

M/S VOLTAS LTD. BOMBAY
v.
UNION OF INDIA AND ORS.

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FEBRUARY 7, 1995

[A.M. AHMADI, CJ, S. MOHAN AND N.P. SINGH, JJ.]

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Monopolies and Restrictive Trade Practices Act, 1969—Section 33 (i) as substituted w.e.f. 1.8.84—Deeming clause—Limitation of Court to ignore mandate of legislature—Trade practices enumerated in clauses (a) to (l) of sub-section (1) of Section 33—Shall be deemed to have been statutorily determined and specified as restrictive trade practices—Neither Commission nor Court can question the wisdom of Parliament—Such agreement has to be registered.

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Sections 37 and 38—Scope of inquiry by Monopolies and Restrictive Trade Practices Commission—If commission satisfied that any practice held to be restrictive trade practice does not restrict or discourage competition in any trade or industry—No order u/s 37 to be passed to desist or discontinue such practice or declare agreement void.

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The appellant had entered into agreements with large number of companies in respect of distribution of different machineries and equipments within different territories of India. Under the terms of the agreements different types of machines and instruments were to be distributed by the appellant as the Marketing Company. The appellant had been appointed as Buyer (Sole Importer) on the terms and conditions mentioned in different agreements.

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In the year 1986, notices were issued u/s 10(a) (iii) r/w s. 37 of the Monopolies and Restrictive Trade Practices Act, 1969, informing the appellant that the agreements between the appellant and the different companies contained conditions which amounted to restrictive trade practices under clauses (a) and (c) of Section 33(1) of the Act. The Monopolies and Restrictive Trade Practices Commission directed the appellant to discontinue the restrictive trade practices as mentioned in the Notice of Enquiry, and not to repeat the same in future and further that the objectionable clauses, as mentioned in the Notices be deleted from the respective agreements, within 8 weeks of the receipt of the said order.

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A The appellant urged that inspite of the amendment in sub-section 1 of section 33 w.e.f. 1.8.1984, the power of the Commission or of this Court has in no way been curtailed or abridged and the Commission or this Court, can examine an agreement for recording a finding as to whether any of the clauses of such agreement relates to restrictive trade practices; that for passing an order u/s 37, first it has to be examined as to whether the agreement relates to any of the restrictive trade practices and if the Commission is satisfied that it relates to one or more restrictive trade practices within the meaning of Section 2(O) of the Act, then the Commission has to examine as to whether such agreement is prejudicial to the public interest; that Section 37 contemplates and conceives inquiry in respect of any restrictive trade practice relating to an agreement which has been registered u/s 35 as well as an agreement which has not been so registered; that while amending sub-section 1 of Section 33, Section 2(O) was not deleted or substituted and that has left an apparent conflict between Section 2(O) and Section 33(1) of the Act, that after the amendment of sub-section 1 of Section 33, there is no forum where a person can show that although it may appear that any of the clauses of the agreement, relate to a restrictive trade practice specified in clauses (a) to (l) of sub-sec. 1 of Section 33, but such clauses cannot be held to be covered by any of the clauses.

E **Allowing the appeals, this Court**

HELD : 1.1.The Legislature by the statute may create a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, but even then Court has to give full effect to such statutory fiction after examining and ascertaining as to for what purpose and between what parties such statutory fiction has been resorted to. In the substituted sub-section (1) of Section 33 of the Monopolies and Restrictive Trade Practices Act, 1969, a deeming clause has been introduced by the Parliament specifying that agreements falling within one or more of the categories mentioned in clauses (a) to (l) to sub-section (1) of Section 33, shall be deemed for the purposes of the Act, to be the agreements relating to restrictive trade practices. By the deeming clause one is not required to treat any imaginary state of affairs as real but to treat that agreements specified and enumerated in sub-section (1) of Section 33 as agreement relating to restrictive trade practices. It can be said that Parliament after having examined different trade practices, has identified

such trade practices which have to be held as restrictive trade practices for the purposes of the Act. To keep such trade practices beyond controversy in any proceeding, a deeming clause has been introduced in sub-section (1) of Section 33 saying that they shall be deemed to be restrictive trade practices. [957-A, F-H, 958-A]

East End Dwellings Co. Ltd. v. Finsbury Borough Council, (1952) A.C. 109 (b); *State of Bombay v. Pandurang Vinayak and others*, AIR [1953] SC 244 = [1953] SCR 773, *Chief Inspector of Mines and another etc. v. Karam Chand Thapar etc.*, AIR (1961) SC 838 = [1962] 1 SCR 9; *M/s J.K. Cotton Spinning and Weaving Mills Ltd. and another v. Union of India and others*, AIR (1988) SC 191 = [1988] 1 SCR 700; *M Venugopal v. The Division Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and Anr.*, JT (1994) 1 SC 281 = [1994] 2 SCC 323 and *Harish Tandon v. The Addl. District Magistrate, Allahabad*, JT (1995) 1 SC 291, relied on.

