2023 LiveLaw (SC) 484

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

K.M. JOSEPH; J., B.V. NAGARATHNA; J., AHSANUDDIN AMANULLAH; J.

CIVIL APPEAL NO. 2845 of 2017, June 15, 2023

COAL INDIA LIMITED AND ANR. *versus* **COMPETITION COMMISSION OF INDIA AND ANR.**

Competition Act, 2002 - Coal India Ltd. would come under the purview of the Act despite being a Public Sector Undertaking.

WITH CONTEMPT PETITION (C) No.896/2018 in C.A. No.2845/2017, T.C.(C) No.19/2023, T.C.(C) No.20/2023, T.C.(C) Nos.16-18/2023, T.C.(C) No.21/2023

For Appellant(s) Mr. Ajay Nandalike, Adv. Mr. Achyuth Ajithkumar, Adv. Mr. Talha Abdul Rahman, AOR Mr. Mohd Shaz Khan, Adv. Ms. Gayatri Dahiya, Adv. Mr. Adnan Yousuf, Adv. Mrs. Bina Gupta, AOR Mr. Harman Sandhu, Adv. Ms. Shally Bhasin, Adv. Mr. Yaman Verma, Adv. Mr. Chaitanya Safaya, Adv. Mr. Prateek Gupta, Adv. Ms. Raveena Lalit, Adv. Mr. Abhishek Hazari, Adv. Ms. Sanjana L.b., Adv. Mr. S. S. Shroff, AOR

For Respondent(s) Mr. Sakya Singha Chaudhuri, AOR Mr. N. Venkataraman, ASG. Mr. Rishad Ahmed Chowdhury, AOR Mr. S. S. Shroff, AOR Mr. Matrugupta Mishra, Adv. Ms. Ritika Singhal, Adv. Ms. Ishita Thakur, Adv. Ms. Divya Roy, AOR Mr. Prabhat Kaushik, AOR Mr. M. A. Venkata Subramanian, Adv. Mr. Ranjit Kumar, Sr. Adv. Ms. Sheena Taqvi, Adv. Ms. Akansha Saini, Adv. Mrs. Bina Gupta, AOR Mr. Nagarkatti Kartik Uday, AOR Mr. G. Saikumar, Adv. Mr. Samir Malik, Adv. Ms. Nikita Choukse, Adv. Mr. Akash Lamba, Adv. Ms. Ekssha, Adv. M/S. D.S.K. Legal, AOR

J U D G M E N T

K.M. JOSEPH, J.

1. The Civil Appeal is directed against the Order passed by the Competition Appellate Tribunal, New Delhi (hereinafter referred to as 'Tribunal'), by which Order, the Tribunal affirmed the findings and conclusion recorded by the Competition Commission of India (hereinafter referred to as 'CCI') on various facets of abuse of dominant position. The abuse of dominant position was ascribed to the appellants. The appeal was dismissed.

2. The second respondent had provided information to the CCI which the CCI proceeded to consider and it found the abuse of dominant position by the appellants.

3. The appellants have filed Interlocutory Application, viz., I.A. No. 66587 of 2017 being an application seeking permission to take additional grounds. Parties exchanged pleadings in the interlocutory application. We have allowed the application seeking permission to urge the new grounds.

4. When the matter came up on 16.09.2022 before a Bench of two learned Judges, the Court felt that since modification of order dated 03.08.2017 was sought, it would be appropriate that these matters are heard by a Bench of three learned Judges. It is, accordingly, that the matter stood posted before a Bench of three learned Judges.

5. The principal bone of contention of the appellants in the I.A. 66587 of 2017 appears to be that Coal India Limited, the first appellant (hereinafter referred to as 'CIL') being a monopoly created by a statute and what is more important, geared and duty bound to achieve the objects declared in Article 39(b) of the Constitution of India and the second appellant, Western Coalfields Limited, a subsidiary company of the first appellant cannot be bound by the Competition Act, 2002 (hereinafter referred to as the 'Act'). In other words, having regard to the very object and purpose for which it was brought into being and the law surrounding such a body, applying the Act would produce such anomalous results as would stultify the sublime goal enshrined in Article 39(b) as also the statute under which

CIL witnessed its birth. Since it was found that there were proceedings pending before the Commission/Tribunal wherein a similar question would directly arise, transfer petitions were filed to call for such proceedings to this Court. It is hence, that the Transfer petitions which we are dealing with came to be allowed. This is however, on the understanding that the Court would not go into the merits of the individual cases but would confine itself to ruling on the question of law raised by the appellants, viz., the applicability of the Act to them.

6. We have heard Shri K.K. Venugopal, learned Senior Counsel, ably assisted by Shri Yaman Verma, learned Counsel. Shri Maninder Singh, learned Senior Counsel, also appears on behalf of the appellant. Also, we have heard Shri N. Venkataraman, learned Additional Solicitor General, on behalf of CCI and Shri Ranjit Kumar, learned Senior Counsel, appearing on behalf of the second respondent in the Appeal/Application. We have further heard learned Counsel appearing in the transferred cases.

