Head Savings Bank may, at any time, cause the account to be closed and the deposits made be refunded to the depositor without interest. Rule 16 speaks that where an account is opened incorrectly under a category other than the one

applied for by the depositor, it shall be deemed to be an account of the category applied for if a person is eligible to open such account and if he is not so eligible, the account may be converted into an account of another category ab initio, if the person so desires and if he is found to be eligible. For any reason, where the account cannot be so converted, the account is to be closed and the deposits made in the accounts be refunded to the depositor with interest at the rate applicable from time to time to a savings account of the type for which the depositor is eligible.

7) Before considering Rule 17, it is useful to refer the communication dated 01.12.1995 of the Post Master-3rdRespondent herein which reads as under:

"DEPARTMENT OF POSTS, INDIA

From

Post Master

Palani 624 601

To

The Joint Commissioner/

Executive Officer

A/M. Dhandayuthapani Swamy

Thirukoil, Palani

No. DPM/SB/Dlg. Dated at Palani 01.12.1995 Sub: Investment by Institution in the Post Office Time Deposits, K.V. Patras, NSC VIII Issue-reg.

Sir,

I am to inform you that with effect from 01.04.1995 investments by Institution in the P.O. T.D. V.P.+N.S.C. VIII issue is discontinued. As Devasthanam is also an Institution, I request you to close all the TD accounts immediately without interest and also if any kind of above said patras and certificates purchased by the Devasthanam after 01.04.1995. The following TD accounts have been opened at Palani H.O. after 01.04.1995. Please close the accounts immediately. 1) 5 year TD 2010417 dt. 05.05.1995, (2) 2010418 dt. 20.05.1995, (3)2010419 dt. 31.05.1995, (4) 2010421 dt. 14.06.1995, (5) 2010422 dt. 21.06.1995, (6) 2010423 dt. 03.07.1995, (7) 2010424 dt. 03.07.1995, (8) 2010425 dt. 11.07.1995 (9) 2010426 dt. 13.07.1995, (10) 2010428 dt. 29.07.1995, (11) 2010429 dt. 01.08.1995, (12) 2010430 dt. 07.08.1995, (13) 2010431 dt. 07.08.1985 and (14) 2010435 dt. 16.08.1995. 8

Yours faithfully

(Sd/-).....

Arulmighu Dhandayupaniswamy ... vs Dir. General Of Post Offices & Ors. on 13 July, 2011

Post Master

Palani 624 601"

It is clear from the above communication that with effect from 01.04.1995 i.e. even prior to the deposits made by the appellant-Temple, investment by institutions under the Scheme was

not permissible and in fact discontinued from that date. It is not in dispute that the appellant-Temple is also an institution administered and under the control of the Hindu Religious and Charitable Endowments Department of the State. Vide the above said communication, the Post Master, Palani informed the appellant to close all those accounts since the same was not permissible. The communication dated 01.12.1995 also shows that all such accounts should be closed and the amounts so deposited are to be refunded without interest. In our case, the deposit accounts have been caused to be closed and the amounts deposited have been returned to the depositors without interest. Though the appellant claimed interest and insisted for the same on the ground of deficiency in service on the part of the Post Master, Palani, in view of Rule 17, the respondents are justified in declining to pay interest for the deposited amount since the same was not permissible. In the light of Rule 17 of the Rules, as rightly concluded by the State and the National Commission, it cannot be held that there was deficiency in service on the part of the respondents, 3rd respondent in particular.

8) The State Commission while rejecting the claim of the appellant relied on a decision of this Court reported in Postmaster Dargamitta, H.P.O., Nellore vs. Raja Prameeelamma (Ms.) (1998) 9 SCC 706. In that case, the complainant therein issued six National Savings Certificates for Rs. 10,000/- each on 28.04.1987 from the Post Office. According to the Notification issued by the Government of India, the rate of interest payable with effect from 01.04.1987 was 11 per cent. But due to inadvertence on the part of the clerical staff of the Post Office, the old rate of interest and the maturity value which was printed on the certificates could not be corrected. The question that arose in that case was whether the higher rate of interest printed in the Certificate shall be paid or only the rate of interest mentioned in the Notification is applicable. This Court held that even though the Certificates contained the terms of contract between the Government of India and the holders of the National Savings Certificate, the terms in the contract were contrary to the Notification and therefore the terms of contract being unlawful and void were not binding on the Government of India and as such the Government refusing to pay interest at the rate mentioned in the Certificate is not a case of deficiency in service either in terms of law or in terms of contract as defined under Section 2(1)(g) of the Consumer Protection Act, 1986. The above said decision is squarely applicable to the case on hand.

9) It is true that when the appellant deposited a huge amount with the 3rd Respondent from 05.05.1995 to 16.08.1995 under the Scheme for a period of five years, it was but proper on the part of the Post Master to have taken a note of the correct Scheme applicable to the deposit. It was also possible for the Post Master to have ascertained from the records, could have applied the correct Scheme and if the appellant, being an institution, was not eligible to avail the Scheme and advised them properly. Though Mr. S. Aravindh, learned counsel for the appellant requested this Court to direct the 3rd Respondent to pay some reasonable amount for his lapse, inasmuch as such direction would go contrary to the Rules and payment of interest is prohibited for such Scheme in terms of Rule 17, we are not inclined to accept the same. We are conscious of the fact that a substantial amount had been kept with the 3rd

Respondent till 03.01.1996 when the said amount was refunded without interest. In the light of the letter dated 01.12.1995 and in view of Rule 17 of the Rules, failure to pay interest

cannot be construed as a case of deficiency in service in terms of Section 2(1)(g) of the Consumer Protection Act, 1986. Both the State and the National Commission have concluded that the 3rd Respondent was ignorant Arulmighu Dhandayupaniswamy ... vs Dir. General Of Post Offices & Ors. on 13 July, 2011 of any Notification and because of this ignorance the appellant did not get any interest for the substantial amount. We agree with the factual finding arrived at by the State and the National Commission and in view of the circumstances discussed above, the respondents cannot be fastened for deficiency in service in terms of law or contract and the present appeal is liable to be dismissed.

10) Before parting with this appeal, we intend to make the following suggestions to the Post Offices dealing with various accounts of deposits:

i) Whether it is metropolitan or rural area, persons dealing with public money or those who are in-charge of accepting deposits to be conversant with all the details relating to types of deposits, period, rate of interest, eligibility criteria etc. for availing benefits under different schemes.

ii) It is desirable to exhibit all these details in vernacular language in a conspicuous place to facilitate the persons who intend to invest/deposit money.

iii) That if the Central Govt. issues any notification/instructions regarding change in the interest rate or any other aspect with regard to deposits, the decision taken shall be immediately passed on to all the authorities concerned by using latest technology methods i.e. by fax, e-mail or any other form of communication so that they are kept updated of the latest developments.

iv) If there is any change in different types of schemes, it must be brought to the notice of the sub-ordinate staff of the post offices dealing with deposits in order to ensure that correct procedures are followed and correct information is given to the public.

11) We are constrained to make these observations since in the case on hand because of the lack of knowledge on the part of the Post Master who accepted the deposit and the appellant, one of the ancient temples in Tamil Nadu lost a substantial amount towards interest.

12) With the above observations, we dismiss the appeal with no order as to costs.

