

In Re: Agreement Relating to Nylon

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Court : Monopolies and Restrictive Trade Practices Commission MRTPC

Decided On : Oct-21-1974

Reported in : (1976)46CompCas357NULL

Judge : J Nain, H Paranjape, H Jhala

Appellant : In Re: Agreement Relating to Nylon

Judgement :

1. On 21st November, 1973, the Commission received a memorandum from the All India Crimpers Association (consisting of 23 members) drawing the attention of the Commission to an agreement dated 9th September, 1973 (hereinafter for the sake of brevity referred to as "the agreement"), made by and between the respondents Nos. 1 to 4 (hereinafter referred to as "the spinners") of the one part and respondents Nos. 5 to 22 (hereinafter referred to as "the weavers") of the other part. The Crimpers Association alleged that the operation of the agreement resulted in a number of restrictive trade practices. They requested that the Commission should institute an inquiry in the matter. On a perusal of the agreement, the Commission was satisfied that the matter required to be inquired into and pursuant to Section 10(a)(iv) of the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter for the sake of brevity referred to as "the Act"), ordered a suo motu inquiry into certain restrictive trade practices under Section 37 of the Act. The respondents were accordingly served with a notice under Regulation 7 of the Restrictive Trade Practices (Enquiry) Regulations, 1970 (hereinafter referred to as "the 1970 Regulations"), calling upon the respondents to

comply with Regulations 14 and 15. The notice states that the Commission had reason to believe that the respondents had entered into the agreement and were indulging in restrictive trade practices of the following nature: (a) Restricting the classes of the persons to whom supply of nylon filament yarn produced by the first four parties should be made to the exclusion of others.

(b) Preventing competition in the production, supply and distribution of crimped/dyed yarn and withholding supply of nylon filament yarn to independent crimpers carrying on the business of changing multifilament nylon/polyster yarn to stressed, crimped, texturised, set, stabilised yarn whereby the shape, bulkness, tenacity and elasticity as well as the physical characteristics of the said basic multifilament nylon/polyster yarn undergoes a complete change, (c) Maintaining prices at unreasonably high level by manipulating production and supplies.

(d) Forcing a particular class of users of nylon filament yarn to purchase such yarn from the first four parties listed above on terms and conditions stipulated in the agreement.

(e) Fixing price schedules which have the effect of eliminating competition.

(f) Limiting the agreement regarding supply of nylon filament yarn to few trade associations thereby preventing entry of new persons or associations to the proposed arrangement regarding supply of nylon filament yarn, etc., etc.

2. Under the 1970 Regulations respondents were required to file their statements of case. Before filing such statements of the case, on 14th February, 1974, the respondents Nos. 1 to 13 filed six applications for an order that the facts on the basis of which the notice of inquiry under Regulation 7 was issued to those respondents be disclosed to them and copies of the requisite documents and records and/or inspection be given to them. The Crimpers Association had by a petition furnished information with regard to the making of the agreement and its operation and furnished a copy of the agreement. The Commission had issued notice under Regulation 7 on the reading of the agreement itself. The fact of the making of the agreement was not denied by the respondents and it was also not denied that the agreement was in operation and had been given effect to. By an

order dated 5th March, 1974, [1975] 45 Comp Cas 646 (MRTPC) we stated that it was the operation, working and giving effect to the provisions of the agreement alone which led to the restrictive trade practices set out in the notice issued under Regulation 7. There was, therefore, no question of disclosure of any other facts or giving of inspection of any documents to the respondents.

3. Thereafter, the respondents filed their statements of the case and the remaining pleadings as required by the 1970 Regulations were completed.

4. On 13th July, 1974, the, 1970 Regulations were repealed and in their place the Monopolies and Restrictive Trade Practices Commission Regulations, 1974 (hereinafter for the sake of brevity referred to as "the 1974 Regulations") came into force.

5. On 12th August, 1974, the respondents Nos. 1 to 4 applied that certain issues arising on the pleadings be raised and decided as preliminary issues. They agreed that issues Nos. 2 to 4 will require no evidence to be led, and only issue No. 1 may require documentary evidence and perhaps the oral evidence of one witness. We, therefore, agreed to try such issues as preliminary issues. Accordingly, the following preliminary issues were framed : "1. Whether the agreement dated September 9, 1973, has the approval of the Central Government within the meaning of Section 33(3) of the Monopolies and Restrictive Trade Practices Act 2. If the answer to issue No. 1 be in the affirmative, whether the agreement is outside the purview of Sections 10 and 37 of the Monopolies and Restrictive Trade Practices Act 3. Whether, on a true construction of the agreement dated September 9, 1973, the operation of the said agreement results in restrictive trade practices as alleged in the notice dated 30th November, 1973, within the meaning of Section 2(o) of the Monopolies and Restrictive Trade Practices Act 4. Whether the notice dated 30th November, 1973, is without jurisdiction and/or in contravention of statutory provisions and/or in violation of the rules of natural justice, as alleged in paragraph 5 of the application of respondents Nos. 1 to 4 dated 12th August, 1974?" We heard the learned counsel for the parties on 13th September, 1974, and 24th September, 1974, to 28th September, 1974, in all for six days.

6. At the outset Dr. Singhvi objected to the appearance of the Director of Investigation (hereinafter for the sake of brevity referred to as "the Director"). He contended that the 1970 Regulations contemplated that the carriage of proceedings in suo motu inquiries would be in the hands of the Registrar of Restrictive Trade Agreements (hereinafter for the sake of brevity referred to as "the Registrar") and in fact until the 1974 Regulations came into force, the Registrar had the carriage of the proceedings in this very matter. He contended that the proceedings were governed by the 1970 Regulations and, therefore, it was the Registrar who must carry on the proceedings and not the Director, It was not disputed that under the 1974 Regulations it was the Director who was to have the carriage of proceedings in the case of suo motu inquiries. We asked Dr. Singhvi whether the matter of carriage of proceedings by a different officer of the Government was causing any prejudice or difficulty to his clients, to enable us to remove such difficulty under Regulation 18 of the 1974 Regulations. He was not able to point out any prejudice or difficulty but stated that it was a question of "jurisdiction" of an officer of the Government and not a matter of prejudice and that we should record the objection so that in case it becomes necessary the objection could be taken in another forum. The matter was not further argued. Prima facie, this objection does not appear to us to be a question of jurisdiction. The respondents are not challenging the jurisdiction of the Commission as a Tribunal.

They are only questioning the authority of an officer of and appointed by the Central Government to carry proceedings in place of another officer of and appointed by the Central Government, without pointing out any prejudice or difficulty caused by the change.

7. In this connection we may refer to Regulation 87 of the 1974 Regulations which provides that the 1970 Regulations were repealed but the repeal shall not affect the previous operation of the repealed Regulations. Regulation 87(2) is in the same terms as Clauses (b), (c), (d) and (e) of Section 6 of the General Clauses Act. The Regulations are procedural regulations and no one has a vested right in the old procedure after the new Regulations came into force. They apply to all proceedings. Regulation 87 merely saves the previous operation of the repealed Regulations as if the repealing Regulations had not been made but except that,

the repealed Regulations stand completely repealed and the procedure is thereafter governed by the repealing Regulations. We find no substance in the objection of Dr. Singhvi to the appearance of the Director.

8. Under the provisions of Section 18(1)(a) of the Act we have the power to regulate the procedure and conduct of the business of the Commission. Under Regulation 18 of the 1974 Regulations we have the power to make orders for removing difficulties, if any. We find no difficulty in coming to the conclusion that the Director is the proper officer to have carriage of these proceedings after the 1974 Regulations came into force. However, to set the matter at rest we order that he shall have the carriage of these proceedings.

9. Before dealing with the preliminary issues it might be well to give a brief historical background of the agreement which is the subject-matter of these proceedings. This background has been given in the statement of the case of respondent No. 5, Silk and Art Silk Mills Association Ltd., Bombay, and the facts stated therein are not in dispute. The said Association consists of about 717 weavers who are admittedly actual users of various types of man-made fibres and yarn.

The said Association is a signatory to the agreement.

10. Indigenous manufacture of nylon yarn is about a decade old. The total supply of nylon yarn available in the country both from sources of indigenous manufacture and from imports is far less than the demand.

The prices of nylon yarn have, therefore, remained high. Most of the production of nylon fabrics in the country comes from weaving units.

They found the prices of nylon yarn extremely high and made representations to the Government of India. In 1968 the Government of India requested the Tariff Commission to inquire, inter alia, into the cost structure of nylon yarn and to recommend fair selling prices for the yarn and the steps required to be taken to bring about reduction in the cost of production. The Tariff Commission submitted its report to the Government of India in September, 1970. The weaving sector

thereafter made representations to the Government of India for fixation of statutory control over the prices to be charged by the spinner for nylon yarn in terms of the recommendations of the Tariff Commission.

The weaving sector desired that the entire production of the spinners in the country should be sold at reasonable and fair prices and distributed in an equitable manner amongst the weavers. The spinners were unwilling to have statutory control over prices and distribution because prices recommended by the Tariff Commission were far below the market prices as well as the prices fixed in the "voluntary agreement".

