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Consumer Education and Research Vs. T.T.K. Pharma Ltd. and ors.

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Court : Monopolies and Restrictive Trade Practices Commission MRTPC

Decided On : May-15-1987

Reported in : (1990)68CompCas89NULL

Judge : G Luthra, S Manchanda, D Aggarwal

Appellant : Consumer Education and Research

Respondent : T.T.K. Pharma Ltd. and ors.

Advocate for Def. : Shri. Ashok Desai, Shri. Ashok H. Desai, Mr. Ashok H. Desai

Judgement :

1. By way of this judgment, which is being written in the enquiry having the title Consumer Education and Research Centre v. T.T.K.Pharma Ltd. (Restrictive Trade Practices Enquiry No. 157 of 1986), 33 enquiries stand disposed of. The remaining enquiries bear Restrictive Trade Practices Enquiry Nos. 158 to 185 of 1986 (except 178 of 1986) 72, 149, 148, 49 and 138 of 1986. A copy of the judgment is being placed in every file while the original one is in Restrictive Trade Practices Enquiry No. 157 of 1986.

2. The respondent in every case is a public limited company which has offered capital for subscription but has linked issue of equity shares with secured redeemable non-convertible debentures. According to the complainant and the Director-General of Investigation and Registration, issue of equity shares tied up with debentures is a restrictive trade practice within the meaning of Sections

2(o)(ii), 33(1)(b) and 33(1)(g) of the Monopolies and Restrictive Trade Practices Act, 1969. They, therefore, pray that an order directing the respondent-company in every case to discontinue the aforesaid restrictive trade practice and not to repeat the same in future be passed.

3. Details of the facts of every case are not being given because they are not necessary for deciding the legal preliminary issues which alone are for decision at present. Some further facts of the case in Restrictive Trade Practices Enquiry No. 157 of 1986 only, which are representative of the facts in other cases, are being briefly mentioned. In Restrictive Trade Practices Enquiry No. 157 of 1986, the respondent-company offered 11,50,000 equity shares of Rs. 10 each for cash at par linking them with 1,15,000 15% secured redeemable non-convertible debentures of Rs. 100 each for cash at par.

4. The respondent in all the cases contested. Their plea is that the facts do not disclose any trade practice much less a restrictive trade practice. It is also pleaded that since the public issue had been expressly authorised and approved by the Central Government under the provisions of the Capital Issues (Control) Act, 1947, no order under Section 37 could be passed and also registration of any agreement regarding this issue is exempt under Sub-section (3) of Section 33 of the Monopolies and Restrictive Trade Practices Act.

1. Does the complaint disclose legally the existence of a restrictive trade practice 2. In case Issue No. 1 is decided against the respondent, can an order under Section 37 of the Monopolies and Restrictive Trade Practices Act be not passed in view of Sub-section (3)(b) of Section 37 of the Monopolies and Restrictive Trade Practices Act.

6. We have heard learned counsel for the parties at length for a number of days.

Issue No. 1.--According to complainants and the Director-General, linking of debentures with issue of shares is a restrictive trade practice. The word "restrictive trade practice" is defined in Section 2(o) of the Monopolies and Restrictive Trade Practices Act which reads as under : " 'restrictive trade practice' means a trade practice which has, or may have, the effect of preventing, distorting or restricting

competition in any manner and in particular,-- (i) which tends to obstruct the flow of capital or resources into the stream of production, or (ii) which tends to bring about manipulation of prices, or conditions of delivery or to effect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions." 8. Reliance of learned counsel for the Director-General and the complainant was on Clause (ii) of the said definition. They argued that that clause prohibited the manipulation of conditions of delivery of goods if it imposed on the consumers unjustified costs, that in the present case shares were goods, that linking of the debentures with the allotment of shares obviously amounted to manipulation of the conditions of delivery of shares in such a manner as to impose unjustified costs on the consumers because they were unjustifiably made to part with money on debentures before they could get shares. Learned counsel also relied on Section 33(1)(b) and (g) of the Monopolies and Restrictive Trade Practices Act which reads as under : "33(1). Every agreement falling within one or more of the following categories shall be deemed, for the purpose of this Act, to be an agreement felating to restrictive trade practices and shall be subject to registration in accordance with the provisions of this Chapter, namely.:--....

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

(g) any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal of the goods." 9. Their argument is that in the present case purchase of debentures is being made a condition to the purchase of shares, thereby attracting Clause (b) of Sub-section (1) of Section 33. Their further argument is that linking of debentures amounts to an agreement to limit or restrict the supply of goods which are shares, thereby attracting the provisions of Clause (g) of Sub-section (1) of Section 33.

10. The aforesaid arguments raise the following questions for determination : (ii) Does allotment of shares amounts to their purchase within the meaning of Section 2(o)(ii) and Section 33(1)(b) and (g) of the Monopolies and Restrictive Trade Practices Act (iii) Are debentures goods to attract the provisions of Section

33(1)(b) of the Monopolies and Restrictive Trade Practices Act 11. Shri Kumar, advocate and learned counsel for the complainant, Shri Harish Salve, learned counsel for the Director-General, Shri O.P. Dua, advocate, relied upon the definition of goods as given in Section 2(e) of the Monopolies and Restrictive Trade Practices Act, which reads as under : "(e) 'goods' means goods as defined in the Sale of Goods Act, 1930 (3 of 1930), andincludes,-- (iii) in relation to goods supplied, distributed or controlled in India, goods imported into India." 12. There is no doubt that shares are goods. But the main question is whether they exist before allotment because if they do not exist, they cannot be "goods" and there cannot be any manipulation of their conditions of delivery so as to constitute "restrictive trade practice". Learned counsel for the Director-General and the complainant argued that shares were goods even before the allotment because they had come into existence. They explained that two processes preceded allotment of shares which were the creation and issue of the same and that creation itself signified coming into existence. Shri S. S. Kumar, advocate, relied upon a judgment of the Madras High Court in Industrial Development Bank of India v. B. Anantha-swami [1986] 60 Comp Cas 99. In that case, the proposition laid down is that "issue of capital" will mean creation of shares in a company with the prior approval of the Central Government under the provisions of the Capital Issues (Control) Act, 1947, and that before there can be allotment, there must be creation of shares. He urged that it clearly meant that creation of shares preceded allotment which meant that shares came into existence before allotment is made and thus they are "goods" and allotment amounts to purchase of goods. It was also contended that the dictionary meaning of the word "purchase" meant acquisition of anything for consideration and that in the present case allotment of shares being for consideration amounted to purchase of shares.Sri Gopal Jalan and Co. v. Calcutta Stock Exchange Association [1963] 33 Comp Cas 862 (SC) to the effect that till allotment of shares takes place, they do not exist as such which means that shares come into existence only when their allotment takes place. It was also held that allotment of shares did not amount to purchase of the same. Following observations were made in paragraph 8 in this respect (at page 865) : "it is beyond doubt from the authorities to which we have earlier referred, and there are many more which could be cited to show the same position, that in company law

'allotment' means the appropriation out of the previously unappropriated capital of a company, of a certain number of shares to a person. Till such allotment, the shares do not exist as such. It is on allotment in this sense that the shares come into existence." (emphasis supplied).