TELECOM REGULATORY AUTHORITY OF INDIA

Delhi Science Forum & Ors. v. *Union of India & Anr.*

AIR 1996 SC 1356

The petitioners in different writ petitions have questioned the power of the Central Government to grant licences to different non-Government Companies to establish and maintain Telecommunications System in the country and the validity of the procedure adopted by the Central Government for the said grant. In February 1993, the Finance Minister in his Budget speech announced Government's intention to encourage private-sector involvement and participation in Telecom to supplement efforts of Department of Telecommunications especially in creation of internationally competitive industry. May 13, 1994 National Telecom policy was announced which was placed in the Parliament saying that the aim of the policy was to supplement the effort of the Department of Telecommunications in providing telecommunications services. Later, guidelines for induction of private-sector into basic telephone services were announced and a Committee was set up to draft the tender documents for basic telephone services under the Chairmanship of G.S.S. Murthy. Ministry of Communications published the 'Tender Documents for Provision of Telephone Service'. It specified and prescribed the terms and conditions for the basic services and it also conceived foreign participation but as a joint venture prescribing a ceiling on total foreign equity so far the Indian Company was concerned was not to exceed 49% of the total equity apart from other conditions. Pursuant to the notice inviting tenders, tenders were submitted for different circles, but before licences could be granted by the Central Government, writ petitions were filed in different High Courts as well as before this Court. All writ petitions filed before different High Courts were transferred to this Court to be heard together.

Telecommunications has been internationally recognized as a public utility of strategic importance. The variety of Telecommunications services that has become available globally in the last decade is remarkable. It is being realized that economy is increasingly related to the way this Telecom infrastructure functions for purpose of processing and transmission of information, which has acquired central stage in the economic world today. The special aspect about Telecommunications is inter- connectivity which is known as 'any to any requirement'. Because of the economic growth and commercial changes in different Parts of the world, need for inter-connectivity means that communication systems have to be compatible with each other and have to be actually inter-connected. Because of this, there is a demand even in developing countries to have communication system on international standards. Even after several decades of the invention of the telephone system, in almost all countries Telecommunications was the subject of monopoly supplied with the public network operator normally being the State owned Corporation or Government Department. Then it was not thought due to different considerations that such right could be granted to private sectors denuding the right of the monopoly of the Government to maintain and run the system of Telecommunications. The developed countries first took decision in respect of privatization of Telecom which amounted to giving up the claim of exclusive privilege over such system and this led to the transition from monopoly to a duopoly policy in many countries. India,

although a developing country also faced a challenge in this sector. By and large it was realized that this sector needed acceleration because of the adoption of liberalized economic policy for the economic growth of the country. It appears that the policy makers were faced with the implications for public welfare vis-a-vis the sector being capital intensive. How the network is well maintained so as it reaches the largest number of people at a price to be paid by such users which can be held as reasonable? This issue was also inter- related with the defence and national security of the nation. Different committees and bodies constituted from time to time examined the Telecom policy which could be adopted by the nation from different aspects and angles. The counsel appearing in some of the writ petitions questioned the validity and propriety of the new Telecom Policy itself on the ground that it shall endanger The national security of the country, and shall not serve the economic interest of the nation. According to them, telecommunication being a sensitive service should always be within the exclusive domain and control of the Central Government and under no situation it should be parted with by way of grant of licences to non-Government Companies and private bodies. The national policies in respect of economy, finance, communications, trade, telecommunications and others have to be decided by the Parliament and the representatives of the people on the floor of the Parliament can challenge and question any such policy adopted by the ruling Government. In the case of R.K. Garg etc. etc. v. Union of India & Ors., (1982) S.C.R. 347 a Constitution Bench of this Court said:

> "Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislature judgment in the field of economic regulation than in other areas where fundamental human rights are involved."

In Morey v. Dond, 354 US 457 Frankfurter, J said:

> "In the utilities, tax and economic regulation cases, there are good reasons for judicial selfrestraint if not judicial difference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events-self limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."

What has been said in respect of legislations is applicable even in respect of policies which have been adopted by the Parliament. They cannot be tested in Court of Law. The courts cannot express their opinion as to whether at a particular juncture or under a particular situation prevailing in the country any such national policy should have been adopted or not.

There may be views and views, opinions and opinions which may be shared and believed by citizens of the country including the representatives of the people in the Parliament. But that has to be sorted out in the Parliament which has to approve such policies. Privatization is a fundamental concept underlying the questions about the power to make economic decisions. What should be the role of the State in the economic development of the nation? How the resources of the country shall be used? How the goals fixed shall be attained? What are to be the safeguards to prevent the abuse of the economic power? What is the mechanism of accountability to ensure that the decision regarding Privatization is in public interest? All these questions have to be answered by a vigilant Parliament. Courts have their limitations because these issues rest with the policy makers for the nation. No direction can be given or is expected from the courts unless while implementing such policies, there is violation or infringement of any of the Constitutional or statutory provision. The new Telecom Policy was placed before the Parliament and it shall be deemed that Parliament has approved the same. This Court cannot review and examine as to whether said policy should have been adopted. Of course, whether there is any legal or Constitutional bar in adopting such policy can certainly be examined by the court. The primary ground of the challenge in respect of the legality of the implementation of the policy is that Central Government which has the exclusive privilege under Section 4 of the Indian Telegraph Act, 1885 (hereinafter referred to as the 'Act') of establishing, maintaining and working telegraphs which shall include telephones, has no authority to part with the said privilege to non-Government Companies for the consideration to be paid by such companies on basis of tenders submitted by them; this amounts to an out and out sale of the said privilege. The expression 'telegraph' has been defined in Section 3(1):

"3(1) "telegraph" means any appliance, instrument, material or apparatus used or capable of use of transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electromagnetic emissions, Radio waves or Hertzian waves, galvanic, electric or magnetic means.

Explanation - "Radio waves" or "Hertzian waves" means electromagnetic waves of frequencies power than 3,000 gigacycles per second propagated in Space without artificial guide."

Section 4 of the Act is as follows:

"4. (1) Within India the CentralGovernment shall have the exclusive privilege of establishing, maintaining and working telegraphs:

Provided that the Central Government may grant a licence, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India:

Provided further that the Central Government may, by rules made under this Act and published in the Official Gazette, permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working-

(a) of wireless telegraphs on ships within Indian territorial waters and on aircraft within or above India, or Indian territorial waters and

(b) of telegraphs other than wireless telegraphs within any part of India.

(2) The Central Government may, by notification in the Official Gazette, delegate to the telegraph authority all or any of its powers under the first proviso to subsection (1). The exercise by the telegraph authority of any power so delegated shall be subject to such restrictions and conditions the Central Government may, by the notification, think fit to impose."

There is no dispute that the expression 'telegraph' as defined in the Act shall include telephones and telecommunications services. Sub-section (1) of Section 4 on plain reading vests the right of exclusive privilege of establishing, maintaining and working telegraphs in the Central Government, but the proviso thereof enables the Central Government to grant licence, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain and work telegraph within any part of India. It is true that the Act was enacted as early as in the year 1885 and central Government exercised the exclusive privilege of establishing, maintaining and working telegraphs for more than a century. But the framers of the Act since the very beginning conceived and contemplated that a situation may arise when the Central Government may have to grant a licence to any Person to establish, maintain or work such telegraph including telephone within any part of India. With that object in view, it was provided and prescribed that licence may be granted to any person on such conditions and in consideration of such payments as the Central Government may think fit. If proviso to sub-section (1) of Section 4 itself provides for grant of licence on condition to be prescribed and considerations to be paid to any person, then whenever such licence is granted, such grantee can establish, maintain or work the telephone system in that part of India. In view of the clear and unambiguous proviso to sub-section (1) of Section 4, enabling the Central Government to grant licences for establishment, maintenance or working of telegraphs including telecommunications, how can it be held that the privilege which has been vested by sub-section (1) of Section 4 of the Act in the Central Government cannot be granted to others on conditions and for considerations regarding payments? According to us the power and authority of the Central Government to grant licences to private bodies including Companies subject to conditions and considerations for payments cannot be questioned. That right flows from the same sub-section (1) of Section 4 which vests that privilege and right in the Central Government. Of course, there can be controversy in respect of the manner in which such right and privilege which has been vested in the Central Government has been parted with in favour of private bodies. It cannot be disputed that in respect of grant of any right or licence by the Central Government or an authority which can be held to be State within the meaning of Article 12 of the Constitution not only the source of the power has to be traced, but it has also to be found that the procedure adopted for such grant was reasonable, rational and inconfirmity with the conditions which had been announced. Statutory authorities have some times used their discretionary power to confer social or economic benefits on a particular section or group of community. The plea raised is that the Act vests power in them to be exercised as they 'think fit'. This is a misconception. Such provisions while vesting powers in authorities including the Central Government also enjoin a fiduciary duty to act with due restrain, to avoid 'misplaced philanthropy or ideology'. Reference in this connection can be made to the cases: Roberts v. Hopewood, (1925) A.C. 578; Prescott v.Birmingham Corporation, (1954)3 All E.R.698; Taylor & Ors. v. Munrow (1960) 1 All E.R. 455; Bromley