SUBMISSIONS OF THE APPELLANTS/APPLICANTS

7. Shri K. K. Venugopal, learned Senior Counsel, would submit that the coal mines operated by the appellants pursuant to the provisions of the Coal Mines (Nationalization) Act, 1973 (hereinafter referred to as the 'Nationalisation Act') would be wholly outside the purview of the Act. This is for the reason that the very purpose and policy underlying the Nationalization Act, was to monopolise the operation of the coal mines and coal mining in the hands of the Central Government and its agencies such as the appellants. It is not an ordinary monopoly. It is a monopoly created by the Nationalization Act; it is, having regard to the need to immunize it from challenge, that it was accorded protection of Article 31B of the Constitution of India; it has been inserted in the Ninth Schedule to the Constitution; Article 39(b) of the Constitution of India takes it out of the category of ordinary monopoly; this is for the reason that the State has been charged with the duty to bear in mind the principles of 'common good' being secured by the 'distribution of scarce resources'; coal, with which mineral we are concerned with, is, indeed, a mineral of the highest importance in the economic life of the nation; its equitable distribution in the manner so as to secure the common good which is the directive contained in Article 39(b) led to the creation of a statutorily mandated monopoly; when such is the thrust of the Nationalisation Act, then, it is wholly inconceivable that the Act would still be applicable to the appellants. It is pointed out, with reference to the Nationalisation Act, that the superintendence of the mines vests with the Central Government or with a corporate body or the company, which it may create. The first appellant is the holding company and there are subsidiary companies under it. This is contemplated under the Nationalisation Act. The mantle of operating the monopoly therefore, fell on the appellants. The appellants are State within the meaning of Article 12 of the Constitution. They continue to be charged with the duty to be guided by the Directive Principles contained in Article 39(b). Learned Senior Counsel would point out that the Act does not deal with a company like the appellant. In other words, while there may be indication in Section 19(4)(g) of the Act that the fact that a body is a monopoly under the statute may indicate the presence of dominant position, there is a subtle distinction. Unlike an ordinary monopoly, a corporate body like the appellant represents a case of a monopoly with the added and unique feature that it is an 'Article 39(b)' monopoly. Such a monopoly is outside the purview of the Act. Reliance is placed on decisions of this Court to emphasize the point that the Nationalization Act was enacted with a view to give effect to the provision of Article 39(b) (See *Ashoka Smokeless Coal India (P) Ltd. and Others* v.

Union of India and Others[1] following *Sanjeev Coke Mfg. Co.* v. *Bharat Coking Coal Ltd. and Another*[2]).

8. Learned Senior Counsel drew our attention to Sections 3 and 11 of the Nationalisation Act to contend that general superintendence, direction, control and management of the affairs and business of a coal mine, *inter alia*, as contained in Nationalisation Act, must be given the widest interpretation. In this regard, reliance is placed by appellants on Judgments interpreting similar words in Article 324 of the Constitution (See *In Re Gujarat Assembly Election matter*[3] and *Election Commission of India v. Ashok Kumar and Others*[4]). Our attention is drawn also to Article 31C of the Constitution for the proposition that a law which gives effect to Article 39(b) or 39(c) cannot be impugned on the ground that it is inconsistent with Articles 14 and 19 of the Constitution. Such a law is to be treated as reasonable. On the other hand, if an action is inconsistent or runs counter to the Directive Principles, it may, *prima facie*, be brushed with the tarnish of it being unreasonable. (See *Kasturi Lal Lakshmi Reddy and Others v. State of Jammu and Kashmir and Another*[5]). It is further pointed out by the appellants that on a conspectus of the Nationalisation Act and on placing it side-by-side with the provisions of the Act, the divergence and the consequent anomalous results of bringing the appellant under the Act, would clearly emerge. Our attention is drawn to the long title of the Act. It is pointed out that the object of the Act is to ensure freedom of trade. This is contrasted with a long title of the Nationalisation Act which indicates that the Law-Giver intended to vest ownership and control of the coal mines in the State so that the said resource is so distributed as to best serve the common good. It is contended that CIL does not operate in the commercial sphere. Great emphasis is laid on the fact that out of 462 mines operated by CIL, 345 have suffered losses amounting to Rs.9,878 Crores in the year 2012-2013. As part of its constitutional responsibility, it engages 51 per cent of its manpower which is about 1,80,726 persons in such mines. Despite the fact that these underground mines only contribute 9 per cent to its total coal production, it is emphasized that the appellants are not free as a private player to lay off its employees.

9. Section 4(2)(a) of the Act prohibits unfair and discriminatory price fixation or conditions for the sale or purchase of goods or services. It is submitted that the Court may bear in mind that price fixation of coal, as far as the appellants and the coal companies under it is concerned, it is based on the Constitutional mandate under Article 39(b) which may be inconsistent with market principles.

10. Under the Nationalisation Act as much as under Article 39(b), the appellants may have to follow differential pricing mechanism to encourage captive coal production. Applying the Act would adversely affect pursing such a differential pricing mechanism. This again would defeat the object underlying the Nationalization Act.