"So Farwell L. J. said in Mosely v. Koffyfontein Mines Ltd. [1911] 1 Ch 73 at page 84, 'As regards the construction of these particular articles, it is plain that the words "creation", "issue" and "allotment" are used with three different meanings familiar to business people as well as to lawyers. There are three steps with regard to new capital; first, it is created ; till it is created, the capital does not exist at all. When it is created, it may remain unissued for years, as indeed it was here ; the market did not allow of a favourable opportunity of placing it. When it is issued, it may be issued on such terms as appear for the moment expedient. Next comes allotment. To take the words of Stirling J. in Spitzel v. Chinese Corporation Ltd. [1899] 80 LT 347, at page 351, he says : 'What is an allotment of shares Broadly speaking, it is an appropriation by the directors or the managing body of the company of shares to a particular person'. Lord Greene M.R. observed in V.G.M. Holdings Ltd., In re [1942]. 1 Ch 235 ; [1942] 12 Comp Cas 254,'. . , it seems to me that the word "purchase" cannot with propriety be applied to the legal transaction under which a person, by the machinery of application and allotment, becomes a shareholder in the company; he does not purchase anything when he does that. Mr.

Wynn-Parry endeavoured heroically to establish the proposition that a share before issue was an existing article of property, that it was an existing bundle of rights which a shareholder could properly be said to be purchasing when he acquired it by subscription in the usual way. I am quiet unable to accept that view. A share is a chose-in-action. A chose-in-action implies the existence of some person entitled to the rights, which are rights in action as distinct from rights in possession, and, until the share is issued, no such person exists. Putting it in a nutshell, the difference between the issue of a share to a subscriber and the purchase of a share from an existing shareholder is the difference between the creation and the transfer of a chose-in-action'." 15. In view of the aforesaid law laid down by the Supreme Court, when shares are not in existence, they cannot be

called goods within the meaning of Section 2(e) of the Monopolies and Restrictive Trade Practices Act. Further, allotment of shares does not amount to purchase of the same. The authority of the Madras High Court relied upon by learned counsel for the complainant has no application in view of the Supreme Court judgment. Further, the Madras High Court judgment does not say that shares came into existence as soon as -the share capital is created. It merely says that before allotment, share capital must be created with the consent of the Central Government obtained under the Capital Issues (Control) Act, 1947.

16. Shri S.S. Kumar, advocate, contended that the judgment of the Supreme Court (Sri Gopal Jalan and Co. v. Calcutta Stock Exchange Association [1963] 33 Comp Cas 862 (SC)) is out of context and hence not applicable. He explained that the question for determination before the Supreme Court was whether reissue of forfeited shares was allotment or not within the meaning of Section 75 of the Companies Act, and that there was no question if shares existed before allotment or not. He then relied upon a judgment of the Supreme Court in Shree Gopal Paper Mills Ltd. v. CIT [1970] 77 ITR 543. In that case, it was held that bonus shares stood allotted as soon as a resolution creating and allotting them was passed by the board of directors. Learned counsel argued that in that way even shares come into existence as soon as there is creation of capital by means of resolution of the board of directors, of course with the approval of the Central Government or the Controller of Capital Issues under the Capital fssues (Control) Act, 1947. According to him, shares come into existence as soon as there is creation of share capital and it is only the shareholders who come into existence by way of allotment of shares.

17. It is obviously wrong on the part of Shri S.S. Kumar, advocate, to urge that the Supreme Court authprity (Sri Gopal Jalan and Co. v.Calcutta Stock Exchange Association [1963] 33 Comp Cas 862 (SC)), has no application in the present case. That authority applied fully to the facts of the present case. In that case, some shares had been forfeited and they had been reissued. Section 75 of the Companies Act requires that whenever there is an allotment, it must be notified to the Registrar of Companies. The question for determination directly involved was as to when the shares came into existence, as to what the "allotment of shares"

meant and that whether reissue of forfeited shares amounted to allotment or not. It was held that reissue of forfeited shares did not amount to allotment which meant appropriation of share capital. It was further held that shares had already come into existence by way of original allotment and hence their reissue after forfeiture did not amount to any allotment within the meaning of the provisions of Section 75 of the Companies Act, 1956.

18. There is no necessity of discussing any further as to when shares come into existence in view of the law laid down by the Supreme Court that they come into existence on allotment. But there are good reasons that the creation of share capital without allotment of the shares does not make the shares come into existence. Creation of share capital merely gives the manner in which the capital is to be collected.

Creation of capital does not automatically bring in amount into the hands of the company. It is only when the shares are allotted against money received from the shareholders that money flows into the coffers of a company. It is only on allotment of shares that something tangible comes into existence which is of value. That tangible item is the share 19. The Supreme Court judgment in Shree Gopal Paper Mills Ltd. [1970] 77 ITR 543, relied upon by Shri S.S. Kumar, advocate, has no application at all. That judgment was on the creation of bonus shares and not ordinary equity shares. Bonus shares are allotted when the intention is to capitalise undivided profits of a company and distribution of shares is to be made amongst the holders of its ordinary shares. In such a case, there is no necessity of any application for allotment of shares and such bonus shares can be allotted by way of a resolution of the board of directors of a company.

This is exactly what happened in the case before the Supreme Court.

Shree Gopal Paper Mills Ltd. was a company incorporated under the provisions of the Companies Act. At a general meeting held on December 30, 1954, the company passed a resolution, "(a) that a sum of Rs. 50,07,500 being part of the undivided profits of the company standing to the credit of the general reserve as on June 30, 1954, be capitalised and distributed amongst the holders of its ordinary shares on the footing that they became entitled thereto as capital and that

the said capital be applied on behalf of such ordinary shareholders in payment of fully paid 5,00,750 ordinary shares of Rs. 10 each and that such new shares shall rank pari passu with the existing shares in all respects except that the holders thereof would not participate in any dividend in respect of any period before December 31, 1954, and that the directors be directed to issue, allot and distribute the new shares amongst the persons whose names were registered as such in its books as on January 1, 1955, in the proportion of one such new share for every ordinary share already held by them on that date." The Supreme Court held that the aforesaid bonus shares stood allotted with effect from the date of the resolution and not from January 1, 1955. There was no observation at all that the ordinary shares could come into existence before allotment 20. Shri S.S. Kumar, advocate and learned counsel for the Director-General and the complainant, contended that even if it is taken for granted that the shares do not come into existence, they are "future goods" within the meaning of Section 2(6) of the Sale of Goods Act. The definition of "future goods" in the aforesaid provision reads as under : "'future goods' means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale." 21. Obviously, the aforesaid argument does not hold any water. Firstly, the definition of future goods as given in the Sale of Goods Act has not been incorporated into the Monopolies and Restrictive Trade Practices Act. It is only the definition of goods as given in the Sale of Goods Act which has been extended to the provisions of the Monopolies and Restrictive Trade Practices Act by virtue of Clause (e) of Section 2 of the Monopolies and Restrictive Trade Practices Act.

Hence, we cannot act upon the definition of "future goods". Secondly, shares, which are to be allotted, do not come within the definition of future goods because they are neither to be manufactured nor produced nor acquired by the seller. These shares are merely issued by the company itself for collecting the capital.