The Government of India was also perhaps unwilling to enforce statutory control over the prices and distribution of nylon yarn and showed preference for a voluntary arrangement between the spinners and the weavers. Pending the implementation of the Tariff Commission's report the spinners and the weavers entered into an agreement dated the 15th July, 1970. From amongst the spinners only respondents Nos. 1 to 4 were parties. At that time Century Enka Ltd. was the fifth spinner but it was not a party to the agreement. The said agreement was followed by subsequent agreements of 18th March, 1971, 22nd April, 1972, and the agreement of 9th September, 1973, which is the subject-matter of the present proceedings. During the period of these agreements, the production of nylon yarn in the country was further reduced because of shortage and high prices of caprolactum which is the major raw material for manufacture of nylon yarn. This led to further rise in the prices of nylon yarn. The Tariff Commission's report of September, 1970, was published by the Government of India only in July, 1973. No steps have been taken by the Government of India so far to enforce the recommendations contained in the said report. Even after March, 1973, the weaving sector made representations to the Government of India to enforce statutory control over prices and distribution of nylon yarn.

The Government of India showed unwillingness to do that and suggested voluntary arrangement between the spinners and the weavers. The weavers continued to ask the Government for statutory control over prices and distribution of the entire 100% production of nylon yarn in the country. In the meanwhile two

new spinners came into existence. The agreement continued to be between the weavers on the one part and respondents Nos. 1 to 4 on the other. Respondents Nos. 1 to 4 are the major spinners in the country. The three remaining spinners, namely.

Century Enka Ltd., Shri Synthetics Ltd. and Stretch Fibres India Ltd. did not join the agreement. Their production is comparatively small.

11. A brief reference to the framework of the agreement of 9th September, 1973, which is the subject-matter of the present proceedings will be helpful. Out of the spinners, the respondents Nos. 1 to 4 are parties to the agreement. There are 3 more spinners named hereinabove in the country. The other party to the agreement are 18 weavers' associations. 5 of the associations are located in and around Bombay, 5 more in Surat, 7 in Amritsar and one in Faridabad near Delhi. The weavers in these parts of India who are not members of these associations and the weavers in the remaining parts of India are not parties to the agreement. The agreement provides that 75% of the nylon yarn produced by the four spinners will be distributed at the fixed prices mentioned in the agreement to "actual users" and the four spinners will be free to sell the remaining 25% of the production at any price that the market can bear. The 18 weavers' associations who are signatories to the agreement purport to act for and on behalf of the members who hold permits and licences for weaving and manufacturing fabrics out of nylon yarn. The expression "actual users" is defined in the agreement as licensed manufacturers of fabrics and/or ribbon on powerlooms or machines. They alone are "deemed to be" actual users while crimpers and twistors are expressly excluded from the definition of "deemed" actual users. The agreement has been described as "voluntary agreement". The agreement recites that there had been meetings between the representatives of the parties and that at the meetings the production and supply of nylon yarn, shortage of caprolactum, its high price and the Tariff Commission's report had been taken into account before the agreement was entered into. The agreement is stated to have come into effect from 1st September, 1973, and is to remain in force up to 31st August, 1975, and may be extended thereafter by mutual consent. The prices at which the respondents Nos. 1 to 4 are to sell nylon yarn to those entitled under the agreement are set out in

annexure "B" to the agreement. These prices are applicable only to 75% of the production. The agreement provides that a body called Central Nylon Committee consisting of 16 representatives of spinners and 16 representatives of weavers' associations shall be set up. The names and official designations of the representatives of weavers' associations are set out in annexure "D" to the agreement. The agreement recites that the prices set out in annexure "B" are agreed prices. The agreement provides for escalation of prices in the event of changes in fiscal levies and price of caprolactum. The agreement also provides that the spinners will endeavour to maintain the pattern of production on the basis of the requirements of weavers who are entitled to benefit under the agreement and that the production pattern of April, 1972, to March, 1973, will be maintained as far as possible. It states that as far as technically feasible the spinners will maintain the same proportion between the coarser and the finer deniers as in April, 1972, to March, 1973, period. One of the clauses of the agreement provides that the parties to the agreement agree that the crimpers are only processors and not actual users of nylon yarn. But keeping in view that they have been getting yarn supply directly from the spinners or through their authorised dealers they will get supply of nylon yarn from spinners proportionate to the off-take in the period from April, 1972, to March 1973, at prices mentioned in annexure "B" subject to the condition that such crimpers agree that they are not actual users and are only processors of actual users and agree to deliver crimped yarn equivalent in quantity to the filament yarn bought by them to weavers who are parties to the agreement at prices and on terms as to delivery laid down by the Central Nylon Committee constituted by the parties to the agreement. Master lists of persons who according to the parties to the agreement are "actual users" are annexed to the agreement and it is provided that they shall be supplied goods by these spinners on the basis of their off-take during the period April, 1972, to March, 1973.

Any new-comer to the business of weaving has to apply to the Central Nylon Committee after becoming a member of one of the signatory associations and the Committee would consider all such applications and lay down a suitable procedure for distribution of nylon yarn to the new-comer "depending on the availability of nylon yarn". The allocation of nylon yarn even to "actual users" included in the master list who is not a member of any of the signatory associations would also be

made by the Central Nylon Committee.

12. With the above background we propose to deal with issue No. 3 first as to whether on a true construction of the agreement of 9th September, 1973, the operation of the said agreement results in restrictive trade practices as alleged in the notice dated the 13th November, 1973, and set out hereinabove within the means of any of the categories in Section 33(1) or Section 2(o) of the Act.

13. However, before we discuss the restrictive trade practices alleged in the notice we might observe the difference between the expressions "user" and "consumer". The literal meaning of the word "user" is a person who employs a material for a purpose whereas a "consumer" uses up the material. Applying this test it appears to us that a crimper or a twister who buys flat yarn and puts it through the process of crimping or twisting before the crimped or twisted yarn is used for manufacture of hosiery is as much a user of flat yarn as a weaver who buys flat yarn and manufactures fabric out of it. Neither of them is the end consumer. The end consumer of hosiery manufactured out of crimped or twisted yarn and the fabric woven out of flat yarn is the person who wears the hosiery or the fabric. It appears to us that calling the weaver "actual user" and excluding the crimper or twister from that definition is an arbitrary and unjustified discrimination.

14. The allegation against the respondents set out in Clause (a) of the notice is that the agreement restricts the classes of the persons to whom supply of nylon filament yarn produced by respondents Nos. 1 to 4 should be made to the exclusion of others. Clause (b) of the notice states that the agreement prevents competition in the supply and distribution of nylon yarn to crimpers who are processors. It is obvious from the agreement that the following classes of persons are excluded from the purchase of 75% of the production of respondents Nos.

1 to 4 under the agreement: (ii) Users of nylon yarn who have bought nylon yarn from the open market during April, 1972, to March, 1973. Para. 18(i) of the agreement provides that 75% of the production of nylon yarn would be distributed to "actual users" on the basis of the average off-take during April to March 1972-73 from the spinners. Para. 22 provides that the actual off-take in 1972-73 shall be according to the master lists received from the spinners. But there may be a class

of persons who may not have bought nylon yarn from the spinners directly during this period but may have met their demands from the open market. Such persons will not be included in the master lists supplied by the spinners under para. 22 of the agreement.

(iii) New-comers to the business of weaving. Such persons are left to the mercy of the Central Nylon Committee under paras. 23 and 24 of the agreement and may be allotted any surplus. The learned counsel for respondent No. 5 has called this, and we think rightly, "crumbs from the master's table".

(iv) "Actual users" included in the master lists received from the spinners who are not members of any of the signatory associations under para. 28 of the agreement are also left at the mercy of the Central Nylon Committee who as we have indicated are not represented on the Central Nylon Committee.

15. The exclusion of the above categories of buyers restricts the persons or classes of persons to whom the goods are sold within the meaning of Section 33(1)(a).

16. We are further of the view that if 75% of the production of respondents Nos. 1 to 4 who are the major producers in the country is sold at concessional rates to a restricted class of persons in a market where nylon yarn is in short supply, the prices of the remaining 25% of the goods which the spinners are free to sell in the open market would tend to be high. This practice tends to bring about manipulation of prices and also tends to affect the flow of supplies in the market relating to nylon yarn in such a manner as to impose on the consumers unjustified costs or restrictions. Such practice also prevents competition among spinners in the supply and distribution of nylon yarn to the excluded classes. Such practices would cover Clauses (a) and (b) of the notice and would in our opinion satisfy the definition of restrictive trade practices in Section 2(o) of the Act.

17. Clause (c) of the notice states that the agreement maintains prices at unreasonably high level by manipulating production and supplies. We are of the view that the production is not manipulated. But by exclusion of 25% of the production of respondents Nos. 1 to 4 from distribution at lower prices to restricted

class of persons, the prices of the remaining 25% are maintained at unreasonably high level discussed hereinabove. Such an agreement limits, restricts and withholds the output or supply of filament yarn within the meaning of Section 33(1)(g) and tends to bring about manipulation of prices and affects the flow of supplies in the market and imposes on the consumers unjustified costs or restrictions within the meaning of Section 2(o) of the Act.