1.2. After the amendment of sub-section (1) of Section 33 if an agreement falls within one of the clauses of the said sub-section, specifying a restrictive trade practice, then it is no more open to the Commission or to the Court to say that it shall not amount to restrictive trade practice. Trade practices enumerated in clauses (a) to (l) of sub-section (1) of Section 33 shall be deemed to have now been statutorily determined and specified as restrictive trade practices. Neither the Commission nor the Court can question the wisdom of the Parliament for having statutorily determined certain trade practices as restrictive trade practices unless in this process there is contravention of any of the provisions of the Constitution. If any agreement contains a trade practice which falls in any of the clauses of sub-section (1) of Section 33 then such trade practice shall be deemed to be restrictive trade practice and such agreement has to be registered. [961-G-H, 962-A]

Tata Engg. and Locomotive Co. v. Registrar, [1977] 2 SCC 55; *Mahindra and Mahindra Ltd. v. Union of India*, [1979] 2 SCC 529, distinguished.

1.3. Under section 37, the Commission has been vested with the power to inquire in respect of agreements which have been registered under Section 35 as well as those which have not been registered. But the fact remains that once the Commission is satisfied that a particular

A agreement has not been registered under Section 35, falls within any of the clauses from (a) to (l) of sub-section (1) of Section 33, then no further inquiry is to be done, as to whether such agreement relates to restrictive trade practices or not. The statutory fiction incorporated in sub-section 1 of Section 33 shall also be applicable in respect of such agreements apart from the penalty provided under section 48 of the Act. As such there is not much scope for discrimination between persons who have got their agreements registered and those who have not got their agreements registered. [962-F-H]

C 1.4 There is no conflict between Section 2(O) and 33(1). Clauses (a) to (l) of sub-section 1 of Section 33 specify such trade practices which have been statutory recognised as restrictive trade practices. But there may be other trade practices, not covered by clauses (a) to (l) of sub-section 1 of the Section 33, which can be examined by the Commission in the light of Section 2(O). [963-B]

D 1.5. Sub-section 1 of Section 33 specifies in different clauses various types of trade practices, which have now been recognised as restrictive trade practices. Any person who is a party to any agreement has to examine the agreement in light of those clauses. If according to such person, the agreement in question does not contain any clause relating to any of the restrictive trade practices specified in clauses (a) to (l), such person need not get the agreement registered under Section 35. He will be at liberty to satisfy the Commission on that question. But once the agreement is registered, then such agreement cannot be inquired into by the Commission, for the purpose as to whether it relates to any restrictive trade practice; of course inspite of registration of the agreement, the person concerned can satisfy the Commission that such practice is not prejudicial to the public interest. [963-E-F]

G 1.6 The Scheme of the Act appears to be that first it specifies some trade practices, under sub-section 1 of Section 33, as restrictive trade practices. Then it has prescribed a forum under Section 37, to inquire as to whether any such trade practice is prejudicial to the public interest. This question has to be examined in the light of Section 38 which in many judgments have been described as 'gateways'. In other words, inspite of a finding that a particular agreement contains a clause which is related to a restrictive trade practice, if the Commission is satisfied in respect of the existence of any of the circumstances specified in clauses (a) to (k) of H

sub-section 1 of Section 38, no order under Section 37 is to be passed to desist or discontinue such practice or to declare any part of the agreement as void. [964-A-B] A

1.7. If the Commission is satisfied that any practice which has been held to be restrictive trade practice does not directly or indirectly restrict or discourage competition to any material degree in any relevant trade or industry then it can resist passing any order under Section 37 directing the person concerned to desist or to discontinue the practice. [964-D] B

Tata Engg. and Locomotive Co. v. Registrar, [1977] 2 SCC 55 and *Mahindra and Mahindra Ltd. v. Union of India*, [1979] 2 SCC 529, relied on. C

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2252 of 1994 Etc. Etc.