22. Although, as is being explained hereafter, debentures are goods, yet the case of the Director-General and the complainant does not receive any strength after having found that the shares before allotment are not goods within the meaning of Sections 2(o)(ii), 33(1)(b) and (g) of the Monopolies and Restrictive Trade Practices Act and the allotment of the share does not amount to purchase within

the meaning of Section 2(o)(ii) and Section 33(1)(b) of the Monopolies and Restrictive Trade Practices Act. The definition of the word "goods" as given in Section 2(e) of the Monopolies and Restrictive Trade Practices Act has already been reproduced. It means goods as defined in Section 2(7) of the Sale of Goods Act. The definition of the word "goods" in the Sale of Goods Act reads as under : "'goods' means every kind of movable property other than actionable claims and money ; and includes stocks and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." 23. By way of reading together the definition of the word "goods" as given in Section 2(e) of the Monopolies and Restrictive Trade Practices Act and Section 2(7) of the Sale of Goods Act, it is clear that goods means every kind of movable property other than actionable claims, The word "actionable claim" is defined in the Transfer of Property Act as under : "3. 'actionable claim' means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the civil courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent." 24. It is apparent from the definition that secured debentures are not actionable claims. It is also obvious that debentures are movable property. That being so, debentures are goods within the meaning of Section 2(e) of the Monopolies and Restrictive Trade Practices Act.

25. Shri Ashok Desai, learned counsel for the respondents, contended that debentures being secured against immovable property, they are immovable property and as such they are not goods.

26. But, in this case, it cannot be said that the security provided to the debentureholders was immovable property. The security could be movable property itself. Further, even if immovable property is provided as a security, the same is not under a mortgage or charge with any particular debentures. Hence, debentures cannot be immovable property and the arguments of learned counsel have no force.

27. In fairness to Shri Ashok Desai, advocate, it may be mentioned that he argued that Section 33 did not contain restrictive trade practices per se and that for a trade practice to be restrictive, it was necessary that the same must fall within the definition of a restrictive trade practice as given in Section 2(o) of the Monopolies and Restrictive Trade Practices Act. He relied upon the judgment of the Supreme Court in Mahindra and Mahin-dra Ltd. v. Union of India [1979] 49 Comp Cas 419 in support of his argument.Director-General of Investigation and Registration v. India Cements Ltd. [1987] 62 Comp Cas 382 (MRTPC). In that judgment, we found that that argument had force before the Monopolies and Restrictive Trade Practices Act was amended in August, 1984. Then, we considered the effect of the amendment of Section 33 of the Monopolies and Restrictive Trade Practices Act brought about with effect from August 1, 1984. We compared the opening words of Section 33(1) before and after the amendment. They read as under : "Any agreement relating to a restrictive trade practice falling within one or more of the following categories shall be subject to registration in accordance with the provisions of this Chapter, namely :--" "Every agreement falling within one or more of the following categories shall be deemed, for the purposes of this Act, to be an agreement relating to restrictive trade practices and shall be subject to registration in accordance with the provisions of this Chapter, namely:--" (emphasis applied).

29. It was held by us that the view of the Supreme Court that Section 33 did not contain any per se restrictive trade practice was on the basis of the opening words of that sub-section as it existed before the amendment. We placed emphasis on the words "shall be deemed for the purposes of this Act" occurring in the opening words of the amended Section 33(1) and held that, in view of the said "deeming clause", it was to be taken for granted that for the purposes of the Monopolies and Restrictive Trade Practices Act, all the agreements in different clauses of Sub-section (1) contained restrictive trade practices.

30. Therefore, we do not find any force in the aforesaid argument of learned counsel for the respondents. But at the same time we have to consider another argument of learned counsel (Shri Ashok H. Desai) which is on the basis of Sub-section (3) of Section 33 of the Monopolies and Restrictive Trade Practices Act which reads as under : "No agreement falling within this section shall be subject to

registration in accordance with the provisions of this Chapter, if it is expressly authorised by or under any law for the time being in force or has the approval of the Central Government or if the Government is a party to such agreement." 31. He contended that if any agreement incorporating a restrictive trade practice was expressly authorised under any law or had the approval of the Central Government, such agreement need not be registered which meant that such agreement ceased to contain a restrictive trade practice within the meaning of Sub-section (3) of Section 33 and that as in the present case approval of the Central Government in respect of linking of debentures with equity shares was obtained under Section 3 of the Capital Issues (Control) Act, 1947, there was no restrictive trade practice within the meaning of Section 33(1) of the Monopolies and Restrictive Trade Practices Act.

32. The argument of learned counsel has force. It was on the basis of the deeming clause that we had taken a view that trade practices mentioned in the different clauses of Sub-section (1) of Section 33 were restrictive ones per se. When Sub-section (3) exempts such agreements containing deemed restrictive trade practices from registration, obviously, the "deeming clause" ceases to exist and all clauses of Sub-section (1) of Section 33 cease to apply. Under these circumstances, even if the present case fell (although, it has been found that it did not fall) in any of the clauses of Sub-section (1) of Section 33, it cannot be held that there was any restrictive trade practice. However, we make it clear that if any such practice is covered by Section 2(o) of the Monopolies and Restrictive Trade Practices Act, it will still be a restrictive trade practice, because Sub-section (3) of Section 33 does not override or operate against the said Section 2(o).

33. Further, we have to see if the alleged linking of debentures with equity shares amounts to a "trade practice" or not because for an act to be a restrictive trade practice, it must be a "trade practice". The word "trade" is defined in Section 2(s) of the Monopolies and Restrictive Trade Practices Act. The said definition reads as under : "'trade' means any trade, business, industry, profession or occupation relating to the production, supply, distribution, or control of goods and includes the provision of any services." 34. Now, we have to see if the impugned act or the act assailed falls within the definition of "trade" or not. What is impugned or assailed in

the present case is the allotment of shares tied up with debentures.

It is common ground between the parties that none of the respondents in these cases is dealing in shares. Therefore, they are not carrying on the "trade" in shares whether with or without linking it with debentures.

35. The word "trade practice" as defined in Section 2(u) of the Monopolies and Restrictive Trade Practices Act reads as under : "'trade practice' means any practice relating to the carrying on of any trade, and includes -- (i) anything done by any person which controls or affects the price charged by, or the method of trading of, any trader or any class of traders, (ii) a single or isolated action of any person in relation to any trade." 36. It is apparent that for a practice to amount to "trade practice", it must be one relating to carrying on of any trade. In the present case, as already found, allotment of shares is not a trade. Therefore, the practice of linking the said allotment of shares with debentures is not related to any trade. The practice of linking debentures is only a mode to raise capital with the aid of which a company is to carry on its trade and that practice has no connection with the method of trade which is carried on by that company.

37. Shri O.P. Dua, advocate, for the Director-General, contended that, according to the definition of "trade", it was same as "industry". He then relied upon a judgment of the Supreme Court in Bangalore Water Supply and Sewerage Board v. A. Rajappa 548. That was a case relating to the interpretation of the word "industry" as defined in Section 2(j) of the Industrial Disputes Act.

That definition reads as under : " 'Industry' means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen." I. (a) Where there is (i) a systematic activity, (ii) organised by cooperation between employer and employee (the direct and substantial element is chimerical), (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss, e.g., making, on a large scale, prasad or food), prima facie, there is an 'industry' in that enterprise.

(b) Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector.

(c) The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations." 39. Shri O.P. Dua, learned counsel for the Director-General, argues that in a nutshell "industry", as interpreted by the Supreme Court, meant any systematic activity for satisfying the material wants of the people, that raising of capital is an essential activity for the carrying on of a trade, that hence "share", which is defined in Section 2(46) of the Companies Act as share in the share capital of a company, is an industry and thus a trade within the meaning of Section 2(s) of the Monopolies and Restrictive Trade Practices Act.