18. Clause (d) of the notice states that the agreement forces a particular class of users of nylon filament yarn to purchase such yarn from respondents Nos. 1 to 4 on terms and conditions stipulated in the agreement. If 75% of the production of major producers in the country is supplied to a limited class of persons the excluded classes are forced to purchase nylon yarn whether out of the said 75 per cent. or from the 25% quota on terms and conditions which the agreement can stipulate and has stipulated. The excluded classes are compelled to submit to the terms and conditions imposed by the Central Nylon Committee on which they have no representation. The Central Nylon Committee controls the price escalation as well as distribution. It is formed under para. 11 of the agreement. Para. 21 of the agreement shows that the crimpers are treated as buyers at sufferance. Whereas the so called "actual users" are permitted by paras. 4 and 5 of the agreement to buy at prices which "are not higher than those mentioned in annexure "B", para. 21 provides that the crimpers shall buy "at" prices mentioned in annexure "B". A condition is also imposed on them by para.

21 that the crimpers shall agree or declare that they are not actual users and are only processors of actual users. This is an onerous condition because an admission that the crimpers are not actual users would hit hard the crimpers in any distribution which the Government may introduce at any time. Another condition imposed by para. 21 on the crimpers is that they would agree to deliver the crimped yarn to the "actual users" and the new-comers as directed by the Central Nylon Committee at prices and terms of delivery as may be laid down by the Central Nylon Committee. As we have stated hereinabove the crimpers are as much processors as weavers. The weavers are not subjected to any such conditions as to sale or otherwise. The distribution is controlled by the Central Nylon Committee under paras. 22, 23, 24 and 28 of the agreement. We think

Clause (d) of the notice is covered by these practices. These practices fall under Section 33(1)(d) and (f). These practices also have or may have the effect of preventing, distorting or restricting competition as they restrict prices on sale of crimped yarn by crimpers, permit the Central Nylon Committee to regulate the sale to the so-called "actual users" and new-comers and restrict and prevent competition in respect of crimped yarn. These practices also fall within the definition in Section 2(o) of the Act.

19. Clause (e) of the notice states that the agreement fixes price schedules which have the effect of eliminating competition. This is true in respect of crimpers only. Whereas under paras. 4 and 5 of the agreement 75% of the yarn is to be sold to "actual users" at prices which "shall not be higher than those mentioned in annexure 'B'" to the agreement, in the case of crimpers para. 21 states that the spinners will sell goods only "at" prices mentioned in annexure "B" to the agreement. This fixes the price schedules for sale to crimpers and has the effect of eliminating price competition between the spinners in the case of crimpers. This practice falls under Section 33(1)(d) and inasmuch as it has or may have the effect of preventing competition in any manner, it also satisfies the definition of restrictive trade practices in Section 2(o) of the Act.

20. Clause (f) of the notice states that the agreement limits the supply of nylon filament yarn to a few trade associations thereby preventing entry of new persons or associations to the proposed arrangement regarding supply of nylon filament yarn. We have indicated hereinabove that the supply of nylon filament yarn under the agreement is limited to "actual users" as defined in the agreement, who have a direct off-take from the respondents Nos. 1 to 4 in April, 1972, to March 1973, and are included in the master lists of these respondents.

The definition appears to us to be arbitrary and not natural and thereby new entrants to the business of weaving, crimping or twisting are prevented from buying out of the 75% quota and are compelled to buy from the open market at high prices which may have the effect of excluding them from the business. The agreement puts the excluded persons at the mercy of the Central Nylon Committee which does not represent them. This practice excludes from the

business of weaving and crimping, persons intending to carry on in good faith these businesses.

This falls under Section 33(1)(i) of the Act and inasmuch as the practice will have the effect of preventing, distorting or restricting competition. It satisfies the definition of restrictive trade practice in Section 2(o).

21. We have held in Restrictive Trade Practice Enquiry No. 6 of 1972 (Registrar of Restrictive Trade Agreements v. Bengal Potteries Ltd.) that practices falling under any of the categories specified in Section 33(1) also fall within the definition of restrictive trade practices in Section 2(o) of the Act as they have or may have the effect of distorting competition. These practices also tend to bring about manipulation of prices and conditions of delivery to affect the flow of supplies in the market and impose on the consumer unjustified costs and restrictions. If 75% of the production of any goods or a commodity which is in short supply is sold at relatively low price to a restricted class of persons it would necessarily push up the prices of the remaining available goods, namely, 25% of the production, because the persons excluded from the agreement will have to fall back on this 25%. This results in manipulation of prices. If the goods are available at the same price to every buyer the prices may on the whole be higher than those at which 75% of the goods are sold but they are bound to be lower than the prices at which the remaining 25% of the goods may be sold, This works unfairly on those excluded from the agreement and we may add arbitrarily excluded. If the entire output were to sell in open market the total price paid by the entire class of buyers for the entire production may be less than the aggregate price paid by the buyers now. The agreement may work unfairly on the buyers as a whole class. These effects would in our opinion satisfy the definition of restrictive trade practices in Section 2(o) of the Act.

22. In view of the above discussion, the answer to issue No. 3 is that on a true construction of the agreement of 9th September, 1973, the operation of the said agreement results in restrictive trade practices as alleged in the notice dated the 13th November, 1973, within the meaning of Section 2(o) of the Act. The several clauses also fall within the categories of restrictive trade practices under Section

33(1) of the Act indicated hereinabove.

23. The learned counsel appearing for the respondents have not argued issue No. 4. The contentions covered by the issue were taken by the respondents earlier and are covered by our order dated the 5th March, 1974. Dr. Singhvi did suggest that Sections 10 and 37 contemplate 2 separate inquiries and only after an inquiry under Section 10 is complete, that a second inquiry under Section 37 can commence. We find no substance in this contention.

24. Now we come to issue No. 1 as to whether the agreement dated the 9th September, 1973, has the approval of the Central Government within the meaning of Section 33(3) of the Act. Section 33 of the Act falls in Chapter V which provides for registration of agreements relating to restrictive trade practices, appointment by the Government of Registrar of Restrictive. Trade Agreements for the purpose, and for other matters pertaining to registration of agreements relating to restrictive trade practices. Sub-section (3) provides that no agreement falling within this section shall be subject to registration in accordance with the provisions of Chapter V, if, (a) it is expressly authorised by or under any law for the time being in force ; or (b) has the approval of the Central Government; or (c) if the Government is a party to such agreements. It was conceded by Dr. Singhvi that the agreement was not expressly authorised by or under any law nor was the Government a party to it. He, however, contended that it had the approval of the Central Government and, therefore, it was saved from registration. The agreement has in fact been registered. It was sent to the Registrar with a covering letter stating that it was being sent without prejudice to the contention of the parties, that it did not require registration as it did not relate to any restrictive trade practice and/or that it had no economic significance and, therefore, may be exempted from registration. It was, however, not claimed that it did not require registration on the ground that it had the approval of the Central Government. To answer this issue by itself should have been irrelevant.

25. But it has been contended by some of the respondents that not only is an agreement which has the approval of the Central Government exempt from registration but it is also exempt from inquiry under Section 37 which falls under

Chapter VI which pertains to inquiries by the Commission into restrictive trade practices. This is covered by issue No. 2, and it is for the effect of this issue on issue No. 2, that we are proceeding to discuss this matter. We must, however, mention that the contention as to approval is new and was not taken before the Registrar.

26. The respondents have led some evidence on this issue. Exhibit 1 collectively is a compilation and contains minutes of a meeting held on 27th June, 1973, in the office of the Textile Commissioner and certain correspondence between the office of the Textile Commissioner and some of the spinners of nylon yarn who are not parties to the agreement or between the Textile Commissioner and some Government officers. Exhibit 2 collectively are extracts from proceedings of the Lok Sabha dated 31st August, 1973, 20th November, 1973, and 23rd November, 1973.

Exhibit 3 collectively is mere correspondence to which the Textile Commissioner is a party. As it was stated by the learned counsel for the director of Investigation that the correspondence in exhibits 1 and 3 was not complete, the Director was permitted to put in by consent, exhibit A collectively, to put in more letters which he thought were relevant. These are also letters to which the Textile Commissioner, Bombay, is a party and were produced by an officer from his department.

Exhibits 1 collectively, 3 collectively and A collectively were produced by Mr. K. Ramamurthy, Director in the office of the Textile Commissioner, Bombay, who was examined as a witness by the Commission and cross-examined by some of the parties. From all this evidence the respondents wish us to infer that the agreement has the approval of the Central Government.

27. The attention of the respondents was drawn to Article 77 of the Constitution of India pertaining to Central Government and corresponding to Article 166 of the Constitution pertaining to State Governments. Article 77 provides that all executive action of the Government of India shall be expressed to be taken in the name of the President and orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President. We asked Dr. Singhvi whether there is in existence a

formal order or approval expressed to have been given in the name of the President. He stated that there was no such formal order in existence. He contended that Article 77(1) is confined to cases where the executive action is required to be expressed in the shape of a formal order or notification or any other instrument. He contended that approval under Section 33(3) was not required to be expressed in the shape of a formal order or notification or any other instrument. Our attention is drawn to Section 54 of the Act which provides that the Central Government may while according any approval under the Act in relation to any matter impose such conditions, limitations or restrictions as it may think fit. We then asked the respondents whether any department of the Central Government had applied its mind to the grant of approval so as to determine whether any conditions, limitations or restrictions should be imposed under Section 54 of the Act. Dr. Singhvi stated that his clients were not aware of any order of approval on record. Usually even where executive action is not required to be expressed in the shape of a formal order, notification or instrument, executive decision is taken on the office files by way of notings or endorsements made by the appropriate Minister or officer. We asked Dr. Singhvi whether there was in existence any approval even on the office files by way of notings or endorsements made by any Minister or officer and whether the executive decision of according approval has been communicated to the Registrar of Restrictive Trade Agreements. Dr. Singhvi replied that his clients were not aware of any decision having been taken in the office files by way of notings or endorsements made by any Minister or officer nor has any such approval been communicated to the Registrar and that it would be enough for the purpose of Section 33(3) if the respondents are able to show by way of inferences from the evidence produced that the agreement had the approval of the Central Government. He invited us to draw such an inference from exhibits 1 collectively, 2 collectively, 3 collectively and "A" collectively. He stated that such approval has been granted by the Commerce Minister. *State of Bombay v. Purushottam Jog Naik*, [1952] SCR 674 ; AIR 1952 SC 317, 318 wherein the Supreme Court held that Article 77(1) is directory and not mandatory in character and that non-compliance with it does not render an order a nullity and that Article 77 does not preclude proof by other means that the order or instrument was made by the President. We are afraid this judgment applies to a case where an

executive order is in existence at least in the office files by way of notings or endorsements made by the appropriate Minister or officer and not where the approval has to be inferred circumstantially. Our attention was also drawn to the case of *Chitrlekha v. State of Mysore*, AIR 1964 SC 1823, 1829. Both these cases decide that the Constitution does not require any particular formula or words for compliance with Articles 77 and 166 but what any judicial tribunal has to see is whether the substance of the requirement has been complied with because the provision is directory.