London Borough Council v. Greater London Council and another, (1982) 1 All E.R. 129. As such Central Government while exercising its statutory power under first proviso to Section 4(1) of the Act, of granting licences for establishment, maintenance and working of Telecommunications has a fiduciary duty as well. The new experiment has to fulfill the tests laid down by courts for exercise of a statutory discretion. It cannot be exercised in a manner which can be held to be unlawful and which is now known in administrative law as Wednesbury principle, stated in Associated Provincial Picture Houses Ltd. v. Wednesbury Corp, (1947) 2 All E.R. 680. The aforesaid principle is attracted where it is shown, that an authority exercising the discretion has taken a decision which is devoid of any plausible justification and any authority having reasonable persons could not have taken the said decision. In the case of Bromley LBC (supra) it was said by Lord Diplock:-

> "Powers to direct or approve the general level and structure of fares to be charged by the LTE for the carriage of passengers on its transport system, although unqualified by any express words in the Act. may none the less be subject to implied limitations when expressed to be exercisable by a local authority such as the GLC ..... "

As such Central Government is expected to put such conditions while granting licences, which shall safeguard the public interest and the interest of the nation. Such conditions should be commensurate with the obligations that flow while parting with the privilege which has been exclusively vested in the Central Government by the Act. A stand was taken that even if it is assumed that because of the proviso to sub-section (1) of Section 4, the Central Government can grant licences in respect of establishing, maintaining or working of telecommunications to Indian Companies registered under the Indian Companies Act, such power should have been exercised only after framing of rules under Section 7 of the Act. In support of this stand, attention was drawn to second proviso to sub- section (1) of Section 4 which says that 'the Central Government may, by rules made under this Act' permit subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working - (a) of wireless telegraphs on ships within Indian territorial waters and on aircraft within or above India, or Indian territorial waters and (b) of telegraphs other than wireless telegraphs within any part of India. It was pointed out that clause (b) of the second proviso to sub-section (1) of Section 4 shall govern the grant of the licence under the first provio to sub-section (1) of Section 4 as well because both provisos contemplate grant of licence/permit for telegraphs within any part of India to any person by the Central Gvoernment. At first blush tghis argument appears to be attarctive, but on closer examination, it appears that whereas the first proviso to sub-section (1) of Section 4 contemplates the grant of a licence, second proviso to be same sub-section (1) of Section 4 speaks about permitting establishment, maintenance and working of telegraphs other than wireless telegraphs within any part of India. It need not be pointed out that the concept of grant of licence to establish, maintain or work a telegraph shall be different from granting Permission under the second proviso to establish, maintain or to work a telegraph within any part of India. They do not conceive and contemplate the same area of operation. It may be relevant to point out that so far clause (b) of second proviso is concerned, it excludes wireless telegraphs, which restriction has not been prescribed in the first proviso. The second proviso was introduced by Act No.VII of 1914. From a copy of the Bill which was introduced in the Council of the Governor General of India in respect of adding one more proviso to sub-section (1) of Section 4 of the Act, it appears there was no

clause (b). In the Statement of Objects and Reasons of the said Amendment, it was said that the second proviso was being introduced, for establishment, maintenance and working of the wireless telegraphs on ships within Indian territorial waters. However, in the Amending Act, clause (b) aforesaid was also introduced enabling the Central Government, by rules to permit, subject to such restrictions and conditions, the establishment, maintenance and working of telegraphs other than wireless telegraphs within any part of India. According to us, there is no question of clause (b) of the second proviso controlling or over-riding in any manner the first proviso which does not speak of the grant of licence by any rules made under the said Act. Section 7 enables the Central Government to make rules consistent with the provisions of the Act for the conduct of all or any telegraphs established, maintained or worked by the Government or by persons licensed under the said Act. Clause (e) of sub-section (2) of Section 7 prescribes that rules under the said Section may provide for conditions and restrictions subject to which any telegraph line, appliance or apparatus for telegraphic communication shall be established, maintained, worked, repaired, transferred, shifted, withdrawn or disconnected. there is no dispute that no such rules have been framed as contemplated by Section 7(2)(e) of the Act. But in that event, it cannot be held that unless such rules are framed, the Power under sub- section (1) of Section 4 cannot be exercised by the Central Government. The power has been granted to the Central Government by the Act itself, and the exercise of that right, by the Central Government, cannot be circumscribed, limited or restricted on any subordinate legislation to be framed under Section 7 of the Act. No doubt, it was advisable on the part of the Central Government to frame such rules when it was so desired by the Parliament. Clause (e) to subsection (2) of Section 7 was introduced by Amending Act 47 of 1957. If the conditions and restrictions subject to which any telegraph - telephone line is to be established, maintained or worked had been prescribed by the rules, there would have been less chances of abuse or arbitrary exercise of the said power. That is why by the Amending Act 47 of 1957 the Parliament required the rules to be framed. But the question is as to whether specifically vested in it by first proviso to Section 4(1) of the Act? Even in absence of rules the power to grant licence on such conditions and for such considerations can be exercised by the Central Government but then such power should be exercised on well settled principles and norms which
can satisfy the test of Article 14 of the Constitution. If necessary for the purpose of satisfying as to whether,the grant of the licence has been made strictly in terms of the proviso complying and fulfilling the conditions prescribed, which can be held not only reasonable, rational, but also in the public interest can be examined by courts. It need not be impressed that an authority which has been empowered to attach such conditions, as it thinks fit, must have regard to the relevant considerations and has to disregard the irrelevant ones. The authority has to genuinely examine the applications on its individual merit and not to promote a purpose alien to the spirit of the Act. In this background, the courts have applied the test of a reasonable man i.e. the decision should not be taken or discretion should not be exercised in a manner, as no reasonable man could have ever exercised. Many administrative decisions including decisions relating to awarding of contracts are vested in a statutory authority or a body constituted under an administrative order. Any decision taken by such authority or a body can be questioned primarily on the grounds: (i) decision has been taken in bad faith; (ii) decision is based on irrational or irrelevant considerations; (iii) decision has been taken

without following the prescribed procedure which is imperative in nature. While exercising the power of judicial review even in respect of contracts entered on behalf of the Government or authority, which can be held to be State within meaning of Article 12 of the constitution courts have to address while examining the grievance of any petitioner as to whether the decision has been vitiated on one ground or the other. It is well settled that the onus to demonstrate that such decision has been vitiated because of adopting a procedure not sanctioned by law, or because of bad faith or taking into consideration factors which are irrelevant, is on the person who questions the validity thereof. This onus is not discharged only by raising a doubt in the mind of the court, but by satisfying the court that the authority or the body which had been vested with the power to take decision has adopted a procedure which does not satisfy the test of Article 14 of the Constitution or which is against the provisions of the statute in question or has acted with oblique motive or has failed in its function to examine each claim on its own merit on relevant considerations. Under the changed scenarios and circumstances prevailing in the society, courts are not following the rule of judicial self-restraint. But at the same time all decisions which are to be taken by an authority vested with such power cannot be tested and examined by the court. The situation is all the more difficult so far the commercial contracts are concerned.