40. Learned counsel for the Director-General and the complainant also contended that trade also meant distribution and control of goods, that shares were goods within the meaning of Section 2(e) of the Monopolies and Restrictive Trade Practices Act, that, therefore, their distribution and control by way of allotment amounted, to a trade and, hence, the practice of linking debentures to them amounted to a trade practice.

41. The judgment of the Supreme Court relied upon by Shri O.P. Dua, advocate, for a number of reasons, has no application in the present case. Firstly, it was held that for an activity to amount to industry, it must be "systematic". Here it is common ground between the parties that none of the respondents deals in shares. Therefore, they are not carrying on the activity of issuing or allotment of shares as a "systematic" or regular or continuous activity. Secondly, it is stated in the judgment of the Supreme Court that the activity should be with special emphasis on the employer and employee relations. In the present case, there is no question of any employer or employee relations.

Anybody can apply for allotment of shares and he need not be an employee of the respondents. Thirdly, the word "industry" is not to be interpreted as defined in the Industrial Disputes Act.Union of India v. R.C. Jain [1981] 58 FJR 284 ; AIR 1981 SC 951 that definition from different statutes should not be borrowed. Hence Bangalore Water Supply and Sewerage Board v. A. Rajappa [1978] 58 FJR 197.;

AIR 1978 SC 548, which is on the interpretation of the word "industry" as defined in the Industrial Disputes Act, is not applicable.

43. Shri Harish Salve, learned counsel for the complainant, contended that if definition of the word "trade" and "trade practice" were read together, allotment of shares amounted to a trade practice. He explained that trade practice meant even a single or isolated action of any person in relation to any trade, that the issue of shares by the respondents was for collecting funds for the trades which were being carried on by them and that, therefore, even a single or isolated action of issuing or allotment of shares amounted to a trade practice.

44. But the aforesaid argument is obviously wrong. The definition of "trade practice" shows that it must be a practice relating to the carrying on of any trade even though it need not be a number of actions taken together but may be confined to single or isolated action.

45. The words "carrying on of the trade" clearly show anything done towards the process of trading itself. It can relate to manufacture, business or industry, etc. Here, the complaint is about linking of debentures with shares. As already mentioned, the practice of linking of debentures is only a mode to raise capital with the aid of which a company has to carry on its trade and thus that practice has no relation with the mode or method or process of carrying on the trade.

Even the issue of shares is a mode to raise capital, because, as defined in Section 2(46) of the Companies Act, which definition is applicable to the provisions of the Monopolies and Restrictive Trade Practices Act in view of Section 2(y) of the said Act, a share is a share in the capital and thus issuing of the same is for building of capital. Raising capital is making arrangements for the carrying on of trade and is not a practice relating to the carrying on of any trade.

It is just like purchasing furniture or appointing employees which are necessary arrangements for trade but has no connection with the mode or method of carrying on a trade.

46. As already held, shares before allotment are not "goods" within the meaning of the Monopolies and Restrictive Trade Practices Act. That being so, the argument of learned counsel for the Director-General and the complainant that allotment of shares meant distribution and control of goods and thus is a trade and that practice of linking debentures with them amounts to a restrictive trade practice falls to the ground.

47. For the reasons stated above, it is held that no restrictive trade practice is disclosed in all the cases and the issue is decided accordingly in favour of the respondents.

Issue No. II. --Although, in view of the finding on issue No. 1, it is not necessary to decide this issue, yet, as the issue raises an important point of law, it is being decided on the supposition that issue No. 1 had been decided in favour of the Director-General and the complainant.

48. Section 37(3)(b) of the Monopolies and Restrictive Trade Practices Act reads as under : (b) a trade practice which is expressly authorised by any law for the time being in force." 49. There is no manner of doubt that the alleged restrictive trade practice is not expressly authorised by any statute or enactment.

50. The contention of the respondent is that since there was sanction of the Controller of Capital Issues acting under the Capital Issues (Control) Act, 1947, in respect of linking of debentures with the issue of equity shares, the said linking was expressly authorised by law and hence no order under Section 37 of the Monopolies and Restrictive Trade Practices Act could be passed in respect of such alleged restrictive trade practice. Shri Ashok H. Desai, learned counsel for the respondent, explained that even an order of the Controller of Capital Issues was law because the term "law" was of very wide amplitude : See in this respect definitions of law as given in Article 13(3)(a) and Article 366(10) of the Constitution of India and Section 3(29) of the General Clauses Act. They read as under :-- (a) 'law' includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law : In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say-- (10) 'existing law'

means any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation.

In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context,-- (29) 'Indian law' shall mean any Act, Ordinance, Regulation, Rule, Order," bye-law or other instrument which before the commencement of the Constitution had the force of law in any province of India or part thereof, or thereafter has the force of law in any Part A State or Part C State or part thereof, but does not include any Act of Parliament of the United Kingdom or any Order in Council, rule or other instrument made under such Act." 51. Learned counsel pointed out that it is very significant to note that even an order could be law within the meaning of the General Clauses Act as well as of the Constitution of India. He laid emphasis on the fact that law could be even in respect of an individual and that it was not necessary that an order amounted to law only if it was general in nature. He, in this respect, cited an example of Section 3(5)(b) of the Essential Commodities Act which says that an order could be directed against a specified individual in respect of control, production, supply or distribution, etc., of essential commodities.

52. In support of his argument, the reliance of learned counsel (Shri Ashok H. Desai) was on a number of authorities. In Saraswati Industrial Syndicate Ltd. v. Union of India, AIR 1975 SC 460, it was held that the fixation of the price of sugar under Clause (7)(2) of the Sugar (Control) Order, 1966, was more in the nature of a legislative measure and that, therefore, the conduct giving rise to a complaint that a rule of natural justice of giving opportunity of being heard was not followed in fixing the price, could not be called in question if the criterion adopted for fixing price was reasonable. According to learned counsel, even an order fixing the price of sugar in that case amounted to law because it could be only while enacting a law that there was no necessity of following the rules of natural justice.

53. In State of Madhya Pradesh v. Ramcharan, AIR 1977 MP 68, it was held that all statutory orders and notifications, legislative in nature, amounted to law and

that, therefore, a notification issued under Section 7(1) of the Telegraph Wires (Unlawful Possession) Act by the Central Government was law and that the court could take judicial notice of the same. Learned counsel stressed that even a notification or order passed under any law could be legislative in nature and amounted to law itself.In Madhubhai Amathalal Gandhi v. Union of India [1960] 30 Comp Cas 667; AIR 1961 SC 21, it was held that a notification issued under any provision of law was law itself and thus could be challenged if it violated any fundamental right. In that case, a notification was issued under Section 4 of the Securities Contracts (Regulation) Act, 1956.

Learned counsel emphasised that this law was not confined to mere statutes enacted by Parliament or any Legislature.In H.C. Narayanappa v. State of Mysore, AIR 1960 SC 1073, it was held that a circular issued by a State Government under the Motor Vehicles Act also amounted to law. Learned counsel submitted that when a circular could amount to law, an order of the Central Government under the Capital Issues (Control) Act, 1947, could also be taken as law.

56. Argument of learned counsel for the respondent has no force. It is well established and is also clear from all the authorities relied upon by counsel that there are two types of orders which can be passesd under any law ; first type is quasi-judicial or administrative and the the second type is legislative. This is also mentioned in a latest authority of the Supreme Court in Union of India v. Cynamide India Ltd. [1987] 2 JT 107 ; AIR 1987 SC 1802, which was delivered on April 10, 1987, by O. Chinnappa Reddy and K.N. Singh JJ. In that case, it was held that fixation of prices of essential commodities under the Essential Commodities Act, 1955, and the Drugs (Price Control) was essentially a legislative activity and that, therefore, there was no necessity of following the principles of natural justice of giving opportunity of being heard to the persons adversely affected before fixation of prices. In paragraph 7 of the judgment, observations in respect of distinction between a legislative order on the one hand and a quasi-judicial or administrative order on the other hand were made.