Some more cases were cited on the point, namely, *Dattatreya Moreshwar Pangarkar v. State of Bombay*, [1952] SCR 612, 624, 631; AIR 1952 SC 181, *State of Bombay v. Purushottam Jog Naik*, [1952] SCR 674 ; AIR 1952 SC 317, 318, *J.K. Gas Plant Mfg. Co. (Rampur) Ltd. v. Emperor*, AIR 1947 FC 38, 41, *Nandan Singh Bist v. State of U. P.*, AIR 1964 All 327, 328, *Ali Ahmad and Sons v. Brij Kishore Pataria*, AIR 1964 All 327, 328 *Gulshan Khandsari Udyog v. Union of India*, AIR 1968 All 75, 77, *Zalam Singh v. Union of India*, AIR 1969 Delhi 285, 289, *Union-Castle Mail Steamship Co.*

Ltd. v. United Kingdom Mutual War Risks Association Ltd., [1958] 1 QB 380 (QB) and *Union of India v. N.K. Private Ltd.* AIR 919. In our opinion all that these cases decided was that substantial compliance must be regarded as sufficient compliance with Articles 77 and 166. But where there is no substantial compliance and there is no approval on any record the law does not permit approvals, orders and notifications to be inferred from circumstances. This would be more so where the approval must be communicated to the Registrar of Restrictive Trade Agreements to enable him to exempt the agreement from registration: *Dattatreya Moreshwar Pangarkar v. State of Bombay*, [1952] SCR 612, 624. Approval under Sections 33(3) and 54 of the Act must at least be a statutory administrative order and must exist even in an informal manner on some Government record. We suggested to Dr. Singhvi that the best way to prove such an approval would be by the affidavit of a responsible officer as to the existence of such approval on record or the production of relevant records. He said that he was not in a position to file any such affidavit and did not propose to summon any such officer or record. In the circumstances we infer that there is no record of such approval in existence. In

any case there is no evidence before us to show that there is any informal administrative order on record granting such approval. There is also no evidence to show who accorded such approval and when and where he did so. In the absence of such evidence we do not know the terms, purpose and extent of the alleged approval of the Central Government. We are of the view that it is not permissible to infer circumstantially such approval although such executive action or statutory approval may be proved aliunde by the affidavit of a responsible officer or production of relevant records.

29. Under Article 77 the Government of India have issued the Government of India (Allocation of Business) Rules, 1961. Under these Rules administration of the Act has been assigned to the Department of Company Affairs (page 71, item 2) Approval of the Central Government under Section 33(3) should normally have been given by the Minister or appropriate officer in charge of the Department of Company Affairs and not by the Commerce Ministry as is claimed by the respondents. This is one more factor indicating that there is no such approval.

30. Coming to the fact of such approval by the Commerce Ministry we have gone through exhibits 1 collectively, 2 collectively, 3 collectively and "A" collectively and the oral evidence and all that we find from these documents is that as a result of complaints from the weaving sector made about the high prices of nylon yarn in 1968 the Government of India entrusted an inquiry to the Tariff Commission to inquire into the cost structure of nylon yarn and its fair distribution. The Tariff Commission submitted its report to the Government of India in September, 1970, in which the prices of nylon yarn recommended were far lower than those provided in annexure "B" to the agreement. On the one hand the weavers continued to press the Government of India for fixation of statutory control over prices and distribution of nylon yarn and on the other the spinners did not want such control. This matter was handled in connection with the statutory price and distribution controls by the Ministry of Commerce. The Ministry of Commerce appears to have been unwilling to introduce statutory control on price and distribution of nylon. The Tariff Commission report of September, 1970, was published by the Government of India in July, 1973. In the situation agreements called "voluntary agreements" appear to have been entered into between the parties to the present agreement in

1970 and 1972, before entering into the agreement of 1973. The Government of India appears to have indicated that they would not like to impose statutory control and desired that the weavers and spinners come to a voluntary agreement with regard to prices and distribution of nylon yarn. The result was the several agreements.

Apart from the four spinners who are parties to this agreement, 3 more spinners--Century Enka Ltd., Shri Synthetics Ltd. and Stretch Fibres India Ltd.--did not join these agreements. The correspondence shows that under the threat of introducing statutory control and persuasion on the basis that the prices recommended by the Tariff Commission were much lower, even these three spinners entered into "voluntary agreement" with the so-called "actual users". At pages 1 to 4 of exhibit 1 collectively are the minutes of a meeting held on 27th June, 1973, between the spinners and the parties to the so-called voluntary agreement in the office of the Textile Commissioner at Bombay where the Textile Commissioner is stated to have attended as an observer. There is correspondence between the Textile Commissioner and the 3 spinners who were not parties to the 1973 agreement in which the Textile Commissioner has pressed upon these 3 spinners to fall in line with respondents Nos. 1 to 4. One of the telegrams states that one of the meetings was to be held in the Ministry of Commerce at New Delhi on the subject of price and distribution arrangement of nylon yarn. In exhibit 3 collectively is a copy of letter dated 19th May, 1973, from an Assistant Director in the Ministry of Commerce, Government of India, to the Textile Commissioner, Bombay, suggesting that the parties should be persuaded to continue the 1972 agreement. There is a copy of letter dated 22nd November, 1973, from Additional Secretary, Ministry of Commerce, to the Textile Commissioner, Bombay, stating that the voluntary agreement signed on 9th September, 1973, between the nylon yarn spinners and weavers had been working "fairly" satisfactorily and that a part of the problem had been solved. It states that due to free sale of 25% of the production the spinners would on the whole benefit and that they would be in a worse position if there is statutory control over 100% production. This point should be impressed on the "demurring" spinners and that the Commerce Minister desired that the "demurring" spinners should enter into similar voluntary agreements and in case they did not fall in line the Government will have no alternative but to enforce

discipline among them by taking appropriate measures. The letter required the Textile Commissioner to call the representatives of these three firms and to use his good offices to make them see this point. The Textile Commissioner appears to have communicated the substance of this letter to the non-party spinners.

This compilation also contains draft orders which were kept ready for being clamped on the intransigent spinners. It appears, ultimately, a separate agreement was signed between these 3 spinners and the so-called actual users.

31. Exhibit 2 collectively are answers of the Commerce Minister to questions put in Parliament with regard to lowering the prices of nylon yarn. The Deputy Minister slated in Parliament that prices of nylon yarn were fixed under a voluntary agreement between the spinners and the weavers and these spinners and the weavers had been advised to review the mutual agreement in view of the recent increases in the market prices of yarn. The Commerce Minister also made a statement that it will be the endeavour of the Central Government to see that the voluntary agreement in the field of nylon yarn works and defaulters would be brought to book. In one answer the Commerce Minister stated that the prices and distribution of nylon yarn and rayon yarn were governed by voluntary agreements between the spinners and weavers and that 75% of the total production of 4 major producers of nylon yarn was supplied to "actual users" on fixed prices and 25% of the production was allowed to be sold by the spinners in the open market and that the Government was also advising 3 small producers of nylon yarn to join the said agreement.

32. From the evidence referred to hereinabove it does appear to us that the Commerce Ministry was firstly aware of the agreement which is the subject-matter of these proceedings and its predecessor agreements and that secondly it thought well of the arrangement and further thought it was a good substitute for statutory control over prices and distribution. The Commerce Minister in his replies has referred to price and distribution of nylon yarn, viz., supply of 75% of the total production of spinners at prices in annexure "B" to the agreement. He was not concerned with the remaining parts of the agreement including those which we have held to relate to restrictive trade practices. For the reasons herein contained

we are of the opinion that this was not an approval under Section 33(3) of the Act and as such it did not exempt the agreement from registration under Chapter V of the Act and we so hold.³³ We are further of the view that approval of the Central Government can only be for a specific purpose. For example an agreement may go for approval in the Ministry of Finance for its approval to foreign collaboration. The Finance Ministry can only consider the agreement from the point of view of foreign collaboration and foreign exchange involved. If the agreement contains restrictive trade practices it would be no concern of the Finance Ministry to examine the agreement from the view-point of the entire legislation of the country and it would appear to us that such approval would not exempt the agreement from registration under Section 33(3). In our view approval for the purpose of Section 33(3) can only be by an appropriate department of the Government which deals with the Monopolies and Restrictive Trade Practices Act and which has had a chance to consider the matter from the view-point of Sections 33 and 54 and imposing or not imposing any conditions to the approval. The approval must be the result of a decision which must either be formally expressed as required by Article 77 of the Constitution or must appear in some noting or record made by a Minister or an appropriate officer and the name of such Minister or officer, date, place, nature and extent of the approval must be ascertainable and ascertained.