11. Next, the point of contrast consists of Section 4(2)(b) declaring it to be an abuse of the dominant position where an enterprise limits or restricts production of goods, provision of services or market. The impact of the provisions would have on policy decisions taken by the Ministry of Coal to encourage certain industries through a coal supply and pricing mechanism is emphasized. As an illustration, it is pointed out that the Ministry of Coal takes action to encourage growth in backward areas by allocating more coal supply. If

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1 (2007) 2 SCC 640
2 (1983) 1 SCC 147
3 (2002) 8 SCC 237
4 (2000) 8 SCC 216
5 (1980) 4 SCC 1

such policy or actions thereunder are to be tested on the anvil of Section 4(2)(b) of the Act, it may not pass muster. This again would undermine the object of the Nationalisation Act and what is more, the wholesome principle enshrined in Article 39(b). Section 3 of the Nationalisation Act, it is next pointed out, vests the ownership of the coal mines in the Central Government. However, under Section 19 the CCI is obliged to take into consideration the monopoly position whether controlled by the Government or not, as a factor to determine the dominant position.

12. Next, it is contended that Section 27(a) of the Act, clothes the CCI with the power to order the cessation of abuse. This would be inconsistent with the appellants pursuing welfare policy in relation to pricing and distribution of coal. Under Section 32 of the Nationalisation Act, the mining companies cannot be wound up. This stands in contrast to Section 28 of the Act which empowers the CCI to divide enterprises abusing dominant position including adjustment of contracts, formation of winding up of enterprises among other things.

13. Next, it is pointed out that Section 28 of the Nationalisation Act declares that the provisions of the said Act would prevail notwithstanding anything inconsistent therewith contained in any other law in force, inter alia. (Reliance is placed on the Judgments of this Court in *Employees Provident Fund Commissioner* v. *Official Liquidator of Esskay Pharmaceuticals Limited*[6] as also *Sanwarmal Kejriwal* v. *Vishwa Coop. Housing Society Ltd. and Others*[7]). Section 60 of the Act, which declares that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force, may not assist the second respondent or the CCI in the stand that a Nationalisation Act must make way for the operation of the Act on its own terms. It is contended that the appellants even if they constituted a monopoly, they cannot act independently of Presidential Directives, which are binding on them. The policy framed by the Central Government must be mandatorily followed. This brings about an inevitable clash between the actions of the appellant with the requirements which are stipulated in the Act. The appellants are not to be driven by a profit motive. The appellants are the extended arms of the welfare State. The activities of the appellants are not any ordinary commercial activities. They must not be so perceived when a complaint of abuse of dominant position is considered under Section 4 of the Act. The mines in question were cost plus mines operated by the appellants to ensure more availability of coal. They may lose their viability if they are operated at notified prices.

14. Shri K. K. Venugopal, learned Senior Counsel, would submit that the actions of the appellants are susceptible to judicial review in proceedings under Article 226 or even Article 32. It is, in fact, pointed out there are other forums such as the Coal Controller wherein complaints of the nature, viz., quality of coal as for illustration could be ventilated. Subjecting the appellants to the provisions of the Act is wholly unjustified.

SUBMISSIONS OF THE RESPONDENTS

15. *Per contra*, the learned Additional Solicitor General on behalf of the CCI, stoutly contended that the Act, indeed, applies in spite of the non-obstante clause contained in Section 28 of the Nationalisation Act. He would point out that the object of the Act is to bring out a paradigm shift in the economic policy of the nation. There is no conflict between the Nationalisation Act and the Act in keeping with the changing times and the imperative need to ensure the best economic interest of the Nation. The Act was born after great deal

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[6] (2011) 10 SCC 727

[7] (1990) 2 SCC 288

of contemplation. A Committee known as the Raghavan Committee, a high-level Committee, went into the issue relating to State monopoly as well. A perusal of the said Report would indicate that it was realized that the operation of the State monopolies did not conduce to secure the best interest of the Nation. The State monopoly could not be allowed to operate in a state of inefficiency. It had to set its house in order and pull up its socks. It was specifically contemplated that such State monopolies must fall in line and operate in the midst of forces of competition. He would point out that the Court should keep in mind that an examination of the merits of the case would clearly indicate that the attempt of the appellants is to wriggle out of the situation when its actions have been found to be violative of the Act and the fine questions which have been raised do not actually even arise on the defense actually set up before the CCI. He poses the question as to whether the appellants could justify the supply of substandard goods and justify it on the high pedestal of a Constitutional goal being imperiled if the same is questioned under the Act.

16. He would point out that there is no challenge mounted to the vires of the Act. There is no scope for reading down the law in the absence of the challenge. He also relied upon the Judgment of this Court in the *New Delhi Municipal Council v. State of Punjab & others*[8] to contend that when the instrumentality of the State proceeds to enter the commercial field and is carrying on a business activity, it cannot claim immunity from the laws of the land. Though the said case was delivered in the context of Article 286, he would submit that the principle is apposite.