From the Judgment and Order dated 14.9.93 of the M.R.T.P. Commission, New Delhi in R.T.P. Enquiry No. 200 of 1986. D

D.N. Misra for J.B. Dadachanji and Co. for the Appellant.

Sanjay Kishan Kaul for the Respondents.

The Judgment of the Court was delivered by E

N.P. SINGH, J. These appeals have been filed under section 55 of the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as 'the Act') against the judgment and order of the Monopolies and Restrictive Trade Practices Commission (hereinafter referred to as 'the Commission'). F

The appellant had entered into agreements with large number of companies, who are respondents in different appeals, in respect of distribution of different machineries and equipments within different territories of India. The Companies, who are respondents, to the different appeals have been manufacturing different types of machines and instruments, which under the terms of the agreements are to be distributed by the appellant as the Marketing company. The appellant has been appointed as Buyer (Sole Importer) on the terms and conditions mentioned in different agreements. G
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A On 26.11.1986, notices were issued under Section 10(a)(iii) read with Section 37 of the Act, informing the appellant that the agreements between the appellant and the different companies, some of which have their Head Offices in foreign countries contain conditions which amount to restrictive trade practices under clauses (a) and (c) of Section 33(1) of the Act. In the notices aforesaid, the terms and conditions in different agreements which are alleged to be violative of Section 33(1)(a) and (c) of the Act were reproduced. Pursuant to the notices aforesaid, show cause was filed in different cases initiated by the Commission against the appellant. Documents and affidavits were also filed on behalf of the appellant in support of its stand that none of the agreements referred to in the notices issued to the appellant related to restrictive trade practices, calling for any action under the Act. The Commission, however, by the impugned judgment and order directed the appellant in respect of each of the 15 inquiries to discontinue the restrictive trade practices as mentioned in the Notice of Enquiry and not to repeat the same in future. It was also directed that the objectionable clauses, as mentioned in the Notices be deleted from the respective agreements, within 8 weeks of the receipt of the said order.

All the appeals were heard together, since the controversy, which been raised, is more or less similar in all the appeals, and as such facts are being referred to from Civil Appeal No. 2252 of 1994, which was heard as the leading case. It appears that the agreement in that case had been entered into between the appellant and Respondent No. 4 M/s. Societe Geneovise D, Instruments De Physique, Geneve, through its Secretary, on 29.11.1956. The Director General of Investigation and Registration (hereinafter referred to as the 'DG') took objection in respect of three of the clauses of the agreement and on his application being filed before the Commission, notice was issued to the appellant on 26.11.1986 saying that the following terms of the agreement amounted restrictive trade practices, within the meaning of the Act :

G "2. The Buyer shall not sell the goods of the Seller to any person who is not residing or carrying on business with the Territory nor to any person residing or carrying on business within the Territory for the purpose of resale by such person outside the Territory."

H "3. The Buyer shall use his best endeavours to promote the interests of the Seller and specifically shall not deal in or sell goods

which could compete with those of the Seller" A

"6. For the consideration aforesaid the Seller agrees not to sell any goods as mentioned before to any individual or firm within the territory other than the buyer and all enquiries and orders received by the Seller from the Territory shall be referred to the Buyer. The Seller shall further not quote for not deliver his goods to any firm outside the Territory for import into the Territory except with the previous consent of the Buyer and terms agreed upon with the Buyer." B

It is proper to refer to some of the provisions of the Act. C

Section 2(o) defines "restrictive trade practice" :

(o) "restrictive trade practice" means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular, D

(i) which tends to obstruct the flow of capital or resources into the stream of production, or

(ii) which tends to bring about manipulation of prices, or conditions of delivery or to effect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restriction;" E

In view of Section 10, the Commission may inquire into any restrictive trade practice (i) upon receiving a complaint of facts from any trade association or from any consumer or (ii) upon a reference made to it by the Central Government or a state government, or (iii) upon an application made to it by the Director General, or (iv) upon its own knowledge or information. Sub-section (1) of Section 33 which is relevant is as follows : F

"33. Registerable agreements relating to restrictive trade practice.- (1) Every agreement falling within one or more of the following categories shall be deemed, for the purposes of this Act, to be an agreement relating to restrictive trade practices and shall be subject to registration in accordance with the provisions of this Chapter, namely- G
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A (a) any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;

B (b) any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

(c) any agreement restricting in any manner the purchaser in the course of his trade acquiring or otherwise dealing in any goods other than those of the seller or any other person ;