Following are the relevant observations in this respect (at page 1806 of AIR 1987 SC) : "It is true that, with the proliferation of delgated legislation, there is a

tendency for the line between legislation and administration to vanish into an illusion. Administrative or quasi-judicial decisions tend to merge in legislative activity and, conversely, legislative activity tends to fade into and present an appearance of an administrative or quasi-judicial activity. Any attempt to draw a distinct line between legislative and administrative functions, it has been said, is 'difficult in theory and impossible in practice'. Though difficult, it is necessary that the line must sometimes be drawn as different legal rights and consequences may ensue. The distinction between the two has usually been expressed as 'one between the general and the particular'. 'A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy' .... Again, adjudication determines past and present facts and declares rights and liabilities while legislation indicates the future course of action. Adjudication is determinative of the past and the present while legislation is indicative of the future." (emphasis supplied).

57. It was also held that a legislative order amounted to law while an administrative or quasi-judicialorder did not amount to law.

58. We have to scrutinise this case in the light of the observations made by the Supreme Court. So as to be legislative in nature, it is to be seen firstly if the consent order of the Controller of Capital Issues in every case laid down a general rule of conduct and, secondly, as to whether the same indicated a future course of action and did not merely determine the past and the present. Here, the consent orders were particular in nature. Every consent order related to issue of shares by the company concerned such consent orders were different in respect of different respondents. Every consent order dealt with an individual application filed by the company concerned and thus it did not indicate any future course of action. It did not specify any policy of linking debentures with equity shares. Under these circumstances, the concerned consent orders obtained by the respondents in their individual cases were administrative or quasi-judicial in nature. They were not legislative and hence they did not amount to law.

61. These are complaints filed by the Consumer Education and Research Centre, Ahmedabad and others except Restrictive Trade Practices Enquiry No. 72 of 1986, Gramophone Co. of India Ltd. ; Restrictive. Trade Practices Enquiry No. 138 of 1986, Hilton Rubber Ltd. and Restrictive Trade Practices Enquiry No. 33 of 1986, W. S. Insulators Ltd., which were initiated under Section 10(a)(iv). The respondent companies are facing an enquiry under Section 10(a)(i) and 10(a)(iv) read with Section 37 of the Monopolies and Restrictive Trade Practices Act into a restrictive trade practice of their -offering to the public equity shares linked with convertible or non-convertible debentures. So far as the enquiry against W. S. Insulators Ltd. is concerned, it is in an advanced stage and is separate from the other enquiries but Mr. S.S.Kumar, advocate, and the Director-General were allowed to address arguments on the preliminary points which are common to all these enquiries. It may be mentioned that so far as the grievance of Mr. S.S.Kumar, advocate, in connection with issuance of equity shares by W.S.Insulators is concerned, it relates primarily to a restriction imposed on the members that they would be entitled to allotment of equity shares on rights basis only if they apply for a particular number of debentures also. The plea raised by the complainants, common to all the public issue of shares linked with debentures, is that denial of option to the subscribers to apply for equity shares only or for equity shares linked with debentures is an unjust restriction besides imposing unjustified costs on the consumer, namely, the subscriber. It is contended that shares and debentures are distinct goods so much so the rights of the shareholders and debenture-holders also vary in so many respects. Subscribers, it is stated, prefer equity shares than to invest in debentures. By way of instance, T.T.K. Pharma Ltd. in Restrictive Trade Practices Enquiry No. 157 of 1986 offered 1,15,000 equity shares of Rs. 10 each for cash at par linked with 1,15,000-- 15% secured redeemable non-convertible debentures of Rs. 100 each for cash at par. In this way, in order to get allotted 100 equity shares worth Rs. 1,000, a prospective investor is obliged to apply for 10 debentures of Rs. 100 each and in this way, the investor is required to invest a larger amount for the purpose of getting allotted particular number of shares than it is necessary for those shares only. Thus, the trade practice pursued by these companies in the matter of inviting subscriptions for equity shares is a restrictive trade practice within the meaning of

Section 2(o) and Section 33(1)(b) of the Monopolies and Restrictive Trade Practices Act.

62. The preliminary objection raised by the respondent-companies is with regard to the jurisdiction of the Commission on the plea that the notice of enquiry does not disclose any cause of action and that no trade practice is involved in the matter of public issue of shares linked with debentures within the meaning of Section 2(u) of the Monopolies and Restrictive Trade Practices Act. It is not a trade as defined in Section 2(s) of the Act. Therefore, neither Section 2(o) nor Section 33 of the Monopolies and Restrictive Trade Practices Act comes into play. Besides that, the public issue of equity shares linked with debentures having been permitted by the Controller of Capital Issues, takes away the jurisdiction of the Commission to enquire into even if it be deemed to be a restrictive trade practice.

(1) Does the complaint disclose legally the existence of restrictive trade practice ; (2) In case Issue No. 1 is decided against the respondents, can an order under Section 37 of the Monopolies and Restrictive Trade Practices Act be not passed in view of Sub-section 3(b) of Section 37 of the Monopolies and Restrictive Trade Practices Act Issue No. 1 : Mainly, the argument canvassed at the Bar is that Sub-scribing for equity shares and the allotment thereof is not a purchase and sale of shares and, therefore, it is not a trade within the contemplation of Section 2(s) of the Monopolies and Restrictive Trade Practices Act. Reference is made to Sri Gopal Jalan and Co. v.Calcutta Stock Exchange Association Ltd. [1963] 33 Comp Cas 862 ; AIR 1964 SC 250. The question for determination before their Lordships was whether reissue of forfeited shares is allotment of shares within the meaning of Section 75(1) of the Companies Act and as such requires a return to be filed with the Registrar. Under the proviso to Clause (a) of Sub-section (1), the company is not required to show in such return any shares if cash has not actually been received in respect of the allotment of those shares. The requirement of furnishing a return is not applicable under Sub-section (5) to the issue and allotment of shares which are forfeited for non-payment of calls. It was held (headnote of AIR) : "In company law, allotment means the appropriation, out of the previously unappropriated capital of a company of a certain number of shares to a person. Till such allotment, the shares do not exist as such. It is on allotment in

this sense that the shares come into existence." 64. Their Lordships further observed that the view well-accepted in company courts has been that issue of forfeited shares was not allotment of them but only a sale. In V.G.M. Holdings Ltd., In re [1942] 1 Ch 235 ; [1942] 12 Comp Cas 254 (CA) also, it has been laid down that the word "purchase" cannot with propriety be applied to a legal transaction under which a person, by the machinery of application and allotment, becomes a shareholder in the company. This being so, it is abundantly clear that subscribing for equity shares and the allotment thereof which is no more than appropriation of a particular number of shares to a particular subscriber is not a transaction in the nature of sale of shares though, of course, the allotment of shares brings into existence the shares identified with a particular subscriber. The subscriber as a shareholder is no doubt owner of the shares.