17. It is submitted that the Act provides for a detailed procedure where information is received or it acts *suo motu.* Invariably, it calls for a report by the investigation wing. The Constitution of the CCI is sufficient safeguard as it is composed of people who are experts in various branches of knowledge. Complaints such as abuse of dominant position are gone into at great length, full opportunity is given to the persons concerned to place their objections. It is only when a clear case of abuse of dominant position, inter alia, is found established, that the CCI acts. He would contend that the appellant is a government company within the meaning of Section 617 of the erstwhile Companies Act. He would point out that it is not the law that such an entity can claim that its acts are placed beyond the pale of scrutiny by reason of the fact that the law under which they operate has been placed in the Ninth Schedule. He would point out that there are three filters provided in the Act insofar as information relating to abuse of dominant position is concerned. In the first place, an entity must answer the description of an enterprise as contained in Section 2(h) of the Act. Once the said hurdle is crossed, the CCI must ascertain whether the enterprise occupies a dominant position. This is a matter which is covered in Section 19(4) of the Act. There are several factors which are indicated. The rear is brought up by the residuary clause, viz., Section 19(4)(m) which provides for any other factor which the Commission may consider relevant for the enquiry. This is the second filter. In other words, it is not the abuse by any entity but it must be abuse by an enterprise. Next, the enterprise must enjoy a dominant position. As to what is a dominant position, has been detailed in the second explanation to Section 4(2) of the Act. Thus, the Commission is governed by predetermined and objective criteria to arrive at a finding as to whether an enterprise occupies the dominant position both with reference to the explanation provided in Section 4(2) as also the factors which have been elaborately laid down in Section 19(4). It is after the second filter is passed, that CCI must pass on to actually find whether there is abuse of its dominant position. Section 4(2) appears to provide for what shall be abuse of

[8] (1997) 7 SCC 339

dominant position. This being the scheme of the Act, he contends that there may be no merit in the attempt of the appellants to extricate themselves from a well thought out law provided by the same Law-Giver.

18. He would point out that initially coal was an essential commodity under the Essential Commodities Act, 1955. When this Court delivered the Judgment relied upon by the appellants as well, viz., *Ashoka Smokeless Coal India (P) Ltd. and Others v. Union of India and Others*[9], coal was an essential commodity. The Court proceeded on the said basis as well. However, in February, 2007, coal ceased to be an essential commodity. Next, it is pointed out that the Nationalisation Act itself, which is projected as the sheet anchor of the appellants entire case was itself taken out from the Ninth Schedule in the year 2017. The Nationalisation Act itself stands repealed. Therefore, he would point out that the Court is being invited to pronounce on the basis of the 'hallowed' position that the Nationalisation Act occupied, which itself is no longer the case. (We must notice here that even in his opening submissions Shri K. K. Venugopal, learned Senior Counsel, pointed out these developments. However, it is his contention that the contracts with which this Court is concerned all arose during the period of time when the Nationalisation Act continued to grace the Ninth Schedule.)

19. Shri N. Venkataraman would point out again that the Court may not lose sight of the fact that while the first appellant was fully owned by the Central Government in terms of its shareholding, after 2010, following disinvestment, the Government shareholding has declined to nearly 67 per cent. The balance of the shareholding is in private hands. Reliance is placed on the Judgment of this Court in *Waman Rao and Others* v. *Union of India and Others*[10]. Considerable support is sought to be drawn from the *I.R Coelho (dead) by LRs v. State of T.N.*[11] for the proposition that the immunity, laws enjoyed on their insertion in the Ninth Schedule and the laws, which may be placed in the Ninth Schedule, stands considerably diluted. It is pointed out further with reference to Judgment in *Khoday Distilleries Ltd. v. State of Karnataka & others*[12] (paragraph-25) that Fundamental Rights are not absolute and they are 'qualified Fundamental Rights'. Placing reliance on the Judgment in *Parag Ice & Oil Mills & another v. Union of India*[13], it is pointed out that unlike the law which may be protected under Article 31C, an order passed under the law may not be entitled to the same immunity. He would caution the Court against adjudicating matters which may at best arise in the abstract. Questions must be answered when they arise on facts.

20. He would contend that the Court may place an interpretation as would advance the object of the law, which in this case, is to bring about a transformation in the economy for the greater good of the common man (See in this regard *Ajaib Singh v. Sirhind Coop. Marketing-cum-Processing Service Society Ltd. and another*[14]).

21. Shri Ranjit Kumar, learned Senior Counsel for the second respondent, would point out that concept of common good so heavily relied upon by the appellant, found in Article 39(b), must be interpreted as meaning the interest of the common man or the citizens. 80 per cent of the coal is supplied by CIL to power companies. Second respondent is a power company. The second respondent it is pointed out in fact supplies power generated using

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9 (2007) 2 SCC 640
10 (1981) 2 SCC 362
11 (2007) 2 SCC 1
12 (1995) 1 SCC 574
13 (1978) 3 SCC 459
14 (1999) 6 SCC 82

coal to distribution companies (represented, in fact, before us incidentally by the Maharashtra State Agency), who, in turn, would finally supply power to the end consumer. The continual supply of coal and prompt performance of the contracts and the reasonableness of the rates and quality of coal, in other words, according to the second respondent, are related to the very common good, which is emphasized by the appellants. He would further point out that the Nationalisation Act was an expropriatory legislation.