C (d) any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;

(e) any agreement to grant or allow concessions or benefits, including allowances, discount, rebates or credit in connection with, or by reason of, dealing;

D (f) any agreement to sell goods on condition that the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged;

E (g) any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal of the goods;

(h) any agreement not to employ or restrict the employment of any method, machinery or process in the manufacture of goods;

F (i) any agreement for the exclusion from any trade association of any person carrying on or intending to carry on, in good faith the trade in relation to which the trade association is formed;

G (j) any agreement to sell goods at such prices as would have the effect of eliminating competition or a competitor;

(ja) any agreement restricting in any manner, the class or number of wholesalers, producers or suppliers from whom any goods may be bought;

H (jb) any agreement as to the bids which any of the parties

thereto may offer at an auction for the sale of goods or any agreement whereby any party thereto agrees to abstain from bidding at any auction for sale of goods; A

(k) any agreement not hereinbefore referred to in this section which the Central Government may, by notification specify for the time being as being one relating to restrictive trade practice within the meaning of this sub-section pursuant to any recommendation made by the Commission in this behalf; B

(l) any agreement to enforce the carrying out of any such agreement as is referred to in this sub-section." C

Clauses (a) to (l) of Section 33(1) specify different types of agreements, which shall be deemed for the purposes of the Act, to be agreements relating to restrictive trade practices and shall be subject to registration, in accordance with the provisions of Chapter V of the said Act. Section 35 requires the Central Government to specify a day by notification in the Official Gazette on and from which every agreement falling within section 33 shall become registerable under the Act. Section 37 vests power in the Commission to inquire into any restrictive trade practice, the relevant part whereof is as follows : D

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

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

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

The Commission may inquire into any restrictive trade practice in connection with any agreement which has been registered under Section 35 or not. If after such inquiry, the Commission is of the opinion that the practice is prejudicial to the public interest, the Commission may direct that the H

- A practice shall be discontinued or shall not be repeated and the agreement relating to any such restrictive trade practice shall be void and shall stand modified in respect thereof. In view of Section 38(1) the restrictive trade practice shall be deemed to be prejudicial to the public interest unless the Commission is satisfied about the existence of the circumstances specified in clauses (a) to (k) in the said sub-section 1 of Section 38 and is further satisfied that restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public.

It may be pointed out that originally the main part of sub-section (1) of Section 33 said :

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

D By Act No. 30 of 1984 that part was substituted w.e.f. 1.8.1984 :

- E "33. Registrable agreements relating to restrictive trade practices- (1) Every agreement falling within one or more of the following categories *shall be deemed, for the purposes of this Act, to be an agreement relating to restrictive trade practices* and shall be subject to registration in accordance with the provisions of this Chapter, namely -"

(emphasis supplied)

- F In the substituted sub-section (1) of Section 33 a deeming clause has been introduced by the Parliament saying that every agreement falling within one or more of the categories mentioned in the said-section (1) shall be deemed, for the purposes of the Act, to be an agreement relating to restrictive trade practices. While amending and substituting that part of
- G sub-section (1) of Section 33, the Parliament determined and specified that agreements falling within one or more of the categories mentioned in clauses (a) to (l) to sub-section (1) of Section 33, shall be deemed, for the purposes of the Act, to be the agreements relating to restrictive trade practices. This was not the position in the original sub-section (1) of
- H Section 33.

The effect of a statute containing a legal fiction is by now well settled. The Legislature by a statute may create a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, but even then Curt has to give full effect to such statutory fiction after examining and ascertaining as to for what purpose and between what parties such statutory fiction has been resorted to. In the well known case of *East and Dwellings Co. Ltd. v. Finsbury Borough council*, (1952) A.C. 109(B), Lord Asquith has said :

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative, state of affairs had in fact existed, must inevitably have flowed from or accompanied it The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