65. According to Mr. Ashok H. Desai, learned counsel for the respondents, it is a means of raising capital for the purpose of increasing production ; not that the company deals in stocks and shares by inviting offers to subscribe. It is stated that the other alternative to raise capital would be to go in for loans from any financial institution or from a bank or by taking deposits from the public. The question for consideration would be whether public issue of equity shares can appropriately be equated with raising loans from a financial institution or bank or accepting deposits from the public. It is needless to say that as soon as allotment of a particular number of shares is made to a subscriber, it brings into existence in the hands of the allottee "goods" within the meaning of Clause (e) of Section 2 of the Monopolies and Restrictive Trade Practices Act. Section 149 of the Companies Act provides that where a company having a share capital has issued a prospectus inviting the public to subscribe for its shares, it cannot commence business or exercise any borrowing powers unless shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less on the whole than the minimum subscription. The public issue can be listed at the stock exchange and Section 73 of the Companies Act provides that where a prospectus states that an application has been or will be made for permission for the shares or debentures offered thereby to be dealt in one or more recognised stock exchanges, then any allotment made in pursuance of such prospectus shall be void if the permission has not been applied for within the statutory time or if the

permission has not been granted by the stock exchange. Allotment of shares confers on the shareholder valuable rights and the entire Companies Act is replete with rights and obligations of the shareholders and with managing and administering the affairs of a company. Under the Capital Issues Control Act, 1947, the issue of capital, i.e., the issuing or creation of any secufities for subscription, or for sale, etc., cannot be made without the consent of the Government. The allottee subscriber becomes a shareholder in the company. A creditor of the company, on the other hand, cannot claim any such rights as the shareholders possess or enjoy nor does the borrowing of money require modalities as are necessitated in inviting offers for subscription in the share capital of a company.

66. There is, therefore, a vital difference between creation or issue of the share capital, allotment of shares and borrowing of money from financial institution or a bank by the company. With rapid industrialisation, the corporate sector has been shifting its dependence from financial institutions to capital markets for mobilising finances.

67. In the premises, it takes us to considering whether existence of "goods" in the shape of shares in the hands of an allottee-subscriber and the non-existence thereof till actual allotment makes any difference with respect to the exercise being construed as a trade within the meaning of Section 2(s). It is significant to note that in the definition of trade in Clause (s) of Section 2, the words "sale" and "purchase" are conspicuous by their absence. "Trade" has been defined to mean any trade, business, industry, profession or occupation relating to the production, supply, distribution or control of goods and includes the provision of any service. It is not an inclusive definition of trade but is comprehensive enough to mean more than one commercial activity in the nature of trade, business, industry, profession or occupation. Furthermore, any such enterprise or exercise should relate to the production, supply, distribution or control of goods. Can it be said that the exercise bearing on the creation, issue and allotment of shares does not produce or bring into existence "goods" though, of course, in the hands of the allottee, not as such in the hands of the company. It cannot be lost sight of that if the call money after allotment is not paid by an allottee, the share does not cease to be in existence

but it then falls into the hands of the company as a forfeited share over which the company has right of disposal. Re-allotment of such a forfeited share then acquires the legal character of sale by the company and purchase by a new allottee thereof. In Sri Gopal Jalan and Co. v. Calcutta Stock Exchange Association Ltd. [1963] 33 Comp Cas 862 (SC), the observations of Vaughan William L.J. in Morrison v. Trustees, Executors and Securities Insurance Corporation [1898] 68 LJ Ch 11 are quoted with approval and, so far as the same are relevant for our purpose, they are reproduced as under : "When we look at the articles we see that what takes place on a forfeiture of shares is that the power of transferring them passes from the original shareholders of the company and the company can then transfer the shares subject to the same rights and liabilities as if they had not been forfeited." It is noteworthy that even though shares as such identified with an allottee do not exist before allotment, it does not imply that there was an absolute void in legal phraseology before allotment In Mosley v. Koffy-fontein Mines Ltd. [1911] 1 Ch 73, at page 84, cited with approval in Sri Gopal Jalan and Co. v. Calcutta Stock Exchange Association Ltd.. [1963] 33 Comp Cas 862 (SC), it is stated, "as regards the construction of these particular articles, it is claimed that the words 'creation', 'issue' and 'allotment' are used with three different meanings familiar to business people as well as to lawyers. There are three steps with regard to new capital ; first it is created ; till it is created, the capital does not exist at all.

When it is created, it may remain unissued for years as indeed it was here ; the market did not allow of a favourable opportunity of placing it. When it is issued, it may be issued on such terms as appear for the moment expedient. Next comes allotment" 68. The correct position has been beautifully portrayed by Dutta J. in Shri Gopal Paper Mills Ltd. v. CIT 67 CC 240 (sic) : "Therefore, it seems to me that the first part of the definition of the word 'share' in the Companies Act refers to the share in this limited sense when the share is still in the womb of the company or in the shell of the company and has no shareholder." 69. As stated above, the word "trade" has been defined in Section 2(s) but other components, namely, business, occupation, industry, etc., have not been defined. In State of Orissa v. Titaghur Paper Mills Co.

Ltd. [1985] 60 STC 213 ; AIR 1985 SC 1293, it is held, "the dictionary meaning of a word cannot be looked at where that word has been statutorily defined or judicially interpreted but where there is no such definition, or interpretation, the court may take the aid of dictionaries to ascertain the meaning of a word in common parlance, bearing in mind that a word is used in different senses according to its context as dictionary gives all the meanings of a word and the court has, therefore, to select the particular meaning which is relevant to the context in which it has to interpret that word." In Webster's New 20th Century Dictionary, "occupation", amongst other meanings, has been stated to mean that which engages one's time and attention, employment or business. The word "business" amongst other meanings, also means labour, diligence, employment, occupation, profession, calling, vocation, means of livelihood, that which occupies time, attention and labour of men, for the purpose of profit or improvement; a matter or affair ; also serious engagement. The word "trade" has been defined, inter alia, to mean to have business dealings or transactions with someone; the act or business of exchanging commodities for other commodities or for money, purchase or sale ; a bargain ; a deal.

70. It shows that the expression "trade" as defined in Section 2(s) of the Act particularly when trade means trade as well as business, occupation, etc., is wide enough to imply any bargain, deal or act of a commercial nature which occupies time and attention. Profit or the intention to make profit is not an essential part of the legal definition of trade or business. (Halsbury's Laws of England, third edition, volume 38, page 11): 71. I am conscious that the jobs or the commercial activities adumbrated in the definition of "trade" carry an impression of repetition or continuity and they should be incidental to production, distribution, supply or control of goods. Issuing of share capital now partakes of an essential commercial activity of a company particularly when under the newly added definition of "goods" shares come into existence during the process of public issue and allotment of shares.

It cannot be said that public issue of equity shares by a company is an accidental phenomenon. Issue of share capital is resorted to not only at the time of the formation of the company but it is a must whenever increase in the business

activity or expansion of any undertaking comes about. To be engaged in a trade practice, one should resort to it as frequently as a particular trade is susceptible of.

72. The exercise being in the nature of business or commercial activity finds sustenance also from the fact that under Section 76 of the Companies Act, in consideration of one's subscribing or agreeing to subscribe for any shares in or debentures of a company or for procuring or agreeing to procure subscriptions for any shares or debentures, the company may pay commission. Needless to say that all such expenses would be defrayed from the subscriptions of the allottee-shareholders.