22. Next, he would point out that the predecessor enactment, viz., the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as MRTP Act), which stood repealed by the Act, may be borne in mind. In the said Act, Section 3 clearly declared that, unless it was otherwise notified, the MRTP Act would not apply to Government Agencies, as indicated therein. There is no such provision in the Act. He drew our attention to Section 21A of the MRTP Act. Drawing inspiration from the preamble to the Act, he emphasizes that the center stage of attention in the Act is occupied by the consumer. Common good in other words, must be associated with the good of the consumer. He drew our attention to Section 54 of the Act which provides for power to exempt. He pointed out two notifications granting exemptions which were in favour of rural regional banks. If the appellants legitimately wished to be taken out of the purview of the Act, Section 54 holds the key and there is a lawful way. As long as there is no exemption, the Act applies to the appellants. He would further contest the case of the appellants that the appellants were running at a loss as a result of a number of mines running at a loss. He would purport to provide figures to demonstrate that the appellants have been making huge sums by way of profits and what is more, making it over to the Government of India by way of dividend. This is besides highlighting the dilution of the shareholding of the Government of India. He would point out that there can be no claim by the appellants that it is carrying on of any sovereign functions. In this regard, he drew our attention to the following decisions. *Bangalore Water Supply & Sewerage Board v. A. Rajappa*[15] (See paragraphs-163 and 168), *N. Nagendra Rao & Co. v. State of A.P.*[16] (See paragraphs-9, 13, 19 and 25), *Chairman, Railway Board and others v. Chandrima Das (Mrs.) and others*[17] (See paragraphs-38, 41 and 42) and *Agricultural Produce Market Committee v. Ashok Harikuni and another*[18] (See paragraphs-21 and 32).

23. Shri M. Mishra, learned Counsel appearing on behalf of one of the parties in the Transferred Cases would support the respondents in the Appeal. He would point out that in fact, he appears for the Maharashtra Power Generation company. He would submit that the Court may bear in mind that it is not as if the complaint against the appellants is being voiced only by private players like the second respondent in the Appeal. The acts and omissions of the appellants is being objected to even by public sector units such as his client. He would point out that under the Electricity Act, 2003, the price of power is regulated by the Commission under the said Act. The return on investment is highly regulated. Coal constitutes 60-70 per cent of the costs. The price of coal has a bearing on both the Consumer Price Index as also the Wholesale Price Index. He would submit that the report of the Director General under the Act brings out the facts. Regarding the contention of the appellants that Writ Courts can go into the question, it is pointed out that the cases may involve facts, which are best dealt with by a Body like the CCI. He drew our attention to the Judgment of this Court in *Hasan Murtza v. State of Haryana*[19] and also

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[15] (1978) 2 SCC 213
[16] (1994)6 SCC 205
[17] (2000) 2 SCC 465
[18] (2000) 8 SCC 61
[19] (2002) 3 SCC 1

Employees Provident Fund Commissioner v. Official Liquidator[20]. Similar contention in support of the CCI and the second respondent has been voiced by the other respondents in the Transferred Cases.

24. In response to the submissions, Shri K.K Venugopal would point out that it is not the case of the appellants that the appellant is immune from all laws. He would further point out that the deletion of the Nationalisation Act from the Ninth Schedule may not affect his contentions as the contracts in question relate to the period when the Nationalisation Act was very much in the 9th Schedule. He would submit that as held in *Ashoka Smokeless Coal India (P) Ltd. and Others* v. *Union of India and Others*[21], it is not as if the actions of the appellants are immune from judicial review under Article 14. He would reiterate that an affected party could seek redress in other forums. He would emphasize again that the Act and even the Raghavan Committee Report does not refer to the species of public sector company which are geared to achieve the common good under Article 39(b) and whose operation was immunized from challenge by their insertion in the 9th Schedule at the relevant point of time. The words in Article 39(b) "so distributed" is a continuing command to the State even after the Nationalisation Act was passed. This is by way of countering the argument that with the Nationalisation Act all was done and it was a one-time affair. In other words, the command of Article 39(b) is that the State shall bear in mind the common good and, therefore, coal even if it is taken out of the Essential Commodities Act, remains a material resource of the country, which must be distributed to achieve common good. He reiterates his contention in this regard. He drew our attention to the distinction between an ordinary monopoly and a State Monopoly, which is covered by Article 39(b). They are not birds of the same feather, it is pointed out. In fact, Shri Yaman Verma, learned Counsel ably supplemented by pointing to the constraints under which the appellants are bound to operate. He points out to the new coal policy and the Presidential Directives. He would then point out that even if the Act were found to be applicable, the Court may clarify that the appellants could claim justification of their actions by relying on criteria, which they are bound to follow. We must, here at this juncture, record that when we queried Shri K. K. Venugopal, learned Senior Counsel, as to whether he was claiming that the appellants were carrying on activities, which can be described as sovereign functions, the answer was clear and forthright, namely, that he was not having such a case.

25. When the aspect about the Presidential Directives and the policy of the Government was pointed out to the learned Additional Solicitor General, N. Venkataraman, he would ask the question as to what is it that prevents such a contention being raised is not pointed out. The case must be decided on the basis of the actual contentions raised and the relevant facts. He would exhort the Court that bearing in mind the paramount need to allow the Act to succeed in its operation, the Court may not allow the appellants to wriggle out of the well thought out provisions of the Act which law will subserve the highest public interest. He would submit that if a defense is set up that bonafide adherence to Presidential Directives is being made under the Act, it would be a matter which may have to engage the CCI.