34. However, as is stated hereinabove, even if we assume without so holding that there was approval of the Central Government under Section 33(3) we are of the opinion that it is of no consequence for the purpose of issue No. 2.

35. Issue No. 2 is : "If the answer to issue No. 1 be in the affirmative whether the agreement is outside the purview of Sections 10 and 37 of the Monopolies and Restrictive Trade Practices Act". As stated hereinabove we have come to the conclusion that answer to issue No. 1 is in the negative. But even assuming without so holding that the answer was in the affirmative we are of the view that the agreement is not outside the purview of Sections 10 and 37 of the Act. Section 10 provides the powers of the Commission to inquire into restrictive trade practices upon several types of complaints or information. This inquiry was started under Section 10(a)(iv) by the Commission upon its own knowledge or information. The agreement was furnished to the Commission by the All India Crimpers Association

and on the basis of such information the Commission ordered this inquiry. That the Commission can do so has been held by us in our order dated the 5th March, 1974, on an argument raised by the respondents that an information so furnished by someone else to the Commission cannot be treated as its own information. We have held that an information so received by the Commission becomes its own information and there is nothing to prevent the Commission from ordering an inquiry on the basis of such information. The contention now taken before us by the respondents is that Section 37(3) of the Act bars an inquiry by the Commission.

36. Section 37(1) provides that the Commission may inquire into any restrictive trade practices whether the agreement has been registered under Section 35 or not, which may come before it for inquiry and if after such inquiry the Commission is of the opinion that the practice is prejudicial to the public interest the Commission may by order direct that the practice shall be discontinued or shall not be repeated or that the agreement relating thereto shall be void, or stand modified. Reliance has been placed on Section 37(3)(b) which provides that no order shall be made under Section 37(1) in respect of a trade practice which is expressly authorised by any law for the time being in force. The argument now advanced before us is that it is true that the trade practices established by the agreement are not expressly authorised by any law for the time being in force, and, therefore, do not in terms fall under Section 37(3). But it is argued that Section 33(3) exempts from registration 3 kinds of agreements, (a) if the agreement is expressly authorised by or under any law for the time being in force, (b) an agreement which has the approval of the Central Government, and (c) if the Government is a party to such an agreement.

The argument is that all these three types of agreements which, are exempt from registration under Section 33(3) are such that no order can be made in respect of them under Section 37(3) because in Section 33(3) all the three types of agreements have been given the same status and, therefore, for the purpose of Section 37(3) also they should be deemed to have the same status even though the legislature has omitted two types of agreements from the exemption under Section 37(3), We are of the opinion that the argument itself furnishes the answer

to it. If the intention of the legislature was to exempt from inquiry or orders all three types of agreements mentioned in Section 33(3) it could have so provided in Section 37(3). The omission in Section 37(3) is eloquent and shows that even if an agreement had the approval of the Central Government for the purpose of exemption from registration it was not intended to save such agreements from inquiry or appropriate order under Section 37.

37. If an agreement has been approved under Section 33(3) for exemption from registration it may have some bearing on Section 38 of the Act which provides the gateway for an agreement to pass through even if it contains restrictive trade practices on the question as to whether such practices are or are not prejudicial to the public interest. An argument may be available to the respondents that if the agreement has the approval of the Central Government it cannot be said to be prejudicial to the public interest. But such an argument can only come by way of rebutting a presumption that the agreement is *prima facie* against public interest under Section 38. This argument will still be available to the respondents at the proper stage but that does not come in the way of an inquiry under Section 37.

38. Another argument advanced by the respondents on this issue was that under Section 37(1) the Commission may inquire into any restrictive trade practice whether the agreement with regard to it has been registered under Section 35 or not. It was argued that the expression "whether an agreement if any relating thereto has been registered under Section 35 or not" applies only to those agreements which require registration under Section 35 and not to those agreements which do not require registration at all.

39. It was argued that in respect of agreements not requiring registration due to exemption or otherwise no inquiry could be held, as such agreement does not contain a restrictive trade practice within the meaning of Section 2(o) of the Act. If the law places an agreement outside registration it will be outside the Act. It was further argued that as the agreement of 1973 had the approval of the Central Government it did not require registration and, therefore, it was neither an agreement which has been registered nor an agreement which requires registration but is not registered. In other words, the contention was that no inquiry

can be made under Section 37 in respect of agreements exempted from registration under Section 33(3). We are afraid we cannot accept this contention. Unlike the English law which provides that an agreement by itself is, restrictive trade practice although it was not put into operation, Section 37 provides for inquiry into restrictive trade practices whether such practices are established under an agreement or without an agreement and whether the agreement "if any" is registered or not. Section 37(1) in our opinion covers all the practices which, (a) are established by an agreement, (b) which are established de hors an agreement, (c) if established by an agreement if the agreement is registered, (d) if established by an agreement even if the agreement is not registered irrespective of whether the agreement requires registration or does not require registration.

40. We are, therefore, of the view that even assuming without so holding that the agreement dated 9th September, 1973, had the approval of the Central Government for the purpose of Section 33(3) of the Act, the restrictive trade practices arising out of or established by the agreement are not outside the purview of Sections 10 and 37 of the Act.

41. The preliminary issues having been answered the matter will now proceed to final hearing, inter alia, for determining whether the restrictive trade practices found are not prejudicial to public interest and as to what orders under Section 37(1) will be appropriate.

42. The matter has been argued before us for six days. All the issues have been answered against respondents Nos. 1 to 4. Costs must follow the event. The respondents Nos. 1 to 4 shall, therefore, pay to the Director of Investigation costs quantified at Rs. 3,000. There will be no other order as to costs.

43. I have had the benefit of going through the order proposed to be passed by the learned Chairman and my learned brother, Dr. Paranjape. I agree with respect with their conclusions in regard to issues Nos. 2, 3 and 4, In regard to issue No. 4 I have nothing to add. In regard to issues Nos. 2 and 3, I have set out hereunder my reasoning which leads to the same conclusions at which my learned colleagues have arrived. In regard to issue No. 1, however, I have been unable to persuade myself to take the view taken by them. It will be convenient to set out my

conclusions issue-wise. The facts of the case, the contentions of the parties and the details of evidence considered have been set out at length in the order of my learned colleagues. It is, therefore, not necessary to set them out over again here.

45. This issue has become more or less academic since our answer in respect of issue No. 2, as suggested in the following paragraphs, is in the negative ; but since some legal issues were raised, it would be necessary to set out my reactions to the same.

46. In the first place, Section 54 does not seem to be relevant to the interpretation of Section 33(3). Section 54 is confined to the decisions of the Central Government under the Monopolies and Restrictive Trade Practices Act, 1969. These decisions relate to, according of approval, sanction, permission, confirmation or recognition or to giving of any direction or issuing of any order or to granting of any exemption. The Act provides for such decisions being taken by the Government, eg., Section 21(3) provides for Central Government's according approval to the proposal for expansion. Under Section 27(4) read with Section 27(3), the Central Government can pass orders covered by the categories mentioned in Section 27(3). There is another category of orders which the Central Government can pass under the provisions of Section 31(3). The function of Section 54 is to give the power to the Central Government to impose conditions, limitations and restrictions while passing such orders authorised under the Act.

Significantly enough there is no provision in the Monopolies and Restrictive Trade Practices Act for the Central Government giving its approval to any agreement for the purpose of exempting it from registration under Section 33. In the absence of such a provision it was not possible to construe the reference to the approval of the Central Government in Section 33(3) as reference to approval by the Government under the Monopolies and Restrictive Trade Practices Act.

The approval referred to in that sub-section is the approval of the Central Government of the agreement in question independently of the provisions of the Monopolies and Restrictive Trade Practices Act.

Otherwise, the reference to the approval of the Central Government in Section 33(3) would be otiose ; because in the absence of any provision for the approval of the Central Government under the Monopolies and Restrictive Trade Practices Act for the purpose of registration under Section 33(3) there would be no agreement which would have the approval of the Government in that sense.

47. It follows from the premises set out in the earlier paragraph that the approval of the Central Government independently of the provisions of the Monopolies and Restrictive Trade Practices Act would be enough to exempt the agreement from the liability to be registered. It is true that the Government might approve of the agreements under the provisions of different Acts. Such an approval might be given by different Ministries for the purposes of their own Ministry. But unless the approval is specifically made for a limited purpose, the approval must be taken to be approval of the agreement as a whole. The underlying assumption of this conclusion is that when an agency takes a decision on approval on behalf of the Government, it does so in conformity with the general policy of the Government ; when it wants to restrict the approval to a specified area or a limited purpose, the agency concerned would take care to circumscribe the approval as in the case of approvals by the Controller of Capital Issues. In the absence of such a limitation, the approval must be taken to be all embracing and it would save the agreement from the necessity of registration under Section 33(3).