This Court in the cases of *State of Bombay v. Pandurang Vinayak and others*, AIR (1953) SC 244 = [1953] SCR 773, *Chief Inspector of Mines and another etc. v. Karam Chand Thapar etc.*, AIR (1961) SC 838 = [1962] 1 SCR 9, *M/s J.K. Cotton Spinning and Weaving Mills Ltd. and another v. Union of India and others*, AIR (1988) SC 191 = [1988] 1 SCR 700, *M. Venugopal v. The Divisional Manager, Life Insurance Corporation of India. Machilipatnam, Andhra Pradesh & Anr.*, JT (1994) 1 SC 281 = [1994] 2 SCC 323 and recently in the case of *Harish Tandon v. The Addl. District Magistrate, Allahabad*, JT (1995) 1 SC 291, has dealt with in detail the effect of a statutory fiction and the limitation of the Court to ignore the mandate of the Legislature, unless it is violative of any of the provisions of the Constitution. So far sub-section (1) of Section 33 is concerned, it mandates that agreements covered under different clauses of sub-section(1) of Section 33 shall be deemed for the purpose of the Act to be agreements relating to restrictive trade practices. By the deeming clause one is not required to treat any imaginary state of affairs as real but to treat the agreements specified and enumerated in sub-section (1) of Section 33 as agreements relating to restrictive trade practices. It can be said that Parliament after having examined different trade practices, has identified such trade practices which have to be held as restrictive trade practices for the purposes of the Act. To keep such trade practices beyond controversy in any proceeding, a deeming clause has been introduced in sub-section

A (1) of Section 33 saying that they shall be deemed to be restrictive trade practices. In this background, according to us, there is not much scope for argument that although a particular agreement, is covered by one or the other clause of sub-section 1 of Section 33, still it shall not amount to an agreement containing conditions which can be held to be restrictive trade practices within the meaning to the Act.

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According to Mr. Desai, the learned counsel, who appeared on behalf of the appellant, inspite of the amendment in sub-section 1 of Section 33, the power of the Commission or of this Court has no in no way been curtailed or abridged and the Commission or this Court, can examine an agreement for recording a finding as to whether any of the clauses of

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such agreement relates to restrictive trade practices. He pointed out that Section 37 which vests power in the Commission to examine and investigate any agreement relating to restrictive trade practices is in two parts, (i) the Commission is required to examine and ascertain as to whether any of the

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terms of a particular agreement relates to restrictive trade practices (ii) if such agreement relates to restrictive trade practices whether it is prejudicial to the public interest. Unless the finding is recorded in respect of the agreement in question on both courts, no order under Section 37 of the Act can be passed. In other words, first it has to be examined as to whether the agreement relates to any of the restrictive trade practices and if the

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Commission is satisfied that it relates to one or more restrictive trade practices within the meaning of Section 2(o) of the Act, then the Commission has to examine as to whether such agreement is prejudicial to the public interest. The Commission can direct that the practice be discontinued or should not be repeated or the agreement of part thereof shall be

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void, only after the Commission is satisfied that any of the clauses of the agreement relates to any restrictive trade practice, within the meaning of Section 2(o) of the Act and such restrictive trade practice is prejudicial to public interests. In this connection, reliance was placed on the judgment of this Court, in the case of *Tata Engg. and Locomotive Co. v. Registrar*,

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[1977] 2 SCC 55. From the facts of that case, it will appear that *Tata Engg. and Locomotive Co.* (hereinafter referred to as the 'TELCO') used to sell vehicles and had of its own initiative introduced certain procedures for distribution of its vehicles. It had notified to its dealers the maximum price for each model of vehicle which they can charge from consumers. When the vehicles were sold it was the responsibility of TELCO to provide facilities for servicing and repairing of the vehicles marketed by it. For that,

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after sale service had been provided for in different parts of the country. It had a net work of dealers service centres and zonal offices. An application was filed by the Registrar, Restrictive Trade Agreements, under Section 10(a)(iii) of the Act before the Commission, for inquiry under Section 37 of the Act into restrictive trade practices alleged therein. Special grievance in respect of territorial restriction and allocation of area or market for exclusive dealership was made. It was pointed out to the Commission by the Registrar, Restrictive Trade Agreements, who had then the power to file an application before the Commission under Section 10(a)(iii) that some of the clauses of the dealership agreement, imposed restriction on the dealers in respect of territories, the maximum price at which goods could be resold, and in respect of dealing in products of other manufacturers which amounted to restrictive trade practice. The Commission held that the practice of allocation of territories to Telco's dealers was not justified. But this Court said :

"The decision whether trade practice is restrictive or not has to be arrived at by applying the rule of reason and not on the doctrine that any restriction as to area or price will *per se* be a restrictive trade practice. Every trade agreement restrains or binds person or places or prices. The question is whether the restraint is such as regulates and thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine this question three matters are to be considered. First, what facts are peculiar to the business to which the restraint is applied. Second, what was the condition before and after the restraint is imposed. Third, what is the nature of the restraint and what is its actual and probable effect."