ANALYSIS

26. As we have noticed the question, we are called upon to decide is whether the Act applies to the appellants or not. It is necessary that we tread carefully so that we skirt an

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[20] (2011) 10 SCC 727
[21] (2007) 2 SCC 640

incursion into the merits, which can be undertaken only when the Appeal is heard on merits.

27. Before we pass on to the Act, it may be necessary to look at the law, which it repealed. The MRTP Act was enacted in the year 1969. It was intended to deal with monopolistic and restrictive trade practices as the very long title suggests. It held sway till the Act repealed it in the year 2002. However, the Act itself was actually brought into force in the year 2009. What is relevant is to notice some of the provisions of the MRTP Act.

28. Section 2(d) of the Act, as substituted by Act 30 of 1982, provided for definition of the words 'dominant undertaking'. The definition itself appears to be fairly convoluted. The word 'goods' was, indeed, defined as goods as defined in the Sale of Goods Act, 1930, and pertinently, it included products mined in India, inter alia. The MRTP Act went on to deal with concepts like associated persons, interconnected undertakings and finally, the word 'undertaking'. Sans the three explanations, the word 'undertaking' was contained in Section 2(v) and it read:

"2(*v*) "undertaking" means an enterprise which is, or has been, or is proposed to be, engaged in the production, storage, supply, distribution, acquisition or control of articles or goods, or the provisions of services, of any kind, either directly or through one or more of its units or divisions, whether such unit or division is located at the same place where the undertaking is located or at a different place or at different places. *Explanation I*.—In this clause,—

(a) "article" includes a new article and "service" includes a new service;

(b) "unit" or "division", in relation to an undertaking includes,—

(i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;

(ii) any branch or office established for the provision of any service.

Explanation II.—For the purpose of this clause, a body corporate, which is, or has been, engaged only in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate shall be deemed to be an undertaking.

Explanation III.—For the removal of doubts, it is hereby declared that an investment company shall be deemed, for the purposes of this Act, to be an undertaking;"

The MRTP Act also provided for definition of the words, monopolistic trade practice as also, restrictive trade practices.

29. Section 3 of the MRTP Act, read as follows:

"3. Act not to apply in certain cases.—Unless the Central Government, by notification, otherwise directs, this Act shall not apply to—

(a) any undertaking owned or controlled by a Government company,

(b) any undertaking owned or controlled by a Government,

(c) any undertaking owned or controlled by a corporation (not being a company) established by or under any Central, Provincial or State Act,

(d) any trade union or other association of workmen or employees formed for their own reasonable protection as such workmen or employees,

(e) any undertaking engaged in an industry, the management of which has been taken over by any person or body of persons in pursuance of any authorisation made by the Central Government under any law for the time being in force,

(f) any undertaking owned by a co-operative society formed and registered under any Central, Provincial or State Act relating to co-operative societies,

(g) any financial institution.

Explanation.—In determining, for the purpose of clause (c), whether or not any undertaking is owned or controlled by a corporation, the shares held by financial institutions shall not be taken into account."

30. In other words, inter alia, the provisions of the said Act did not apply to an undertaking owned or controlled by a government company or any undertaking owned or controlled by a corporation (not being a company established by or under a central, provisional or State Act) unless it was expressly made applicable by a notification. It also did not apply to any undertaking, the management of which was taken over by any person or body of persons in pursuance of any authorization made by the Central Government under any law enforced for the time being in force [Clause (e)]. Conspicuous by its absence, is any such provision in the Act.

31. The Colliery Control Order came to be passed in the year 1945 under the Rules. It is the said Order, which came to be continued under the Essential Commodities Act. The Coal Controller controlled the quality and quantity as noticed in *Ashoka Smokeless Coal India (P) Ltd. and Others*[22]. Considering its vital importance, it became the only mineral which was nationalized in terms of the Coking Coal Mines Nationalization Act, 1972 and the Coal Mines Nationalisation Act 1973. The Colliery Control Order 1945 was repealed and replaced by the Colliery Collar Control Order 2000 w.e.f. 01.01.2000.

32. The Preamble to the Nationalisation Act reads as follows:

"An Act to provide for the acquisition and transfer of the right, title and interest of the owners in respect of the coal mines specified in the Schedule with a view to reorganising and reconstructing such coal mines so as to ensure the rational, co-ordinated and scientific development and utilisation of coal resources consistent with the growing requirements of the country, in order that the ownership and control of such resources are vested in the State and thereby so distributed as best to subserve the common good, and for matters connected therewith or incidental thereto."

33. Section 3(1) of the Nationalisation Act reads as follows:

"3. Acquisition of rights of owners in respect of coal mines.—(1) On the appointed day, the right, title and interest of the owners in relation to the coal mines specified in the Schedule shall stand transferred to, and shall vest absolutely in, the Central Government free from all incumbrances."