48. Coming to the question as to whether on the facts and in the circumstances of the present case, the impugned agreement had the approval of the Government, I am inclined to the view that the agreement had the approval of the Government. There is no dispute that there is no order according the approval to the agreement by the Government. The question, therefore, whether the order was in the form and in the manner required by Article 77 of the Constitution was not germane to the resolution of the dispute before us. The question is whether, on the facts and in the circumstances of the case, approval of the Government could be spelt out. In this regard reliance is placed by the respondents on certain facts. There was a meeting of the spinners and the representatives of the weavers at the office of the Textile Commissioner, Bombay, on June 27, 1973, to sort out the point of difference in respect of the agreement to be entered into in respect of price and

distribution of indigenous yarn. By a letter dated July 21, 1973, the Director in the office of the Textile Commissioner informed the three spinners other than the spinners who became subsequently signatories to the agreement that all the indigenous manufacturers of nylon yarn had to fall in line in respect of the arrangement agreed to regarding the distribution and prices of nylon yarn. These developments took place before the agreement was signed. After the agreement, Shri R. Thirumalai, Additional Secretary in the Ministry of Commerce, Government of India, wrote to the Textile Commissioner, Bombay, inter alia, as under: ".....In the background of the availability of 25% of production, netting around 225 per cent. of the agreed price, the average return per kg. is much higher than the Tariff Commission prices if they were to be imposed on 100% production. It is only to give some relief to the spinners during the present period of acute scarcity of raw material that such a formula has been agreed to by Government ..." (Emphasis* mine).

49. Thereafter the Government insisted on the recalcitrant spinners, who are not signatories to the agreement, to fall in line on peril of being faced with a statutory order controlling the distribution of their product.

50. In the meantime, on 31st August, 1973, the Deputy Minister in the Ministry of Commerce stated in the Lok Sabha in answer to an unstarred question that prices of nylon yarn were fixed on the basis of a voluntary agreement between spinners and weavers and that the spinners and weavers had been advised to review their mutual agreement on the prices of various deniers of nylon yarn, in view of the recent increases observed in market prices and the need for actual users to get supplies at the agreed price. This was before the agreement was entered into. After the agreement was entered into, the Minister for Commerce in the course of proceedings of the Lok Sabha on 20th November, 1973, stated as under: "One point is whether certain big industrial houses or companies like Century Enka, Shri Synthetics, Stretch Fibres, etc., will be exempted from the voluntary scheme. My answer is a clear and categorical NO --N Capital and O Capital. I would like to add only two things. The first point is, already Century Enka and Shri Synthetics had agreed to contribute 50 per cent. for this voluntary scheme but they are hesitating for coming forward with 25 per cent.

more which is what is the stipulated quantum to be contributed.

Their argument has not been acceptable to us and to the Ministry that their production has been relatively small and not competitive, and, therefore, they may be given a special treatment. We are not persuaded by this argument and therefore we stand by our own formula." (Emphasis mine).

51. On the same day he also observed as under during the course of discussions :
" ... For the benefit of the House I would like to submit that the market price of nylon filament yarn of 20 deniers is 160 rupees per kilogram but the agreed price according to the voluntary agreement is Rs. 74.85. The price of rayon filament is about Rs. 8 a pound for the 120 denier, 60 per cent. of it is being sold at that price while 10 per cent. of it is being sold at about Rs. 6.00. The open market price of the same is Rs. 22.50. 29.5 per cent. of it is being sold at that price. The agreed price of viscose staple fibre spun yarn 20 counts is Rs. 11.20 per kilogram. The open market prices of the same is Rs. 34 per kilogram. As the figures will indicate, the Government intervened and brought down the price very significantly ... "
(Words have been underlined* by me).

"In fine, I would like to say that I believe that when raw materials like DMT and caprolactum are produced indigenously and the research and development efforts of our local spinners are applied, this industry will be placed on a stable footing and our reliance on the imported machinery and raw materials will be reduced considerably.

Meanwhile, it will be our endeavour to see that the voluntary agreement in the field of nylon yarn works and defaulters are brought to book." (Emphasis mine).

53. The question against this background is whether it is possible to say that the impugned order did not have the approval of the Government. The approval might not have been made in the name of the President of India or authenticated in the manner required by Article 77 of the Constitution. If there is a formal order of approval, there is no room for dispute. If there is recording of the decision of the approval, then again there is no room for dispute. But that did not mean that the approval cannot be spelt out by circumstantial evidence.

The approval by the Government of an agreement is something very much less in terms of responsibility and liability, than Government being a party to an agreement. It is merely an executive policy decision which can be taken by the Minister in charge or even for that matter by an official under him. It did not require the form of an order in the name of the President or contract in the name or on behalf of the President.

In this context it would be pertinent to refer to the decision in *Union-Castle Mail Steamship Co. Ltd. v. United Kingdom Mutual War Risks Association Ltd.*, [1958] 1 QB 380, 382, 383, 397 (QB) quoted by learned counsel, Shri Cooper. In that case the plaintiffs-shipowners insured two of their ships under the Standard Form of War Risks Time Policy on Hull and Machinery issued by the defendants. The Clause 1 of the policies read as under: (F). Expenses incurred by the assured by reason of: (1) the detention of the insured ship in pursuance of the orders or directions or with the approval of the committee or of any British Government department or official or British military authority given in order to avoid loss or damage to the insured ship by any peril hereby insured; (2) prolongation of the voyage arising out of compliance with such orders or directions, or with such approval as aforesaid ; ..." 54. The ships in question sailed from London on 26th September and 17th October, respectively. On 30th October, 1956, the British Admiralty issued the following statement : "In view of the situation between Israel and Egypt, merchant shipping is advised, for the time being and until further notice, to keep clear of the Suez Canal and Egyptian and Israeli waters," (Emphasis mine).

55. The plaintiffs ordered their ships to sail back by the Cape route and they notified the defendants of the divergence. On a claim by the plaintiffs, under the policies it was held by the court that the plaintiffs were entitled to rely on the Admiralty warning as a standing approval by the British Government department of all such steps taken by them as it had taken to heed the advice contained in the warning.

For coming to the conclusion Diplock J. observed as under : "Whether a particular step is taken with the approval of the Government authority is a question of fact.

The approval need not be given in any particular form ; it may be given in advance ; it may--although it does not arise in this case--be given, I think, retrospectively; it may be given generally to all ships or specifically to individual ships. If advice is given by the Admiralty to ships generally, steps taken in accordance with that advice are, in my view, taken with the approval of the Admiralty within the meaning of the clause. " 56. It is not possible to distinguish the facts of the present case from the facts in the case quoted. In the latter case there was a warning by Government agency, which was in the nature of an advice. In the present case the agreement was hammered out in the presence of a representative of the Government. Senior officers of the Government have referred to the Government being in agreement with the formula which is the basis of the agreement. The Minister in charge of the Ministry defended the agreement in Parliament and has made it clear that the spinners who had not been signatories to the agreement will be brought to book. Clause 32 of the agreement in terms stated that the parties to the agreement had been assured by the authorities that all effective steps would be taken by them so as to compel the nylon spinners, who are not signatories to the agreement, to join the agreement. Two of them subsequently were brought to book on a threat of control order being issued on the lines of the agreement impugned.

Clause 34 of the agreement, provided that in the event of any spinner or actual users' association, party to the agreement, failing to abide by the terms of the agreement, the remaining parties to the agreement would join in any representation to the concerned authorities if and when so desired by the party aggrieved. According to the agreement, therefore, the forum for redress of the grievances arising from the implementation of the agreement was none other than the concerned authorities, i.e., the Government. Against this background I do not find it possible to take the view that the impugned agreement did not have the approval of the Government. The learned counsel, Shri Sharma, tried to distinguish this case by saying that it related to a war emergency measure. But the ratio of the decision in so far as the issue in dispute before us was concerned, was not affected by the background of emergency. He also referred to the existence of Article 77 which, according to him, distinguished the present case from the English case but, as stated earlier, Article 77 had a limited ambit. It laid down the

modalities of an order of the Central Government made in the name of the President of India. It did not exhaust the modalities in which or by which the decisions of the Central Government can be made or made out. The agreement impugned before us was clearly supported by the Government. The Government also insisted that adamant spinners who remained out of the agreement should be either coaxed or cajoled into entering into the agreement and its insistence bore fruit. The agreement, therefore, in my view, had the approval of the Government within the meaning of Section 33(3).

58. There is no difficulty about answering this issue in the negative.

The opening words of Section 37 (1) authorise the Commission to inquire into any restrictive trade practices which may come before it for inquiry whether the agreement, if any, relating thereto had been registered under Section 35 or not. The objective of the inquiry is restrictive trade practice. It may or may not arise from an agreement.