It was further said in respect of sub-section 1 of Section 33 as it stood then that it deals with registration of certain types of restrictive trade practices, which had been prescribed in categories mentioned in clauses (a) to (l) of sub-section 1 of Section 33 of the Act. It was then said :

"An agreement will be registrable, when it will have both the effect of restricting competition within the meaning of Section 2(o) of the Act and also deal with the subject matter described in Clauses (a) to (l) of sub-section (1) of section 33 of the Act. Clauses (a) to (l) aforesaid described some species of agreement

A which require registration if they are within the genus of restrictive trade practice defines in Section 2(o) of the Act. A practice which is not restrictive under Section 2(o) of the Act cannot be restrictive trade practice only because of Clauses (a) to (l) of sub-section (1) of section 33 of the Act. Section 33 does not provide statutory illustrations to section 2(o) of the Act but only enumerates some types of trade practices which if they are restrictive within Section 2(o) of the Act require registration."

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This Court in the aforesaid judgment on basis of sub-section 1 of section 33 as it was then held that a practice which is not restrictive trade practice under section 2(o) of the Act, cannot be held to be restrictive trade practice, only because of clauses (a) to (l) of sub-section 1 of Section 33 of the Act. Again in the case of *Mahindra and Mahindra Ltd. v. Union of India*, [1979] 2 SCC 529, after making reference to the aforesaid case of *Tata Engg. and Locomotive Co.* (supra) it was said :

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D "It is now settled law as a result of the decision of this Court in the Telco case that every trade practice which is in restraint of trade is not necessarily a restrictive trade practice. The definition of restrictive trade practice given in Section 2(o) is a pragmatic and result-oriented definition. It defines 'restrictive trade practice' to mean a trade practice which has or may have the effect of preventing, distorting or restricting competition in any manner and in clauses (i) and (ii), particularises two specific instances of trade practices which fall within the category of restrictive trade practice. It is clear from the definition that it is only where a trade practice has the effect, actual or probable, of restricting, lessening or destroying competition that it is liable to be regarded as a restrictive trade practice. If a trade practice merely regulates and thereby promotes competition, it would not fall within the definition of restrictive trade practice, even though it may be, to some extent, in restraint of trade. Whenever, therefore, a question arises before the Commission or the Court as to whether a certain trade practice is restrictive or not, it has to be decided not on any theoretical or a priori reasoning, but by inquiring whether trade practice has or may have the effect of preventing, distorting or restricting competition. This inquiry obviously cannot be in vacuo but it must depend on the existing constellation of economic facts and cir-

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cumstances relating to the particular trade. The peculiar facts and features of the trade would be very much relevant in determining whether a particular trade practice has the actual or probable effect of diminishing or preventing competition and in the absence of any material showing these facts or features, it is difficult to see how a decision can be reached by the Commission that the particular trade practice is a restrictive trade practice."

But now with the amendment of main part of sub-section 1 of Section 33 with a statutory fiction the situation has changed. It can be said that clauses (a) to (l) of sub-section (1) of Section 33 provide statutory illustrations of restrictive trade practices. The framers of the Act have now in clear and unambiguous words said that very agreement falling within one or more of the categories specified in clauses (a) to (l) of sub-section 1 of Section 33, shall be deemed for the purposes of the said Act, to be an agreement relating to restrictive trade practices and shall be subject to registration in accordance with the provisions of Chapter V. Now it is no more open to the commission or to this court to test and examine any of the trade practices mentioned in clauses (a) to (l) of sub-section 1 of Section 33 in the light of Section 2(o) of the Act, for the purpose of recording a finding as to whether those types of trade practices shall be restrictive trade practices within the meaning of Section 2(o) of the Act. This exercise has to be done only in respect of such trade practices which have not been enumerated in any of the clauses from (a) to (l). Only such trade practices have to be examined in the light of section 2(o) of the Act, as to whether they amounted to restrictive trade practices. It need not be pointed out that both judgments aforesaid of this Court interpreted the scope of sub-section 1 of Section 33, as it stood prior to the amendment by Act 30 of 1984. But after the amendment of sub-section 1 of Section 33 if an agreement falls within one of the clauses of the said sub-section, specifying a restrictive trade practice, then it is no more open to the Commission or to the Court to say that it shall not amount to restrictive trade practice. Trade practices enumerated in clauses (a) to (l) of sub-section (1) of Section 33 shall be deemed to have now been statutorily determined and specified as restrictive trade practices. Neither the Commission nor the Court can question the wisdom of the Parliament for having statutorily determined certain trade practices as restrictive trade practices unless in this process there is contravention of any of the provisions of the Constitution. In this background, if any agreement con-

A tains a trade practice which falls in any of the clauses of sub-section 1 of Section 33 then such trade practice shall be deemed to be restrictive trade practice and such agreement has to be registered.