34. It came to be amended by the Coal Mines (Nationalisation) Amendment Act, 67 of 1976. There was subsequent amendment, viz., Act 47 of 1993 dated 09.06.2003. After the amendment, Section 3(3) reads:

"3(3) On and from the commencement of section 3 of the Coal Mines (Nationalisation) Amendment Act, 1976 (67 of 1976),—

(a) no person, other than—

(i) the Central Government or a Government, company or a corporation owned, managed or controlled by the Central Government, or

(ii) a person to whom a sub-lease, referred to in the proviso to clause (c), has been granted by any such Government, company or corporation, or

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[22] *Ashoka Smokeless Coal India (P) Ltd. and Others v. Union of India and Others (2007) 2 SCC 640*

(iii) a company engaged in— (1) the production of iron and steel, (2) generation of power, (3) washing of coal obtained from a mine, or (4) such other end use as the Central Government may, by notification, specify, shall carry on coal mining operation, in India, in any form;

(b) excepting the mining leases granted before such commencement in favour of the Government, company or corporation, referred to in clause (a), and any sub-lease granted by any such Government, company or corporation, all other mining leases and sub-leases in force immediately before such commencement, shall, in so far as they relate to the winning or mining of coal, stand terminated;

(c) no lease for winning or mining coal shall be granted in favour of any person other than the Government, company or corporation, referred to in clause (a):

Provided that the Government, company or corporation to whom a lease for winning or mining coal has been granted may grant a sublease to any person in any area on such terms and conditions as may be specified in the instrument granting the sub-lease, if the Government, company or corporation is satisfied that—

(i) the reserves of coal in the area are in isolated small pockets or are not sufficient for scientific and economical development in a co-ordinated and integrated manner, and

(ii) the coal produced by the sub-lessee will not be required to be transported by rail."

35. Under Section 4, the Central Government was to become the lessee of the State Government when vesting took place under Section 3. Section 5 read as follows:

"5. Power of Central Government to direct vesting of rights in a Government company.—

(1) Notwithstanding anything contained in sections 3 and 4, the Central Government may, if it is satisfied that a Government company is willing to comply, or has complied, with such terms and conditions as that Government may think fit to impose, direct, by an order in writing, that the right, title and interest of an owner in relation to a coal mine referred to in section 3, shall, instead of continuing to vest in the Central Government, vest in the Government company either on the date of publication of the direction or on such earlier or later date (not being a date earlier than the appointed day), as may be specified in the direction.

(2) Where the right, title and interest of an owner in relation to a coal mine vest in a Government company under sub-section (1), the Government company shall, on and from the date of such vesting, be deemed to have become the lessee in relation to such coal mine as if a mining lease in relation to the coal mine had been granted to the Government company and the period of such lease shall be the entire period for which such lease could have been granted under the Mineral Concession Rules; and all the rights and liabilities of the Central Government in relation to such coal mine shall, on and from the date of such vesting, be deemed to have become the rights and liabilities, respectively, of the Government company.

(3) The provisions of sub-section (2) of section 4 shall apply to a lease which vests in a Government company as they apply to a lease vested in the Central Government and references therein to the "Central Government" shall be construed as references to the Government company."

36. Section 11 is significant for the purpose of the case. It read:

"11. Management, etc., of coal mines.—(1) The general superintendence, direction, control and management of the affairs and business of a coal mine, the right, title and interest of an owner in relation to which have vested in the Central Government under section 3, shall,— (a) in the case of a coal mine in relation to which a direction has been made by the Central Government under sub-section (1) of section 5, vest in the Government company specified in such direction, or (b) in the case of a coal mine in relation to which no such direction has been made by the Central Government, vest in one or more Custodians appointed by the Central Government under sub-

section (2), and thereupon the Government company so specified or the Custodian so appointed, as the case may be, shall be entitled to exercise all such powers and do all such things as the owner of the coal mine is authorised to exercise and do. (2) The Central Government may appoint an individual or a Government company as the Custodian of a coal mine in relation to which no direction has been made by it under subsection (1) of section 5."

37. Suffice it for the purpose of this case that we notice next Section 28:

"28. Effect of this Act on other laws.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act, or in any decree or order of any court, tribunal or other authority."

38. Finally, we notice Section 32. It read as follows:

"32. No proceeding for the winding up of a mining company, the right title and interest in relation to the coal mine owned by which have vested with Central Government called a government company under this Act or for the appointment of a receiver in respect of the business of the company, shall lie in any Court except with the consent of the Central Government."

39. The Nationalisation Act came to be inserted in the Ninth Schedule to the Constitution. It remained in the Ninth Schedule till it is removed therefrom in the year 2017.

40. Article 31B of the Constitution of India reads as under:

"31B. Validation of certain Acts and Regulations Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force."

41. Article 31C of the Constitution of India reads:

"31C. Saving of laws giving effect to certain directive principles Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy: Provided that where such law is made by the Legislature of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent Right to Constitutional Remedies."

42. The working of the MRTP Act was found to be inadequate particularly in the context of changes which happened not only in the country but also on a larger scale.

43. A high-level Committee known as Raghavan Committee delved into the issues. It is, inter alia, stated in the Report as follows: "the object of competition policy is to promote efficiency and maximize welfare. In this context, the appropriate definition of welfare is the sum of consumer surplus and producer's surplus and also includes any taxes collected by the Government."(See paragraph-2.1.1) We notice the following observations as well:

"2.1.1 Competition policy is defined as "those Government measures that directly affect the behaviour of enterprises and the structure of industry" (Khemani, R.S. and Mark A. Dutz, 1996). The objective of competition policy is to promote efficiency and maximize welfare. In this context the appropriate definition of welfare is the sum of consumers' surplus and producers' surplus and

also includes any taxes collected by the Government.1[1] It is well known that in the presence of competition, welfare maximization is synonymous with allocative efficiency. Taxes are generally welfare-reducing."