The Parliament has adopted and resolved a national policy towards liberalization and opening of the national gates for foreign investors. The question of awarding licences and contracts does not depend merely on the competitive rates offered; several factors have to be taken into consideration by an expert body which is more familiar with the intricacies of that particular trade. While granting licences a statutory authority or the body so constituted, should have latitude to select the best offers on terms and conditions to be prescribed taking into account the economic and social interest of the nation. Unless any party aggrieved satisfies the court that the ultimate decision in respect of the selection has been vitiated, normally courts should be reluctant to interfere with the same. Tender documents for provision of telephone service were issued inviting tenders in respect following Telecom Territorial Circles: (1) Andhra Pradesh, (2) Andaman & Nicobar Islands, (3) Assam, (4) Bihar, (5) Gujarat, (6) Haryana, (7) Himachal Pradesh, (8) Jammu & Kashmir, (9) Karnataka, (10) Kerala, (11) Madhya Pradesh, (12) Maharashtra (including MTNL Bombay), (13) North East, (14) Orissa, (15) Punjab, (16) Rajasthan, (17) Tamilnadu (including Madras Metro Distt.), (18) Uttar Pradesh, (19) West Bengal (including Calcutta Metro Distt.), (20) Delhi (MTNL Delhi). In the Tender Documents the aforesaid Telecom Territorial Circles were put under three categories as Category A, Category B and Category C service areas. In category A - A.P. Circle, Delhi (MTNL), Gujarat Circle, Karnataka Circle, Maharashtra Circle (including Bombay MTNL), T.N. Circle (including Madras Metro District); in Category B - Haryana Circle, Kerala Circle, M.P. Circle, Punjab Circle, Rajasthan Circle, U.P. West Circle, U.P. East Circle, W.B. Circle (Including Calcutta Metro District); and in Category C - Andaman & Nicobar Islands Circle, Assam Circle, Bihar Circle, H.P. Circle, J&K Circle, N.E. Circle, Orissa Circle were specified. It was said the DOT/MTNL shall continue to operate telephone service in the Service Areas mentioned aforesaid. It was further said that in respect of International, National and Inter-service Areas, Telephone Traffic will be routed through the Long Distance Network of DOT (Department of Telecommunications). The eligibility conditions for bidders

which were specified in Clause 2.1 Part I Section II of the Tender Documents: "2.1 ELIGIBILITY CONDITIONS FOR BIDDERS:
i) Indian Company: The bidder must be an Indian Company registered, before the date of submission of bid, under the Indian Companies Act, 1956. However, the bidder must not be a Government Company as defined in the Indian Companies Act, 1956.
(19) ii) Foreign Equity : Total foreign equity in the bidding Company must not exceed 49% of the total equity.
iii) Networth : Networth of the bidder Company and its promoters, both Indian and Foreign, as reflected in the latest audited balance sheet, must not be less than the amount mentioned in Table
I for each category of Service Areas provided that the networth of a Foreign promoter shall not be
taken into account for this purpose if its share in the equity capital of the bidder Company is less than 10%. A bidder Company which meets the minimum requirement of networth for a Service Area of one category may bid for any number of Service Areas of that or lower category.

Total Category of Service Areas (one or more the Bidder Service Area) for which bid can be submitted.	Networth of Company
Rs. 50 Crores C	
Rs.200 Crores B and C	
Rs.300 Crores A, B and C	

Networth in foreign currency shall be converted into Indian Rupees at rates valid for 16.01.1995 as declared by the Reserve Bank of India. Networth is defined as the total in Rupees of paid up equity capital and free reserves.
iv) Experience : The bidder must have experience as a service provider and a network operator of
a public switched telephone network with a minimum subscriber base in terms of DELs served (excluding ISDN lines and mobile telephone lines) as on 01.01.1995 of not less than 500,000 (5 Lakh) lines.
For the purpose of eligibility with regard to experience of a promoter Company which has an equity of 10% or more in the bidder Company and which is a service provider and a network operator of a public switched telephone network, Will also be added to the experience of the bidder Company.
NOTE:
1. Subscriber base refers to the Subscriber who are being provided telephone service.
2. Telephone service - see Section IV.
V) Any number of Indian Companies as well as foreign Companies can combine to promote the bidder Company, However, an Indian, Company cannot be part of more than one such joint venture. The same restriction applies to a foreign Company. Clause 2.2 required the bidder company to submit apart from other documents mentioned therein: (i) Copy of

Certificate of incorporation of the bidder company from the Registrar of Campanies. (ii) Memorandum and Articles of Association of the bidder company.
(iii)Networth and experience calculation sheet as per Annexure 1.
(iv) Annual reports for the last five financial years of the bidder Company as well as all the promoter Companies which have to be taken into consideration for the purpose of evaluating networth and experience.
(v) A comprehensive detailed document containing Company profile, a five year perspective network plan, a five year financial plan with funding mechanism. Details of management and technical expertise etc.
(vi) Copy of the agreement between Indian and foreign Company.
(vii)Approval of the Government of India for the terms of foreign participation, if already taken, otherwise copy of the application submitted to the competent authority of Government of India, in this regard together with proof of submission.
(viii)Certificate from the competent authority in the Government of India to the effect that the total foreign equity in the bidder company does not exceed 49%. (ix) Documentary evidence in support of the experience claimed and other items quoted in the bid. Clause 12 provided for the award of tenders. The relevant part is as follows:
" The maximum number of Service Areas, a successful bidder can be licensed for, is dependent upon the total networth of the bidder. A successful bidder can be awarded X, Y, Z numbers of category A B and C areas respectively if the total networth calculated as per Clause 2.1 (iii) above equals or exceeds Rs.(300X + 200Y + 50Z)
Crores.....
.....
.....
TELECOM AUTHORITY is free to restrict the number of service areas for which any one Company can be licensed to provide the SERVICE."
(emphasis supplied)
Section III contained different conditions including in respect of Security in Clause 16. Section IV provided the condition relating to technical service. In the same Tender Documents service tariff was also specified. Pursuant to the invitation of tenders aforesaid different Indian Companies including Indian Companies with foreign equities submitted their tenders. The Tender Evaluation Committee comprised of the following members for evaluation of the bids for basic telephone service: Shri B.S. Karandikar, Member (Production).. Chairman Shri S.D. Chaturvedi, Jt. Secretary (T).. Member Smt. Runu Ghosh, DDG (LF).. Member Shri S.K. Jain, DDG (TX).. Member Shri M.K. Garg, DDG (VAS).. Member Shri O.P. Choudhary, DDG (BS)... Member & Convenor All the tenders were placed before the said Committee which after evaluating all the bids received submitted its report. We are not concerned with the details of the said report, but it shall be proper to refer to some salient features which have bearing on some of the issues raised in these writ petitions. As one of the tenderers M/s HFCL - Bezeq had emerged as the highest bidder in nine circles, the Committee reported.
"Multiple H1 Bids from a Single Bidder:
(1) The Committee observed that in nine Circles, only one bidder viz. M/s HFCL Bezeq have emerged as the highest bidder. If all the nine Circles are awarded to this bidder, it would

result in a kind of private monopoly with M/s HFCL emerging as the single largest dominant Private undertaking in this sector with over 75% share of additional DELs over a period of three years.

(2) The main purpose of allowing the private sector to enter into Basic Service was to complement the efforts of DOT in reaching the Delhi Science Fortum & Ors vs Union Of India & Anr on 19 February, 1996 target of 'telephone-on-demand' situation by 1997, covering all villages as early as possible and providing telecom services of world standard. If we entrust the development of telecom in so many major Circles to only one bidder and that bidder is not able to

deliver the number of lines promised due to inability in a short time to mobilize the very large resources required for providing services in so many Circles, then development of Telecom in the country will be stunted.