B Now the question which still remains to be answered is as to whether after the amendment in sub-section 1 of Section 33 and after registration of an agreement, the scope of inquiry by the Commission under section 37 in respect of the agreement, has been curtailed and the Commission had now to examine only one question as to whether such practice is prejudicial to the public interest.

C On behalf of the appellant, it was pointed out that Section 37 contemplates and conceives inquiry in respect of any restrictive trade practice relating to an agreement which has been registered under Section 35 as well as an agreement which has not been so registered. As such
D persons who have got their agreements registered on their own in order to escape prosecution, although in such agreements there may not be any clause relating to restrictive trade practices, cannot urge before the Commission, after having got the agreements registered, that they do not contain any clause relating to any restrictive trade practice. On the other
E hand, persons who for one reason or other have not got their agreements registered under Section 35, will be in an advantageous position inasmuch as in respect of their agreements, commission will have to examine both aspects (i) whether the agreement relates to any restrictive trade practice,
F (ii) even if it relates to restrictive trade practice, whether the said practice is prejudicial to the public interest. It is true that under Section 37, the Commission has been vested with the power to inquire in respect of agreements which have been registered under section 35 as well as those
G which have not been registered. But the fact remains that once the Commission is satisfied that a particular agreement which has not been registered under Section 35, falls within any of the clauses from (a) to (l) of sub-section 1 of Section 33, then no further inquiry is to be done, as to whether such agreement relates to restrictive trade practices or not. The statutory fiction incorporated in sub-section 1 of Section 33 shall also be applicable in respect of such agreements apart from the penalty provided under Section 48 of the Act. As such there is not much scope for discrimination between persons who have got their agreements registered and
H those who have not got their agreements registered.

It was also urged that while amending sub-section 1 of Section 33, Section 2(o) was not deleted or substituted and that has left an apparent conflict between section 2(o) and Section 33(1) of the Act. According to us there is no conflict between Section 2(o) and 33(1). Clauses (a) to (l) of sub-section 1 of Section 33 specify such trade practices which have been statutorily recognised as restrictive trade practices. But there may be other trade practices, not covered by clause (a) to (l) of sub-section 1 of Section 33, which can be examined by the Commission in the light of section 2(o).

It was pointed out on behalf of the appellant that after the amendment of sub-section 1 of Section 33, there is no forum where a person can show that although at a first look, it may appear that any of the clauses of the agreement, relates to a restrictive trade practice specified in clauses (a) to (l) of sub-section 1 of Section 33, but such clauses cannot be held to be covered by any of the clauses. According to us, in this respect a decision has to be taken by the person who is a party to the said agreement whether to get such agreement registered under Section 35. But once he gets the agreement registered, then he is debarred from questioning whether it contains any clause relating to a restrictive trade practice. Sub-section 1 of Section 33 specifies in different clauses various types of trade practice, which have now been recognised as restrictive trade practices. Any person who is a party to any agreement has to examine the agreement in light of those clauses. It according to such person, the agreement in question does not contain any clause relating to any of the restrictive trade practices specified in clause (a) to (l), such person need not get the agreement registered under Section 35. He will be at liberty to satisfy the Commission on that question. But once the agreement is registered, then such agreement cannot be inquired into by the Commission, for the purpose as to whether it relates to any restrictive trade practice; of course inspite of registration of the agreement, the person concerned can satisfy the Commission that such practice is not prejudicial to the public interest.

At this stage it shall be proper to refer to Section 38 of the Act. Sub-section 1 of Section 38 also contains a statutory fiction because it says that for purposes of any proceedings before the Commission under Section 37, a 'restrictive trade practice shall be deemed to be prejudicial to the public interest' unless the Commission is satisfied of any or more of the circumstances specified in clauses (a) to (k) of sub-section 1 of Section 38.