If it arises from an agreement, the agreement relating thereto may or may not have been registered. The Commission's authority, however, is not dependent either on there being an agreement or on the agreement being registered. The agreement may not have been registered either because the parties were not alive to their responsibilities under the Act or were violating the provisions of the Act or it may not have been registered because, under the provisions of the Act, it was not registrable. It is not possible to accept the argument put forward on behalf of the respondents that the words "registered under Section 35 or not" related to agreements which were registrable under Section 33 and that the agreements which were not registrable were outside the purview of the Commission's inquiry under Section 37(1). The argument does not square at all with the opening words of Section 37(1). These words not only permit inquiry where the agreement, for whatever reasons, is not registered but it also permits inquiry where there is no agreement. The sole purpose behind the introduction of the words "whether the agreement, if any, relating thereto, has been registered under Section 35 or not" was clearly to eliminate an argument that could possibly be made by a recalcitrant party that its agreement was not open to inquiry because it was not registered. In

other words, the words were meant to ensure that the party which ignored its obligation to register the agreement, should not be in a position to say that by reason of its dereliction it could have also avoided an inquiry. The functions of Section 37 and Section 10(a) on the one hand and of Section 33 on the other are entirely different from and independent of each other. The former are concerned with inquiry into restrictive trade practices whereas the latter is concerned with registration of restrictive trade agreements. It would be fallacious to import the provisions of the latter into the provisions of the former or to telescope the two provisions together. It cannot be done without reading into Section 37 words which are not there. Even assuming, therefore, that the agreement was not registrable under Section 35 because it had the approval of the Central Government, it could not be immune from the inquiry under Section 37(1).

60. Issue No. 3 is to be examined in two aspects--first, in the light of Section 2(o) and, secondly, in the light of the charges given in the notice. It was not necessary to examine the issue whether any of the clauses of the agreement falls within the categories set out in Section 33(1) or whether implicit in the categories mentioned in Section 33(1) was the assumption that the categories in question must first satisfy the requirements of Section 2(o). As a matter of fact, Section 33 is concerned with the question of registration and it is not concerned at all with the competence of the Commission to institute an inquiry into restrictive trade practices or with the nature of restrictive trade practice to be inquired into by the Commission. This is consistent with the view expressed in the earlier paragraph relating to issue No. 2. We have, therefore, to examine the agreement, firstly, in the light of Section 2(o).

61. According to that section, restrictive trade practice has to satisfy one condition, e.g., it must have the effect of preventing, distorting or restricting competition in any manner. The section goes on to specify or particularise two cases in which the restrictive trade practice could arise but these two particular cases do not in any manner limit the definition of restrictive trade practice given in the earlier part of Section 2(o). In other words, these two cases do not exhaust between themselves categories of restrictive trade practices.

The categories particularised in the section refer to cases in which the practice in question tends to obstruct the flow of capital resources into the stream of production or it tends to bring about manipulation of prices or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such a manner as to impose on the consumer unjustified costs or restrictions.

As stated earlier, apart from these two categories, there would conceivably be many categories of practices which would tend to prevent, distort or restrict competition but which would not fit in in these two categories.

62. Examining the agreement from the point of view of Section 2(o), the first point relates to the crimpers. Clause 21 of the agreement provided that the crimpers would get the supplies of nylon yarn from the spinners proportionate to their off-take in April, 1972, to March, 1973, at prices mentioned in annexure "B" subject to the condition that such crimpers agreed that they were not actual users and were only processors and also agreed to deliver grey and/or dyed, crimped/texturised yarn equal in quantity to actual users who have been purchasing crimped, yarn from them on the basis of deliveries of April, 1972, to March, 1973. The price at which the crimpers had. to sell the crimped yarn was to be determined by the Central Nylon Committee. These provisions insist on the crimpers satisfying the condition relating to their identity as actual users which was clearly oppressive, vexatious and unreasonable. The question whether the crimpers were in fact actual users of yarn or not is not altogether germane to the controversy before us. There is no doubt a difference between actual user and end user; suffice it to say for the purpose of dispute before us that the difference between the crimpers and the weavers, if there is any difference, is a difference only of degree. The condition imposed on the crimpers, however, apart from stultifying them, puts them in jeopardy vis-a-vis the other requirements of the Government. The effect of this condition was, therefore, to discourage or dissuade some crimpers from getting the supplies at concessional rates provided in the annexure. In regard to the crimpers who had not taken their supplies from the spinners in the crucial period or in regard to new crimpers, Clause 21 was completely silent. Clause 22 purported to lay down the basis for the allotment to the actual users and since the definition of the actual users given in Clause 2 specifically excluded crimpers, the crimpers

who bought their requirements from sources other than spinners in the critical period and the new crimpers among the crimpers had no choice of getting any supplies on favourable terms; they had to remain content with what the learned counsel, Shri Chagla, picturesquely described as "crumbs from the master's table" out of the surplus yarn which became available in terms of Clause 23. In such circumstances no new crimpers would come into business and some of the existing ones would go out of business. There was, therefore, a clear obstruction to the flow of capital resources into the stream of production and there would also be an effect of restriction of competition between the crimpers and the crimpers on the one hand and between the crimpers and the spinners who were crimpers on the other.

63. The position regarding pricing, in so far as the crimpers were concerned, was also quite menacing. In the case of actual users the prices given in the schedule were maximum prices. In the case of crimpers, however, there was no room for bargaining or negotiations ; it was a case of "take it or leave it". Moreover, in the case of actual users at least, in so far as the agreement was concerned, there was no limitation on the price at which their end products could be sold. In the case of spinners who crimped their own yarn, the prices were set out in annexure "C" but these were the maximum prices and the spinners could reduce them according to the exigencies of the market situations.

In the case of crimpers, however, there was no such freedom and the prices as dictated by the Central Nylon Committee were binding on them.

There is no certainly about this fixation by the Central Nylon Committee. No standards are set out in the agreement which have to be followed by the Central Nylon Committee ; it is not at all suggested that the prices as per schedule "G-I" would also be enforced on the crimpers. The crimpers were, therefore, at the mercy of the Central Nylon Committee and their competing power vis-a-vis spinners who also crimped their yarn was seriously impaired. These conditions, therefore, clearly tended to prevent, distort or restrict competition.

64. The question whether these conditions also attract the provisions of Section 2(0)(ii) is, no doubt, fraught with some difficulty. The question to be decided is

whether the conditions referred to above bring about manipulation of prices or conditions of delivery or affect the flow of supplies in the market relating to goods or services in such a manner as to impose on the consumer unjustified costs or restrictions. There are two limbs to this provision : the first limb refers to manipulation or creation of artificial conditions of scarcity and the second relates to the impact on the consumers. The first limb presupposes that there is a power which is utilised for the benefit of the person possessing the power. There is no ambiguity about this provision. It is not possible to doubt that to the extent indicated earlier the agreement did give the power to the spinners. Regarding the other limb, however, the question arises whether consumers referred to are the consumers of the final product or persons who use the product as raw material or intermediate product. If consumers meant consumers of the final product, the impugned conditions would have no effect on the costs incurred by them. What was denied to one category of crimpers or actual users, would be available to other categories and the effect on the price of the final product would be nil. If, on the other hand, the consumers meant persons who use the products as raw materials or at intermediate stage, the crimpers themselves and the actual users would also be consumers and the conditions referred to earlier would have effect on the cost to those consumers. The Supreme Court, while interpreting the word "consumption" by reference to Article 286(1) of the Constitution in *Anwar Khan Mahboob Company v. State of Bombay*, AIR 1961 SC 213 ; [1960] 11 STC 698 (SC) held that the word "consumption" in the Explanation to Article 286(1) of the Constitution could not be understood in the limited sense of eating but in the wider sense of using and that in the absence of any words to limit the connotation of the word "consumption" to the final act of consumption it will be proper to think that the Constitution-makers used the word to connote any kind of user which is ordinarily spoken of as consumption of the particular commodity. On the other hand, Chambers' Twentieth Century Dictionary gives the meaning of "consume" as "to use up, to devour, to waste or spend or to exhaust" and defers to consumer goods as goods to be used without further processing to satisfy the human needs. The Monopolies and Restrictive Trade Practices Act itself refers to "consumers" in Sections 32(d), 38(1)(b), 41(1)(a), 41(1)(b) and 41(1)(c) and to "consumption" in Sections 37(3), 38(1)(a) and 38(2). It would appear that the legislature wanted to

make a clear distinction between "consumers" and "users" so as to emphasise that the consumer is the consumer of the final or the end product. Section 37(3)(a) clearly emphasises the distinction between goods which are bought by the buyers for consumption and goods which are bought for re-sale, whether in the same or different form, type or specie or as constituent of some other goods. This view of the matter, however, would exclude a large number of users of commodities and a large number of commodities from the protective ambit of the Monopolies and Restrictive Trade Practices Act.

In view of this uncertain position and particularly in view of the decision of the Supreme Court referred to earlier, the term "consumer" in Section 2(0)(ii) must be taken to include not only the consumers of the final product but the consumers of raw materials and intermediate products. In that view of the matter, even in terms of Section 2(0)(ii) the conditions referred to in the earlier paragraphs must be held to be restrictive trade practices since in so far as the crimpers were concerned, who were not willing to accept that they were not actual users or the crimpers who were new-comers or who have bought their requirements of yarn in the crucial period from the open market and not from the spinners, there will be imposition of extra cost in that they will have to buy from the open market at least that part of the supply which they could reasonably have got on favourable terms. In the alternative, they would have to subject themselves to oppressive conditions. These provisions would, therefore, attract the provisions of Section 2(0)(ii). As stated earlier, however, the requirements of the definition of the restrictive trade practice were satisfied by these clauses regardless of whether they came within the first or the second particular categories given in Section 2(0).