(3) Further, Telecom being a very sensitive sector from the point of view of national security, private foreign investment should be more evenly distributed and the predominance of any one foreign country (which would result from one bidder with a specific foreign partner getting a majority of Circles) should be avoided.

(4) Taking all these factors into consideration, imposition of a limit on the maximum number of Circles to be allotted in 'A' & 'B' category circles, seems to be called for. The restriction can be as follows:

(i) Out of category 'A' & `B' circles bid, not more than three circles should be allotted to any single bidder. This restriction need not apply to category 'C' circles which have evoked poor response from the bidders.

(ii) Subject to this restriction, the H1 bidder should be given an option to choose the Circles.

(iii) The Circles which are vacated by H1 bidder after exercising the above option will need to be offered to the rest of the bidders in the descending order of their ranking for matching the package offered by the H1 bidder.

(5) The Committee felt that the gap between H1 and the H2 bids in such Circles referred to in para B 4(iii) above is so wide that there appears to be remote possibility of any of the bidders matching the H1 package. In such a situation, the Department may have to go in for retendering for these Circles.

However, the Committee noted that if we invite fresh bids through an open tender for both technical/commercial as well as financial bids, this process would take a very long time and the main purpose of allowing the private sector to participate in the operation of Basic Service, which

was to meet the objectives of the National Telecom Policy would be defeated. The Committee, therefore, felt that the purpose will be served by inviting fresh financial bids only, from among those bidders except H1 who have already participated in the original tender and whose bids have been found technically and commerciallycompliant. The Committee observed that for this purpose, an important issue will be fixation of Reserve Price below which no offer would be accepted. The normal procedure would have been to keep the levy quoted by the highest bidder as the reserve price, since the highest bidder has not withdrawn his offer but would be prevented from accepting these Circles on account of the proposed restriction placed on the number of Circles to be allotted to any single bidder. But since all bidders for a particular Circle would have already refused to match the highest levy before

calling for fresh financial bids, no purpose would be served by keeping that levy as a reserve price."

From the aforesaid recommendations of the Committee it appears that it recommended that out of category 'A' and 'B' service areas not more than three service areas be allotted to any bidder; no such restriction was to be applied to category 'b' service areas which had evoked poor response from the bidders. It also recommended that while applying the above restrictions the H1 bidder may be given an option to choose from the service areas where he had offered the package with highest ranking. It is no doubt little surprising as to how and why M/s HFCL - Bezeq offered such high bids in nine circles. But it is an admitted position that in view of the recommendations of the Tender Evaluation Committee capping system was introduced and aforesaid M/s HFCL - Bezeq was allotted only three circles i.e. Delhi, U.P. (West) and Haryana so far categories 'A' and 'B' circles are concerned. In respect of the other 'A' and 'B' circles although the said M/s HFCL - Bezeq was the highest. bidder, the offer was not accepted because in that event it would have led to a virtual monopoly, the said M/s HFCL Bezeq having emerged as a single largest dominant private undertaking. The learned counsel appearing in different writ petitions have attacked this policy of capping. However, in spite of repeated queries, none of them could satisfy as to how in this process the said M/s HFCL - Bezeq had been a gainer or the nation has been a loser. It was pointed out that if this capping system would not have been applied, then a much higher amount would have been received because of the high tenders submitted by said M/s HFCL - Bezeq for other circles which on principle of capping was denied to the said Company. It was also Submitted that in any event, no choice should have been given to the bidders to select the circles and in respect thereof unilateral decision should have been taken by the Central Government. As pointed out above, the decision regarding capping and putting a limit in respect of category 'A' and 'B' circles bid to not more than three was recommended by the Tender Evaluation Committee which appears to have been accepted by the Central Government. Unless it is alleged and proved that the Tender Evaluation Committee's decision in respect of capping was because of any bad faith or due to some irrational consideration, according to us the Central Government cannot be held responsible for that decision. It may be mentioned at the outset that in none of the writ petitions there is any whisper much less any allegation of malafide against the members of the Tender Evaluation Committee stating any one of them had a bias in favour of one bidder or the other or that they have acted on dictate of any higher authority, abdicating their functions entrusted to them. Some of the petitioners urged that policy of capping was applied after receipt of the tenders. This is not correct. In the Tender Documents as quoted above it had been clearly stated that 'Telecom Authority is free to restrict the number of the service areas for which one Company can be licensed to provide the service'. As such, it cannot be urged that the decision regarding capping restricting the award of licence in category 'A' and 'B' circles to one biddar to three was taken with some ulterior motive or purpose, not being one of the terms specified and prescribed in the tender documents. It was also pointed out in respect of M/s HFCL- Bezeq that its networth was shown at Rs.4,622 crores, but the break up of the networth of different Companies which are the partner Companies thereof, it shall appear that one foreign Company holding only 26% equity share has shown networth of Rs.4,1116 crores i.e. 89.05% whereas the Indian Company

Consortium Leader HFCL having equity share of 44% has shown its networth was Rs.62 crores i.e. 1.34%. As already pointed out above clause 2.2 of Section II of Part I of tender documents required the bidder Company to produce the copy of the agreement between the Indian and Foreign Company including the approval of the Government of India for the terms of foreign participation and certificate from the competent authority in Government of India to the effect that total foreign equity in the bidder Company does not exceed 49%. It was stated during the hearing of writ petitions on behalf of the aforesaid M/s HFCL - Bezeq that it had produced the copy of certificate of incorporation of the said Company from the Registrar of Companies including Memorandum and Articles of Association. The terms and conditions of tender documents restricted the bidder Company that it shall not have total foreign equity in excess of 49%. In the instant case, the foreign Company admittedly does not have foreign equity in excess of 49%. It was also pointed out on behalf of the respondents that when the tender document prescribed about the networth of the bidder Company, it did not mean the actual investment of that amount. If a foreign Company having equity less than 49% has networth to fulfill the requirement of the bidder Company, its bid had to be examined by the Tender Evaluation Committee as has been done in the present case. Counsel appearing for writ petitioners and M/s HFCL - Bezeq were heard on the question as to whether clauses 2.1 and 2.2 of Section II of the Tender Documents in respect of Eligibility Conditions had been complied with by aforesaid M/s HFCL Bezeq. Mr. Venugopal, the learned counsel appearing for the said respondent pointed out that 30.3.1995 was the date fixed for submission of the tenders which was later extended to 23.6.1995. He further stated that the said respondent submitted different documents specified in clause 2.2 of Section II of the Tender Documents along with the bid and as such there has been full compliance of clauses 2.1 and 2.2. None of the counsel appearing in different writ petitions challenged this statement. The counsel for writ petitioners did not allege any bias against the Tender Evaluation Committee suggesting that it has favoured the said M/s HFCL - Bezeq so far the grant of licence in the three circles mentioned above are concerned. It can be said that the petitioners in different writ Petitions have primarily questioned the right and propriety of the Central Government to grant licences to non-Government Companies. No direct attack was made in respect of procedure for selection adopted by the Tender Evaluation Committee. On behalf of petitioners it was urged that Circle 'C' and North Easter Regions have been neglected while implementing the National Telecom Policy. Objections were also raised in respect of rates of charges for I.S.D. and S.T.D. It is not possible for this Court to issue specific directions on those questions. It need not be pointed out that whenever a new policy is implemented there are teething problems. But they have to be sorted out. On behalf of the petitioners, it was also submitted that neither-there was any justification nor any national basis for debarring the Government Company from submitting their bids. Although it is not necessary for this Court to express any opinion on that question because according to us that shall amount to a policy matter, but it can be said that the new Telecom Policy is based on privatization with foreign participation. Government undertakings like MTNL were already functioning in Delhi and Bombay and in spite of that it was felt that telecommunication should be handled by non-Government undertakings with foreign participation to improve the quality of service and to cover larger areas. In this background, there is no question of Government undertaking being ignored or discriminated while awarding the licences in different service circles. The counsel appearing