It appears that issue of shares can as well be at a premium or at a discount Under Section 78 where a company issues shares at a premium whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares has to be transferred to an account called the "share premium account". This shows that the issue of shares and the timing of issue after it is authorised and created will depend upon market forces. In fact, in Mosley v. Coffyfontein Mines Ltd. [1911] 1 Ch 73, it has been observed that when share capital is created, it may remain unissued for years as indeed it was in the reported case because the market did not allow of a favourable opportunity of placing it. It may be mentioned that, vide letter No.8/32/(76)77-Cl. V, dated March 13, 1978, of the Department of Company Affairs to be found at page 72 of the Companies Act, 1956, edited by U.K. Bhargava, under the heading "Section 75", the allotment of shares can be made by a company to a person in lieu of a genuine debt due to him and the same will be deemed to be as allotted for cash within the meaning of Section 75 of the Companies Act. In this way, the coming into existence of a share in the hands of the allottee-subscriber is not without a quid pro quo ; it is for consideration whether in the shape of cash or in discharge of a debt 73. Mr. Ashok H. Desai, learned counsel for the respondent, argued that issuance of share or the conversion of shares into stock pertains to the powers of a company under the Companies Act and not a trade. May it be so, but then the power partakes of a trade which operates to produce goods in the form of shares.

74. It brings me to considering whether it can be termed as trade practice. Section 2(u) reads : '"trade practice' means any practice relating to the carrying on of any trade, and includes -- (i) anything done by any person which controls or affects the price charged by, or the method of trading of, any trader or any class of traders.

(ii) a single or isolated action of any person in relation to any trade ;" 75. Now, if public issue of shares is a trade relating to the production, i.e, bringing into existence of shares, it would be a trade practice even if the issue of debenture-linked-equity be a single or isolated action in relation thereto.

76. Mr. Harish Salve, advocate, learned counsel for the Consumer Education and Research Centre, argued that if Clauses (s) and (u) of Section 2 are read together, a trade practice would mean any action of any person relating to any trade, business, industry, profession or occupation related to the production, supply, distribution or control of goods. Learned counsel cited State Wakf Board, Madras v. Abdul Azeez Sahib, AIR 1968 Mad 79, to emphasise that the expression "relating to" comprehends what might have direct significance as well as indirect significance depending on the context. They are not words of restrictive content. 76 Corpus Juris Secundum, 621 on the word "relate" was cited with approval by the High Court wherein it is observed: "it is a very broad word, and it presupposes another subject-matter." In the reported case, reference is also made to Shyam Lal v. M. Shyamlal, AIR 1933 All 649 [FB], to the effect that matters may not, strictly speaking, be the subject-matter of the suit itself as brought and yet, they may relate to the suit. In this way, it has been suggested by learned counsel that the act of a company in issuing shares whether linked with debenture or not or inviting the public to subscribe for shares in the company and the allotment thereof to them having as it does a proximate nexus with the carrying on of business or expansion of the business, industry, occupation or trade has to be construed as a trade practice relating to business or trade, etc., of production, distribution and control of goods. Mr. Ashok H. Desai, advocate, wondered if this view holds good with respect to other acts as of employing personnel and workmen or admitting a partner in a firm. It may be mentioned that the act of a company in the matter of alloting shares has acquired significance particularly due to shares having been bestowed, when allotted, with the character of "goods". The shares as goods in

the hands of the allottee-subscribers do carry value in relation to the manufacturing or business activities of the company. In this sense, could it not be regarded to be in the nature of a byproduct the marketability of which is influenced by the profitability in the normal trade of the company. Therefore, there is a basic and perspective difference between an act related to the issue and allotment of shares and an act related to borrowing of money from a creditor and employing workmen. The admitting of a person as a partner in a firm does not lead to the bringing into existence of any "goods" as in the case of allotment of shares.

77. While defining "goods" in Section 2(e) as to mean "goods" as defined in the Sale of Goods Act, 1930, shares and stocks have been specifically included even though Section 2(7) of the Sale of Goods Act, 1930, includes stocks and shares within the meaning of "goods".

Can it be said that Parliament was not aware that stocks and shares already figure in the definition of goods under the Sale of Goods Act It seems that the object in overemphasising shares and stocks to be "goods" under the Monopolies and Restrictive Trade Practices Act is that they are not limited only to purchase and sale as the Sale of Goods Act, 1930, is concerned with. As I have discussed above, the expression "trade" as defined in the Monopolies and Restrictive Trade Practices Act is not necessarily confined to "purchase" and sale of goods.

78. It brings me to considering the crucial point as to whether it is a restrictive trade practice as defined in Section 2(o) or in relation to Section 33 of the Monopolies and Restrictive Trade Practices Act. It is needless to say that the predominant object of this part of the statute is to deal with restrictive trade practices. Section 2(o) reads as follows : "'restrictive trade practice' means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular-- (i) which tends to obstruct the flow of capital or resources into the stream of production, or (ii) which tends to bring about manipulation of prices, or condition of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions ;" 79. As regards Section 2(o)(ii) of the Monopolies and Restrictive Trade Practices Act, the foremost points for

consideration would be : (2) whether linking of equity shares with debentures is manipulation of prices ; (3) whether it imposes unjustified costs or restrictions on the consumer, i.e., the allottee-subscriber.

80. Under Sections 44(2) and 56 of the Companies Act, the prospectus to be filed with the Registrar is required to state, inter alia, the amount payable on application and allotment on each share.

81. In Clause (b) of item 8 under Part I of Schedule 2 to the Companies Act, one of the particulars required to be mentioned in the prospectus is : "(b) the price to be paid for shares or debentures subscribed for under the options or right." 82. Normally, what is understood by "subscription" is an amount of money subscribed for acquiring any periodical or even to acquire a right of membership in a company or in a club. When a subscriber of any periodical receives the periodical, it is nothing short of purchasing it for a price. In Governments Stock and other Securities Investment Co. Ltd. v. Christopher [1956] 1 All ER 490 (Ch D), it is held that the word "subscription" in the definition of prospectus means taking or agreeing to take shares for cash. Nevertheless, the statutory meaning given to the word "price" cannot be overlooked. In Clause (1), of Section 2 of the Monopolies and Restrictive Trade Practices Act, the word "price" is defined as under : "'Price', in relation to the sale of any goods or to the performance of any services, includes every valuable-consideration, whether direct or indirect and includes any consideration which in effect relates to the sale of any goods or the performance of any services although ostensibly relating to any other matter or thing." 83. The above definition suggests that the amount or any other valuable consideration has to be taken "in relation to the sale of any goods" or to the performance of any service. I wonder, if the act of the company in the matter of inviting offers to invest in the shares of any company does not get translated into a kind of service qua the allottee subscriber, but the case was not argued from that angle. It is not, therefore, possible to hold that this subscription is in the nature of a valuable consideration for any service. Both in India and in England, judicial verdict is against the allotment of shares to be regarded as sale of shares by the company and purchase thereof by the allottee subscriber. This being so, the word "subscription" cannot replace the word "price" in Section 2(o)(ii). In the ultimate

analysis, therefore, the ideology behind manipulation of prices as to impose unjustified costs so far as it could influence the subscription for debenture-linked-equity shares falls to the ground. Otherwise too, excepting the case of rights issue of equity shares where a holder of equity shares becomes entitled as a matter of right to be allotted the shares in a particular proportion, it is doubtful if obligating a subscriber to apply both for equity share and debenture as a condition to being allotted shares could be said to be in the nature of imposing unjustified costs.