- A The scheme of the Act appears to be that first specifies some trade practices, under sub-section 1 of Section 33, as restrictive trade practices. Then it has prescribed a forum under Section 37, to inquire as to whether any such trade practice is prejudicial to the public interest. This question has to be examined in the light of Section 38 which in many judgments have been described as 'gateways'. In other words, inspite of a finding that a particular agreement contains a clause which is related to a restrictive trade practice, if the Commission is satisfied in respect of the existence of any of the Circumstances specified in clauses (a) to (k) of sub-section 1 of Section 38, no order under Section 37 is to be passed to desist or discontinue such practice or to declare any part of the agreement as void. One of the circumstances specified in clause (h) of sub-section 1 of Section 38 is :

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

- D If the Commission is satisfied that any practice which has been held to be restrictive trade practice does not directly or indirectly restrict or discourage competition to any material degree in any relevant trade or industry then it can resist passing any order under section 37 directing the person concerned to desist or to discontinue the practice. It may be mentioned that in connection with old sub-section 1 of Section 33 in the case of *Tata Engg. and Locomotive Co.* (supra) this Court pointed out that the exclusive dealings do not impede competition but promote it. It was said :

- F "The exclusive dealings do not impede competition but promote it. Such dealings lead to specialisation and improvement in after sales service. The exclusive dealership agreements do not restrict distribution in any area or prevent competition. The customer has the choice of buying any make he likes. The advantage of exclusive dealership is that a dealer specialises in his own type of vehicles with all the attending advantages of trained personnel, special service stations, workshops and spare parts."

- H It was also said that by specialising in each make of vehicle and providing the best possible service that the competition between the various makes is enhanced. In that connection it was also said :

"By making its dealers exclusive to Telco, there cannot be said to be any prevention, distortion or restriction of competition in the territory in which a dealer operates, either between manufacturers of the same type of vehicles or between dealers in these vehicles. Any manufacturer or vehicles such as those of Telco may manufacture and sell its vehicles in a territory in which Telco's dealers operate. Any other manufacturer of vehicles similar to those of Telco is also free to appoint dealers of its choice in the same territory covered by Telco's dealers. The channels for outlet for vehicles have not been blocked by the fact that the dealers appointed by Telco are exclusive to Telco not it can be said that Telco has by its exclusive arrangement with its dealers affected the flow of supplies of vehicles into the market."

Again in the case of *Mahindra and Mahindra Ltd. v. Union of India*, (supra), it was said that after the Commission is satisfied in respect of restrictive trade practices then it has to proceed to consider whether any of the 'gateways' provided in Section 38(1) exist so that the trade practice, though found restrictive, is deemed not to be prejudicial to the public interest.

In the light of what has been said above, if the order of the Commission is examined, it shall appear that the Commission has set out briefly the facts of 15 cases. Then the Commission has pointed out that the Director General in support of his case has tendered the various agreements. Thereafter reference has been made to the affidavits filed on behalf of the appellant and other documents. The real discussion is only in para 40 of the Order under appeal which is as follows :

"We have gone through voluminous records and pleadings pertaining to these enquiries, evidence produce by the parties, oral argument, written submissions and cases referred to by the parties and are of the view that no case for gateways under Section 38(1), as pleaded, has been made out by the Voltas in these proceedings. Likewise the manufacturer Simtools Limited in RTP Enquiry No. 483 of 1987 has also failed to make out any case for the gateways. Therefore, we hold that the respondents have indulged into the restrictive trade practices, as alleged in the Notice of Enquiry, and those practices are prejudicial to the public interest in each of the

A 15 enquiries."

According to us, the Commission was required to go deeper into the matter and to record findings in respect of different agreements whether the objectionable clauses of the registered agreements were prejudicial to the public interest. It need not be impressed that any finding recorded by

B the Commission under Section 37 and direction given in terms of clauses (a) and (b) sub-section 1 of Section 37 has a far reaching effect. As such every aspect of the matter is required to be examined in the light of the provisions of Sections 37 and 38 of the Act before an order to 'cease and desist' is passed by the Commission.

C Accordingly, the appeals are allowed. The impugned order passed in the 15 enquiries by the Commission is set aside and the Commission is directed to examine the questions involved afresh on the basis of the material produced on behalf of the parties. It will be open to the Commission to require any of the parties to adduce further evidence, oral

D documentary, in order to enable it to come to the conclusion one way or the other. In the facts and circumstances of the cases, there shall be no orders as to cost.

R.A.**Appeals allowed.**