in some of the writ petitions laid great stress on nor-creation of a separate Telephone Regulatory Authority after amending the Act and non delegation of the power by the Central Government to such Authority to supervise the functioning of the new Telecom Policy in the country. It appears that almost all the countries of the world who have privatized the telecommunications, have constituted Regulatory Authorities under she different enactments. In United Kingdom under the Telecommunications Act, 1984 a Regulatory Authority has been constituted to secure that the telecommunications services are provided throughout the United Kingdom and to supervise the connected issues. Such Authority has to promote the interests of the consumers, purchasers and other users in the United Kingdom (including in particular those who are disabled or of pensionable age) in respect of prices charged for and the quality and variety of, telecommunications services provided. It also maintains and promotes effective competition between persons engaged in commercial activities connected with telecommunications in the United Kingdom. The Authority is also responsible to encourage persons providing telecommunication services and telecommunication apparatus in the United Kingdom to compete effectively in the provision of such services and supply of such apparatus outside the United Kingdom. In United States the Federal Communication Commission- created by the Communication Act, 1934 is a primary federal regulator of the communication industry. The Federal Communication Commission is currently organized into six bureaus. As a general rule the operating bureaus are authorized to enforce existing Commission decisions and policies. Wireless Telecommunication Bureau has the responsibility to supervise all wireless technologies including Cellular services. In Canada the Telecommunication Act which is the primary statute relating to telecommunication came into force in 1993 replacing variety of statutes. It contains different provisions to review the functioning of the telecommunications and vests power in authorities in respect of supervision and implementation of the said policy. In Australia, AUSTEL is responsible for regulation of telecommnication services, equipment and cabling under Telecoms Act, 1991. AUSTEL determines standards relating to network integrity and safety, compliance with recognized international standards and end-to-end quality of service. In France, General Directorate for Post and Telecommunications, 'DCPT' has the responsibilities of determining and adapting the economic and technical framework for post and telecommunications activities, ensuring the conditions of fair competition among the various competitors in the telecommunications field. There are other supervisory and advisory bodies assisting the regulation of the telecommunications. In Japan the Telecommunications Technology Council has over all responsibility to coordinate the services, with outside administrative bodies and various manufacturers, users, institutes and other organizations in establishing the standards for Japan. Similar is the position in many other countries developed as well as under-developed. It appears that the Telecom Regulatory Authority of India Ordinance, 1996 has been promulgated after the hearing of the writ petitions concluded. From the preamble of the said Ordinance it appears that object thereof is to establish the Telecom Regulatory Authority of India tn regulate the telecommunication services, and for matters connected therewith or incidental thereto. Section 2(i) defines 'telecommunication service'. Chapter II contains provisions in respect of the establishment of the Telecom Regulatory Authority of India and conditions of service in respect of Chairperson and members thereof. The Chairperson shall be a person who is or has been a Judge of the Supreme Court or who is or has been the Chief

Justice of a High Court. A Member shall be a person who is holding the post of Secretary or Additional Secretary to the Government of India or to any equivalent post in the Central Government or the State Government for a period of three years. The term of the Chairperson has been fixed at five years from the date on which he enters upon his office. So far the Member is concerned, he has to hold office for a term of five years from the date on which he enters upon his office or until he attains the age of 62 years, whichever is earlier. The other conditions have been prescribed in the said Chapter. Chapter III prescribes the powers and functions of the said Authority. Section 11 opens with a non-obstante clause saying that notwithstanding anything contained in the Indian Telegraph Act, 1885, the functions of the Authority shall be as specified in the said Section including to ensure technical compatibility and effective inter-relationship between different service providers, to ensures compliance of licence conditions by all service providers, to facilitate competition and promote efficiency in the operation of telecommunication services, to protect the interest of the consumers of the telecommunication services, to levy fees at such rates and in respect of such services as may be determined by regulations. Sub-section (2) of Section 11 says:

"Notwithstanding anything contained in the Indian Telegraph Act, 1885, the Authority may, from time to time, by order, notify the rates at which the telecommunication services within India and outside India shall be provided under this Ordinance including rates at which messages shall be transmitted to any country outside India."

Sub-section (2) of Section 11 has also a non-obstante clause giving over-riding effects to said sub-section over anything contained in the Indian Telegraph Act,'1885. In view of the aforesaid sub-section, the Authority may from time to time by order notify the rate at which telecommunication services within India and outside India shall be provided. Sub- section (3) of Section 11 enjoins the Authority not to act against the interest of the sovereignty, integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality. In view of Section 12 if the Authority considers it expedient so to do, it may by order in writing call upon any service provider at any time to furnish in writing such information or explanation relating to its affairs as the Authority may require. It can also appoint one or more persons to make enquiry in relation to the affairs of any service provider. The Authority can also direct any of its officers or employees to inspect the books of accounts or other documents of any service provider. The Authority has been vested with the powers to issue such directions to service providers 'as it may consider necessary', for proper functioning by the service provider. Section 13 also reiterates the said power of the Authority by saying that for its functions under sub-section (1) of Section 11, the Authority can issue such directions from time to time to service provider as it may consider necessary. Chapter IV contains provision tn respect of settlement of disputes. Section 29 provides for penalty if any person violates the directions of the Authority and Section 30 prescribes for punishment if the offence is alleged to have been committed by a Company. With the establishment of the

Telecom Regulatory Authority of India, it can be said that an independent telecom Regulatory Authority is to supervise the functioning of different Telecom service providers and their activities can be regulated in accordance with the provisions of the said Ordinance. Section V of Tender Documents contains financial Conditions. Clause 2.0 thereof says:

"TARIFF: Tariff for the SERVICE provided by the LICENSEE shall not be more than DOT's Tariff. Tariff is subject to regulation by Telecom Regulatory Authority of India, as and when such an authority is set up by the Government of India."

The aforesaid condition provides that licensee shall not charge tariff for service more than DOT's tariff and such tariff shall be subject to regulation by Telecom Regulatory Authority of India. This condition shall safeguard the interest of the persons to whom services are provided by the licensees. The new Telecom Policy is not only a commercial venture of the Central Government, but the object of the policy is also to improve the service so that the said service should reach the common man and should be within his reach. The different licensees should not be left to implement the said Telecom Policy according to their perception. It has rightly been urged that while implementing the Telecom Policy the security aspect cannot be overlooked. The existence of a Telecom Regulatory Authority with the appropriate powers is essential for introduction of plurality in the Telecom Sector. The National Telecom Policy is a historic departure from the practice followed during the past century. Since the private sector will have to contribute more to the development of the telecom network than DOT/MTNL in the next few years, the role of an independent Telecom Regulatory Authority with appropriate powers need not be impressed, which can harness the individual appetite for private gains, for social ends. The Central Government and the Telecom Regulatory Authority have not to behave like sleeping trustees, but have to function as active trustees for the public good. Subject to the directions given above, the writ and Transferred Cases petitions are dismissed. However, there shall be no orders as to costs.

INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY

I. HISTORY OF INSURANCE

In India, insurance has a deep-rooted history. It finds mention in the writings of Manu (*Manusmrithi*), Yagnavalkya (*Dharmasastra*) and Kautilya (*Arthasastra*). The writings talk in terms of pooling of resources that could be re-distributed in times of calamities such as fire, floods, epidemics and famine. This was probably a pre-cursor to modern day insurance. Ancient Indian history has preserved the earliest traces of insurance in the form of marine trade loans and carriers' contracts. Insurance in India has evolved over time heavily drawing from other countries, England in particular.