84. It may now be examined whether the trade practice in question comes under : (ii) to affect the flow of supplies in the market relating to goods or services : 85. It is to be noticed that "manipulation" qualifies both "prices" and "conditions of delivery". By the rule of noscitur a sociis, if price is required to be construed in relation to the sale of any goods, the conditions of delivery cannot but be construed as incidental to sale of any goods, particularly when the term delivery has not been defined in the Act as to include "allotment". Surely, to obligate a shareholder on rights basis issue of equity shares to subscribe both for shares and debentures without any option to go in for shares only is an unjustified financial burden and restriction on him, yet in view of subscription and allotment not being an incidence of sale as juridically understood, the provisions of Section 2 (o) (ii) do not help him.

86. In so far as the situation described as "to affect the flow of supplies in the market relating to goods" is concerned, I have not been referred to any data that may show that linking of debentures with equity shares affects the supplies of equity shares, or debentures (if debentures are construed to be goods). There is no research-finding on this aspect and I think, it will be too hazardous to give any finding on the basis of surmise or theoretical reasoning. The applicability of this part of the definition can advantageously be examined only when a specific issue is raised bearing on this aspect with concrete data. As at present advised, I hold that it is not applicable.

87. In the complaint, it has been ratiocinated that linking of debentures with equity shares adversely affects the intending investors with limited resources. The extra amount which could be invested in equity shares of other companies gets blocked.

It is stated that in this way, competition in the market is distorted or restricted so far as the share market is concerned. There is no expert study nor any evidence on the point that this extra deposit in debentures has deprived other companies of the resources of the capital market. May be, in competition with companies issuing debenture-linked equity shares, some other companies may be encouraged to allure the intending investors by offering equity shares without being linked with debentures. It may thus promote competition rather than hurt it in any way.

88. Section 33(1)(b) speaks of any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.

It will not come into play because even if the resolution of the company to make a public issue of equity shares linked with debentures be regarded as "an agreement", allotment of equity shares and debentures is not a sale or purchase transaction Therefore, under Section 33 of the Monopolies and Restrictive Trade Practices Act, acquisition of shares by allotment would not fall within the definition of "restrictive trade practice" though of course, the exercise or the process of allotment of shares bears the character of a trade practice.

89. In the context or in the event of its being held to be a restrictive trade practice so as to attract the applicability of Section 33, Mr. Ashok Desai, advocate, submitted in an alternative plea that the linking of debentures with public issue of equity shares having been approved by the Central Government is covered by Sub-section (3) of Section 33 as the agreement is not registrable and no enquiry could, therefore, be instituted. In Agreement relating to Nylon Filament Yarn, In re [1976] 46 Comp Cas 357 (MRTPC) and in Nirlon Synthetic Fibres and Chemicals Ltd. v. R.D. Saxena, Director of Investigation [1976] 46 Comp Cas 419 (Delhi), it has been held that 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 a gateway for an agreement to pass through even if it contains restrictive trade practices on the question as to whether such practices are not prejudicial to public interest. The approval of the Central Government does not take the agreement outside the purview of Sections 10 and 37 of the Act. The Delhi High Court affirmed that such approval has nothing to do with Section 37 ; it

has reference only to Section 33(3) relating to regis-trability of the agreement. It may be mentioned that non-registration of an agreement which relates to a restrictive trade practice is an offence punishable under Section 48 of the Monopolies and Restrictive Trade Practices Act, while carrying on of a restrictive trade practice cannot be penalised ' because it is not void ab initio. An agreement, being a restrictive trade practice, becomes void if it is declared to be so by the Commission. Raman Hosiery Factory v. J.K. Synthetics Ltd. [1975] 45 Comp Cas 374 (Delhi) makes the position abundantly clear on this subject. So, if the "agreement" be deemed to relate to a restrictive trade practice, an enquiry under Section 37 will still be competent even though it may have been approved by the Central Government and, therefore, exempted from registration.

90. As a result of this discussion, Issue No. 1 is decided in favour of the respondents.

Issue No. 2.--Mr. Ashok H. Desai, advocate, learned counsel for the respondent, submitted that the linking of debentures, convertible or non-convertible, with equity shares has been authorised by law within the meaning of Section 37(3)(b) of the Act. The Controller of Capital Issues under the Capital Issues Control Act, 1947, sanctioned the issue of debenture-linked equity shares. Clause (b), Sub-section 3 of Section 37 says that no order shall be made under Section 37 where a trade practice is expressly authorised by any law for the time being in force. According to learned counsel, the sanction of the Controller of Capital Issues bears the character of an order and, therefore, it falls within the term "law" as defined in Articles 13(3)(a) and 366(10) of the Constitution read with Section 3(29) of the General Clauses Act, 1897. Learned counsel also cited Food Corporation of India v. Thakur Shipping Co., AIRRai Sahib Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549 and State of M.P. v. Ramcharan, AIR 1977 MP 68.

It is not necessary to dilate upon this matter in detail except to say that an order of the Government can operate as "law" only where the order is such as has the force of law. It may be mentioned that the use of varying expressions such as "expressly authorised by law", "has the approval of the Central Government", "has been expressly authorised and approved by the Central Government" in different

places in the Act, suggests that "law" cannot be equated with "approval of the Central Government" in interpreting these terms. Moreover, it is a misnomer to say that permission to the public issue of equity-linked-debentures is an order of the Controller of Capital Issues, and for the matter of that, of the Central Government. Section 3(4) of the Capital Issues Control Act, 1947, provides that the Central Government may qualify any consent or recognition accorded by it under Sub-section (2) or Sub-section (3) with such conditions as it may think fit to impose. As such, it is only a consent to the resolution of the company whereby it proposes to make a public issue of equity share linked with debentures.

It is not that it is a condition imposed by the Controller of Capital Issues in the exercise of the discretion of the Central Government. I feel there is no provision in the Capital Issues Control Act, 1947, whereunder power has been conferred on the Controller or the Central Government to order a company not to make public issue of equity shares unless the same be linked with debentures. The "conditions" which can be imposed will be the conditions related to equity shares perhaps with a view to safeguard the interests of the subscribers.

91. In so far as Clause (b) of Sub-section (3) of Section 37 of the Monopolies and Restrictive Trade Practices Act exempts a trade practice from the purview of a cease and desist order, it is a trade practice which is "expressly authorised by any law". Linking of debentures with equity shares can hardly be said to be even implieldy authorised by or under the provisions of the Capital Issues Control Act, 1947, much less "expressly". The consent of the Controller is not an order having the force of law and, therefore, it cannot be held to be authorised by law or being expressly authorised by law.

92. So, if making a public issue of equity share linked with debentures were a restrictive trade practice, the provisions of Section 37(3)(b) or Section 33(3) would hardly help the respondent companies. I decide this issue against the respondents.

R.T.P.E. Nos. 148, 149, 757 to 177 and 179 to 185 on complaints under Section 10(a)(i) of the Monopolies and Restrictive Trade Practices Act and other enquiries Nos. 49, 72 and 138 under Section 10(a)(iv) : As a result of decision of issue No. 1

in favour of the respondents in different cases, all the complaints under Section 10(a)(i) of Consumer Education and Research Centre, Ahmedabad, and others are hereby dismissed and further proceedings in all the enquiries started under Section 10(a)(iv) are hereby closed. Hence, all the thirty three enquiries stand disposed of and notices of enquiry issued in them are discharged.

These are applications under Section 12A of the Monopolies and Restrictive Trade Practices Act for issue of interim injunctions against the respondents in the complaints. As the complaints have been dismissed, these applications cannot survive and are, therefore, dismissed.

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