65. There is no basis for the contention of the learned counsel, Shri Diwan, that the spinners could keep back certain yarn for their own crimping before distribution according to the formula set out in the agreement. According to Clause 18(ii), total production of nylon 6 crimped/texturised yarn of each spinner was subject to the ceiling of the monthly average of the quantity of such yarn delivered to the actual users during the period April, 1972, to March, 1973, and it was distributed on the recommendations of the Central Nylon Committee. If the production of such yarn in any month subsequent to September, 1973, was higher than the production in

September, 1973, 75% of the excess was to be distributed through the Central Nylon Committee to the actual users and only the remaining production was to be distributed by the spinners at their discretion. It is, therefore, clear that the spinners could not withhold anything from distribution so long as it was equal to the average monthly output of such yarn for the critical period and even in respect of the excess they were bound to account for 75% to the Central Nylon Committee. In regard to the production covered by the monthly average of the critical period and in regard to 75% of the excess, the signatories to the agreement had not kept to themselves any initiative or discretion. There could, therefore, be no possibility of any prevention, distortion or restriction of competition on this score.

Much less there could be any suggestion on any manipulation of prices or conditions of delivery or manoeuvring of the flow of supplies in the market. All these presuppose the power to change the supplies available in the market. Here there is no scope for changing the total supplies and the changes in different categories of goods supplied were also to be effected according to the formula from which the producers could not depart. The pattern of production could not be changed except for reasons of technical feasibility.

66. Nor was it possible to suggest that Clause 9 enabled the spinners to change the pattern of production in such a way that deniers profitable to them were manufactured in large quantities while the coarser deniers useful to crimpers and hosiery manufacturers could be reduced in quantities. Clause 9 enjoined on the spinners to maintain the pattern of production on the basis of the actual users' requirements as far as technically feasible. The pattern of production as maintained during the period April, 1972, to March, 1973, was to be continued as far as technically feasible and the production pattern was to be adjusted to the extent possible so as to cater to the requirements of the actual users in standard accepted deniers. No doubt, Clause 9 did permit adjustments or changes which were technically necessary in view of the shortage of caprolactum but it was emphasised that, as far as technically feasible, the spinners would maintain the proportion of production between the mono-filament and multi-filament yarn and also the proportion of production of deniers 112 and below and above 112 deniers.

The clause as it stood was such that no exception could be taken to it from the point of view of Section 2(o). If in the actual implementation of that clause the spinners had deviated from the letter and spirit of the clause, it is a different matter. We are concerned here, however, with the agreement as it is and we have to assume that the agreement such as it is was implemented. On that assumption no charge could be spelt out under Section 2(o) in respect of this clause.

67. The next question to be considered is that of actual users. Clause 2 includes in the category of actual users almost all actual users with the exception of crimpers and twisters. It is not confined to actual users who are members of any association or who are signatories to the agreement. The benefit of the agreements as per Clause 2 would, therefore, extend to all the actual users other than crimpers and twisters assuming that they are actual users. The difficulty, however, arises while applying Clause 18(i). That clause makes it clear that the distribution of nylon yarn by all the spinners during the period of the agreement was to be done on the basis that 75% of the production of nylon 6 flat yarn up to and inclusive of 180 denier of all grades which is not crimped and/or twisted, will be distributed to the actual users on the basis of their average off-take during the period April to March, 1972-73, by the spinners on the recommendations of the Central Nylon Committee and the balance of 25% of such yarn was to be distributed by the spinners at their discretion. It is clear from this clause that 75% of the production of nylon 6 flat yarn is to be distributed on the basis of the off-take of the critical period and this would leave out the new-comers among the actual users and also the actual users who did not, during the critical period, buy the requirements from the spinners but bought them in the open market. "On behalf of some of the respondents, reliance was placed on Clause 22.

According to this clause, the Central Nylon Committee was to lay down the basis for the allotment to each of the actual users taking into account,

- (1) the actual off-take during the critical period as indicated in the Master's list,
- (2) the authorised installed capacity and

(3) the supply of rayon filament yarn and viscose staple fibre yarn Apparently, there is a conflict between Clauses 18(1) and

22. But if the two clauses are read harmoniously together, it is clear that, as far as 75% of the production was concerned, the same was to be distributed among the actual users on the basis of their actual off-take in the critical period and adjustments were to be made in cases where the off-take in the critical period was in excess of the actual capacity. This interpretation is borne out by Clause 23 where Clause 23 (i) clearly refers to reduction in allocation to actual users on the ground that their actual off-take in 1972-73 was excessive in relation to their authorised consumption capacity. It would, therefore, appear that the distribution of 75% of the production was available only to actual users who were on the Master's list prepared by the spinners themselves and this allocation was to be made on the basis of their off-take in the critical period modified by the departures from the authorised capacities, if any. In so far as the new-comers were concerned or in so far as the actual users, who were buying their requirements in the critical period from the open market were concerned, there was no hope or relief by reference to Clauses 18(1) and

22. Once again they had to remain content with what the learned counsel, Shri Chagla, described as "crumbs from the master's table" in the shape of surplus yarn which would become available on account of certain reasons, viz., reduction in allocation to actual users by reference to their actual capacity, non-allocation to crimpers who refused to satisfy the conditions laid down in the agreement and non-allocation of yarn to actual users who had no authorised permits.

As in the case of crimpers, therefore, in the case of new-comers among actual users and the actual users, who had no off-take in the critical period, the agreement did result in preventing, distorting or restricting competition by discouraging them to continue in the business and also tended to obstruct the flow of capital resources into the stream of production. As far as the provisions of Section 2(o)(ii) were concerned, once again, as in the case of crimpers, the provision will be attracted in so far as the actual users, who were new-comers and the actual users who did not buy the requirements from the spinners in the critical

period were concerned. There would be imposition of unjustified costs on them because they will have to buy from the open market at least a part of their supplies which they could have reasonably got at favourable rates. It was, however, not possible to predicate in the case of actual users, whether they belonged to the excluded category or they belonged to the favoured category, that there was any possibility implicit in the agreement for manipulating the supplies by changing the pattern of production. As stated earlier, the clause relating to the pattern of production was, on the face of it, reasonable and harmless.

68. Three more clauses which require examination in the light of Section 2(o) are Clauses 6, 7 and 8. These are escalation clauses and provide for shifting to the actual users of any increase as a result of rise in the price of caprolactum and/or by way of excise duty, sales tax, octroi, import duty, currency valuation affecting the price of nylon yarn, or increase in the cost of production of nylon yarn as a result of increase by any government or local body in the rates of excise duty, import duty, sales tax, purchase tax, octroi or any other fiscal measure affecting the raw material of nylon yarn or affecting the utilities. There was also the corresponding provision for de-escalation in case of decrease in the duties or charges. The learned counsel, S/Shri Diwan and Chagla, contended that these clauses saved the spinners from absorbing any part of the loss which would have resulted from the increase in the duties and charges. It was, however, well to remember that the provision regarding escalation was matched by the provision regarding de-escalation. Moreover, the provisions were confined only to rise in the price of caprolactum or to fiscal measures affecting nylon yarn or the raw materials. Any other changes in the production costs were to be left to the free play of the competing forces. Moreover, the whole idea behind the agreement was to secure 75% of the production for the actual users at a price very much below the ruling market price. Taking all these circumstances into account, it was not possible to invoke the assistance of these clauses for bringing home the charge under Sections 2(o), 2(o)(i) and 2(o)(ii).

69. In the light of discussions contained in the preceding paragraphs, it is now necessary to dispose of the charges contained in the notice issued to the respondents. As far as charges (a) and (b) were concerned, the same were borne

out because the crimpers who did not accept the conditions set out in the agreement or the new-comers among the crimpers or the crimpers who bought the requirements from the open market in the critical period, were excluded from the benefit of supplies of yarn at favourable rates. The same is the position in regard to new-comers among actual users and actual users who did not buy their requirements from the spinners in the crucial period. Charges (c) and (e) were borne out to a limited extent in that in so far as the three categories of crimpers, referred to earlier, were concerned and as far as the actual users, who were new-comers or who had bought their requirements from the open market in the crucial period in respect of a portion of their supply, at least the agreement had the effect of maintaining prices at an unreasonably high level. It had also the effect of fixing the price schedule in respect of a portion of the supplies which adversely affected these categories of crimpers and actual users and thereby restricting competition. There was no question of manipulating production here but by reason of the agreement, the supplies were diverted away from these categories of customers. Charge at (d) was also borne out in the limited sense in that crimpers, if they wanted to buy the yarn from the four spinners, had to accept the terms and conditions stipulated in the agreement and there was, therefore, an element of compulsion regarding acceptance of these conditions before the crimpers could get their supplies. In regard to charge (f) the same is not borne out in the manner indicated in the charge. As stated earlier, however, new crimpers or crimpers who had not bought the requirements from the spinners in the critical period, new-comers among the actual users and the actual users who had not bought their requirements from the spinners in the critical period, were to all intents and purposes, prevented from getting the benefit of the concessional rates and, therefore, discouraged from entering the business.

71. In regard to issue No. 4 I have nothing to add to what is stated by my learned brothers.

72. Shri H.M. Jhala, a member of the Commission, has delivered a differing opinion. He has answered issue No. 1 in the affirmative. He has concurred with the Chairman and Dr. H.K. Paranjape in answering the remaining issues. Under Section 6(6) of the Act the opinion of the majority shall prevail and the opinion or

orders of the Commission shall be expressed in terms of the views of the majority. Accordingly, the answers to the issues in the concurring opinion of the Chairman and Dr. H.K. Paranjape and their opinions and orders shall be the answers, opinions and orders of the Commission.

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