1818 saw the advent of life insurance business in India with the establishment of the Oriental Life Insurance Company in Calcutta. This Company however failed in 1834. In 1829, the Madras Equitable had begun transacting life insurance business in the Madras Presidency. 1870 saw the enactment of the British Insurance Act and in the last three decades of the nineteenth century, the Bombay Mutual (1871), Oriental (1874) and Empire of India (1897) were started in the Bombay Residency. This era, however, was dominated by foreign insurance offices which did good business in India, namely Albert Life Assurance, Royal Insurance, Liverpool and London Globe Insurance and the Indian offices were up for hard competition from the foreign companies.

In 1914, the Government of India started publishing returns of Insurance Companies in India. The Indian Life Assurance Companies Act, 1912 was the first statutory measure to regulate life business. In 1928, the Indian Insurance Companies Act was enacted to enable the Government to collect statistical information about both life and non-life business transacted in India by Indian and foreign insurers including provident insurance societies. In 1938, with a view to protecting the interest of the Insurance public, the earlier legislation was consolidated and amended by the Insurance Act, 1938 with comprehensive provisions for effective control over the activities of insurers.

The Insurance Amendment Act of 1950 abolished Principal Agencies. However, there were a large number of insurance companies and the level of competition was high. There were also allegations of unfair trade practices. The Government of India, therefore, decided to nationalize insurance business.

An Ordinance was issued on 19th January, 1956 nationalising the Life Insurance sector and Life Insurance Corporation came into existence in the same year. The LIC absorbed 154 Indian, 16 non-Indian insurers as also 75 provident societies—245 Indian and foreign insurers in all. The LIC had monopoly till the late 90s when the Insurance sector was reopened to the private sector.

The history of general insurance dates back to the Industrial Revolution in the west and the consequent growth of sea-faring trade and commerce in the 17th century. It came to India as a legacy of British occupation. General Insurance in India has its roots in the establishment of Triton Insurance Company Ltd., in the year 1850 in Calcutta by the British. In 1907, the

Indian Mercantile Insurance Ltd, was set up. This was the first company to transact all classes of general insurance business.

1957 saw the formation of the General Insurance Council, a wing of the Insurance Associaton of India. The General Insurance Council framed a code of conduct for ensuring fair conduct and sound business practices.

In 1968, the Insurance Act was amended to regulate investments and set minimum solvency margins. The Tariff Advisory Committee was also set up then.

In 1972 with the passing of the General Insurance Business (Nationalisation) Act, general insurance business was nationalized with effect from 1st January, 1973. 107 insurers were amalgamated and grouped into four companies, namely National Insurance Company Ltd., the New India Assurance Company Ltd., the Oriental Insurance Company Ltd and the United India Insurance Company Ltd. The General Insurance Corporation of India was incorporated as a company in 1971 and it commence business on January 1sst 1973.

This millennium has seen insurance come a full circle in a journey extending to nearly 200 years. The process of re-opening of the sector had begun in the early 1990s and the last decade and more has seen it been opened up substantially. In 1993, the Government set up a committee under the chairmanship of RN Malhotra, former Governor of RBI, to propose recommendations for reforms in the insurance sector.The objective was to complement the reforms initiated in the financial sector. The committee submitted its report in 1994 wherein, among other things, it recommended that the private sector be permitted to enter the insurance industry. They stated that foreign companies be allowed to enter by floating Indian companies, preferably a joint venture with Indian partners.

Following the recommendations of the Malhotra Committee report, in 1999, the Insurance Regulatory and Development Authority (IRDA) was constituted as an autonomous body to regulate and develop the insurance industry. The IRDA was incorporated as a statutory body in April, 2000. The key objectives of the IRDA include promotion of competition so as to enhance customer satisfaction through increased consumer choice and lower premiums, while ensuring the financial security of the insurance market.

The IRDA opened up the market in August 2000 with the invitation for application for registrations. Foreign companies were allowed ownership of up to 26%. The Authority has the power to frame regulations under Section 114A of the Insurance Act, 1938 and has from 2000 onwards framed various regulations ranging from registration of companies for carrying on insurance business to protection of policyholders' interests.

In December, 2000, the subsidiaries of the General Insurance Corporation of India were restructured as independent companies and at the same time GIC was converted into a national re-insurer. Parliament passed a bill de-linking the four subsidiaries from GIC in July, 2002.

Malhotra Committee Report

In the backdrop of new industrial policy, the Government of India set up in 1993 a high-powered committee headed by Mr. R. N. Malhotra to examine the structure of the insurance industry, to assess its strength and weaknesses in terms of the objective of providing high

quality services to the public and serving as an effective instrument for mobilization of financial resources for development, to review the then existing structure of regulation and supervision of insurance sector and to suggest reforms for strengthening and modernizing regulatory system in tune with the changing economic environment.

The Malhotra Committee submitted its report in 1994. Some of the major recommendations made by it were as under:-

(a) the establishment of an independent regulatory authority (akin to Securities and Exchange Board of India);

(b) allowing private sector to enter the insurance field;

(c) improvement of the commission structure for agents to make it effective instrument for procuring business specially rural, personal and non-obligatory lines of business;

(d) insurance plans for economically backward sections, appointment of institutional agents;

(e) setting up of an institution of professional surveyors/loss assessors;

(f) functioning of Tariff Advisory Committee (TAC) as a separate statutory body;

(g) investment on the pattern laid down in s.27;

(h) marketing of life insurance to relatively weaker sections of the society and specified proportion of business in rural areas;

(i) provisions for co-operative societies for transacting life insurance business in states;

(j) the requirement of specified proportion of the general business as rural non-traditional business to be undertaken by the new entrants;

(k) welfare oriented schemes of general insurance;

(l) technology driven operation of General Insurance Corporation of India (GICI); GIC to exclusively function as a reinsurer and to cease to be the holding company;

(m) introduction of unlinked pension plans by the insurance companies; and

(n) restructuring of insurance industry.

In this context, and in the changing economic scenario, it is felt that the IRDA would have to play a vital role for the regulation and development of insurance business. Accordingly, it is felt that the Insurance Act, 1938 would require review and revision. This has prompted the present reference to the Law Commission of India.

The revision of the Act has to be carried out in such a manner that it not only promotes insurance business but also protects policyholders and strengthens the Authority to ensure financial stability. While revising the Act, the other related laws are also be reviewed and the relevant provisions of the IRDA, Act, 1999 are required to be merged into the principal Act after necessary modifications. In fact, an integrated approach to revise the insurance laws is the need of the hour.

I. The Insurance Act, 1938 being a legislation of colonial era, contains provisions that are redundant and accordingly require deletion. For example, provisions regarding provident

societies and mutual insurance companies as also principal agents, chief agents and special agents, or references thereof, are no longer required and such provisions need to be deleted.

II. Some of the provisions of the Act, are of transitional nature and should, therefore, be deleted. Further, matters covered in the Regulations framed by the IRDA should be deleted from the Act, in order to avoid duplication. Further, The IRDA Act, 1999 has inserted some provisions in the Insurance Act, 1938, the effect of which was to nullify some existing provisions. They have not been deleted, thus giving rise to anomalies,

III. References in the Insurance Act, 1938 to older enactments have to be replaced by references to the corresponding new legislations that have replaced such enactments. For e.g., references to the Indian Companies Act, 1913 have to be replaced by the Companies Act, 1956.

IV. The insurance sector, which earlier covered only a few areas like life and marine insurance, has now expanded to cover various kinds of risk activities. Hence reclassification of insurance businesses is necessary. For instance, insurance business may broadly be classified as 'life' and 'non-life' or 'short term' and 'long term' insurance business. For this purpose, the definition of the term 'insurance' and 'insurer' would have to be amended.

V. The IRDA exercises its powers by and large under the provisions of the principal Act. Therefore, it is appropriate as well as necessary that the relevant provisions of IRDA Act be merged in the Insurance Act, 1938.

VI. The IRDA while regulating the business activities of the insurers exercises quasi-judicial powers, in addition to the administrative powers, e.g., issue, renewal and cancellation of registration certificate to insurers, order in regard to investigation of the affairs of the insurers, making application to the court for the winding up of the insurance companies, grant of licenses to the insurance agents etc. It is felt necessary that there must be a provision of appeal against the decisions of the IRDA to an independent body constituted under the Act itself.

VII. The insurance business has increased several fold even while policy holders have not been entirely satisfied with the manner of functioning of insurance companies, particularly in the area of settlement of claims. Although at present, there is in place of the office of an Ombudsman under the Redressal of Public Grievances Rules, 1998, complaints nevertheless continue to be filed in the consumer fora constituted under the Consumer Protection Act, 1986. In order to provide a more effective grievance redressal missionary, while at the same time, lessening the burden of the consumer fora, it is proposed that there should be a full-fledged grievance redressal mechanism.

VIII. The principle of uberrimae fidei, i.e., of absolute good faith, governs both the parties to a contract of insurance. Though standardized insurance policies prohibit certain misleading contract provisions, problems have arisen with misrepresentation or non-disclosure whenever personal characteristics are collected by insurance agents for risk classification. In this context, the issue is whether a failure to make a disclosure of the material information would render the contract void or voidable. For this purpose, some specific statutory enumerations are required for protecting the interest of policyholders so that unintended minor mistakes in disclosure do not lead to a loss of coverage.

IX. Provisions regarding investments, loans and management need review and revision. The IRDA has made detailed investment regulations, hence provisions are to be revised so as to eliminate inconsistencies and duplication. The term "approved securities" is required to be revised in the context of new economic policy and business practices.

X. At present, there is no provision in the principal Act for motivation or encouragement for insurers to invest in "Research & development" or "Technology up gradation" as regards valuation of assets for the purpose of solvency margin calculations. There is a suggestion that it is appropriate if such provisions for taking a portion of the investment/ expenditure in areas as directed by the IRDA are incorporated in the Act for the purpose of "Solvency Margin" so as to encourage insurers to take up such investments.

XI. The provisions regarding solvency margin of the principal Act have been amended by the IRDA Act, 1999. But these provisions still require revision because they stipulate minimum level of solvency margin without a control level, i.e., a position below which the Authority can get warning signals in respect of a particular insurer. The Principal Act is required to be amended so as to empower the Authority to intervene whenever the solvency margin falls below the control level. IRDA has framed regulations for the determination of the amount of liabilities, solvency margin and valuation of assets. But the provisions regarding solvency margin are still to address the extent of appropriate matching of assets and liabilities.

XII.The Principal Act and IRDA Act empower the Central Government and the Authority to frame rules and regulations. These are to be revised and harmonized with the Act in the context of new regulatory regime.

XIII. The Act provides for penalties in the miscellaneous part of the Act, for contravention or non-compliance of the provisions of the Act or Regulation or rules under ss.102 to 105C. These provisions of the Act are to be reviewed and revised as the amount of fine or penalty provided therein is not adequate enough to be considered now as a fine or penalty. In addition to these provisions, there are other provisions which provide for the punishment along with the other provisions requiring mandatory compliance. It is appropriate that all such specific clauses on penalty may be shifted to the chapter dealing with the penalties.

The necessity for merging the provisions of the IRDA Act with the Insurance Act, 1938 is to bring about an integrated approach to the task of formulating a legislative regime that can encompass the key facets of the functioning of the Regulatory Authority even while strengthening the regulatory regime. With the IRDA exercising many of the key functions assigned to it under the Insurance Act, 1938, there is no justification for continuing to have a separate legislation concerning the constitution and functions of the IRDA. Moreover, at the time that the IRDA Act was being prepared, the task of a comprehensive revision of the Insurance Act, 1938 was felt necessary but was not undertaken due to paucity of time. Now, with the experience of the functioning o the IRDA and several rounds of discussion with key insurance personnel, a comprehensive revision of the Insurance Act, 1938 appears possible.

The Insurance Regulatory and Development Authority (IRDA) is a national agency run by the Government of India. IRDA is based in Hyderabad and was formed by an act of Indian Parliament called as IRDA Act of 1999. Considering some of the emerging requirements of the Indian insurance industry, IRDA was amended in 2002. As stated in the act mission of

IRDA is "to protect the interests of the policyholders, to regulate, promote and ensure orderly growth of the insurance industry and for matters connected therewith or incidental thereto." Indian insurance industry is regulated by the terms and conditions of the IRDA. Indian law has certain expectations from the IRDA to perform in the Indian insurance industry. IRDA should protect the interest of policyholders by ensuring fair treatment by the insurance companies. The growth of insurance companies in a speedy and orderly manner should be taken care by the IRDA. It should monitor and implement quality competence and fair dealing of the insurance companies in the industry. IRDA should make sure that the insurers are providing precise and correct information about the products offered by them for the insurance customers. IRDA should also ensure speedy settlement of genuine claims of the policyholders and prevent malpractices in the process of claims settlement.

II. OBJECT AND SCOPE

To protect the interest of and secure fair treatment to policyholders

To bring about speedy and orderly growth of the insurance industry (including annuity and superannuation payments), for the benefit of the common man, and to provide long term funds for accelerating growth of the economy;

To set, promote, monitor and enforce high standards of integrity, financial soundness, fair dealing and competence of those it regulates;

To ensure speedy settlement of genuine claims, to prevent insurance frauds and other malpractices and put in place effective grievance redressal machinery;

To promote fairness, transparency and orderly conduct in financial markets dealing with insurance and build a reliable management information system to enforce high standards of financial soundness amongst market players;

To take action where such standards are inadequate or ineffectively enforced;

To bring about optimum amount of self-regulation in day-to-day working of the industry consistent with the requirements of prudential regulation.

III.COMPOSITION OF AUTHORITY

The Authority is a ten member team consisting of

(a) a Chairman;
(b) five whole-time members;
(c) four part-time members,

(all appointed by the Government of India)

IV. DUTIES, POWERS AND FUNCTION OF IRDA

The Authority shall have the duty to regulate, promote and ensure orderly growth of the insurance business and re-insurance business.

issue to the applicant a certificate of registration, renew, modify, withdraw, suspend or cancel such registration;

protection of the interests of the policy holders in matters concerning assigning of policy, nomination by policy holders, insurable interest, settlement of insurance claim, surrender value of policy and other terms and conditions of contracts of insurance;

specifying requisite qualifications, code of conduct and practical training for intermediary or insurance intermediaries and agents

specifying the code of conduct for surveyors and loss assessors;

promoting efficiency in the conduct of insurance business;

promoting and regulating professional organisations connected with the insurance and re-insurance business;

levying fees and other charges for carrying out the purposes of this Act;

calling for information from, undertaking inspection of, conducting enquiries and investigations including audit of the insurers, intermediaries, insurance intermediaries and other organisations connected with the insurance business;

control and regulation of the rates, advantages, terms and conditions that may be offered by insurers in respect of general insurance business not so controlled and regulated by the Tariff Advisory Committee under section 64U of the Insurance Act, 1938 (4 of 1938);

specifying the form and manner in which books of account shall be maintained and statement of accounts shall be rendered by insurers and other insurance intermediaries;

regulating investment of funds by insurance companies;

regulating maintenance of margin of solvency;

adjudication of disputes between insurers and intermediaries or insurance intermediaries;

supervising the functioning of the Tariff Advisory Committee;

specifying the percentage of premium income of the insurer to finance schemes for promoting and regulating professional organisations

specifying the percentage of life insurance business and general insurance business to be undertaken by the insurer in the rural or social sector; and exercising such other powers as may be prescribed

TH E E N D