44. After referring to the reforms initiated in 1991 and dealing with public sector, it is stated as follows:

"2.6.4 Public sector

In 1991, Government abolished the monopoly of the public sector industries except those where security and strategic concerns still dominated. These include arms and ammunition and allied defence equipment, atomic energy and nuclear minerals and railway transport. Major industries including iron and steel, heavy electrical equipment, aircraft, air transport, shipbuilding, telecommunication equipment and electric power are now open for private sector investments. A large number of loss-making public enterprises were referred to the Board for Industrial and Financial Reconstruction (BIFR). Essentially two different types of reforms were envisaged: greater autonomy for public sector enterprises and greater private sector ownership."

45. We may next notice paragraph-2.8.5:

"2.8.5 Public Sector To a large extent, the imperative for privatisation of the public sector has arisen from fiscal considerations. From the point of view of economic efficiency and competition policy, it is important that the public sector does not enjoy monopoly power and is subject to market disciplines through competition. Most of the sectors where the public sector operates have in recent years been opened up to entry by private sector firms. However, as we have noted earlier, the public sector is given preferential treatment in Government procurement. We are of the view that the public sector should be exposed to competition and not given any preferential treatment."

46. State Monopolies Policy is seen dealt with under paragraphs-3.4.5 and 3.4.6. They read as follows:

"3.4.5 State Monopolies Policy State monopolies are not only a reality but are regarded by many countries as inevitable instruments of public growth and public interest. While ideology may have played some role in spurring the growth of State monopolies, much of this increase can be attributed to the pragmatic response to the prevailing milieu, which is frequently an outcome of the historical past in different countries. A view shared by many is that State monopolies and public enterprises in India have played a vital role in its developing process, have engineered growth in critical core areas and have performed social obligations. Nonetheless, there is also a recognition, consequent on the adverse financial results and the resultant pumping of budgetary oxygen from the Government treasury to those enterprises, that there is not only scope for their reformation but also for structural and operational improvements. This recognition has led to the trend towards privatising some of them. This is also a part of the general process of liberalisation and deregulation. Privatisation involves not only divestiture and sale of Government assets but also a gradual decline in the interventionist role played by them.

3.4.6 State monopolies may lead to certain harmful effects, anti-thetical to the scheme of a modern Competition Policy. They are :

A. The dominant power enjoyed by State monopolies may be abused because of Government patronage and support.

B. Because of the said patronage, State monopolies may adopt policies which tantamount to restrictive trade practices. For example, preference to public sector units in tenders and bids, insistence on using public sector services for reimbursement from Government (travelling allowance for Government officials).

C. State monopolies suffer from the schemes of administered prices, contrary to the spirit of Competition Policy."

47. In paragraph-3.4.7, it is, inter alia, stated that in the interests of the consumer the State Monopolies and Public Enterprises need to be competitive in production of goods and service delivery. Thereafter, it is stated:

"3.4.7 It is well accepted that competition is a key to improving the performance of State monopolies and public enterprises. The oftnoted inefficiency of Government enterprises stems from their isolation from effective competition (Aharoni, Yair, 1986). In the interest of the consumers, State monopolies and public enterprises need to be competitive in the production and service delivery. While Government should reserve the right to grant statutory monopoly status to select public enterprises in the broad national interest, it is desirable for the Government to always keep in mind that de-regulation of statutory monopolies and privatisation are likely to engender competition that would be healthy for the market and consumers."

48. In the summary contained in paragraph-3.5.2, we only notice the following:

"3.5.2 Summary

xxx xxx xxx

6. Government should divest its shares and assets in State monopolies and public enterprises and privatise them in all sectors other than those subserving defence and security needs and sovereign functions. All State monopolies and public enterprises will be under the surveillance of Competition Policy to prevent monopolistic, restrictive and unfair trade practices on their part."

49. Under the head, the Contours of Competition Policy, in paragraphs-4.2.2 and 4.2.4, we notice the following:

"4.2.2 Scope

State Monopolies and Government Procurement. In a number of countries, Government enterprises are excluded from the purview of the Competition Law. With the exception of Government entities engaged in sovereign functions, there is no valid justification for such exclusion and all other Government enterprises should be within the ambit of the law.

4.2.4 By the same logic, Government enterprises and departments engaged in any sovereign function (like defence, law and order, currency functions) may not be subjected to the rigours of Competition Law."

(Emphasis supplied)

50. In paragraph-4.4.7, we notice the following:

"4.4.7. Before assessing whether an undertaking is dominant, it is important, as in the case of horizontal agreement, to determine what the relevant market is. There are two dimensions to this – the product market and the geographical market. On the demand side, the relevant product market includes all such substitutes that the consumer would switch to, if the price of the product relevant to the investigation were to increase. From the supply side, this would include all producers who could, with their existing facilities, switch to the production of such substitute goods. The geographical boundaries of the relevant market can be similarly defined. Geographic dimension involves identification of the geographical area within which competition takes place. Relevant geographic markets could be local, national, international or occasionally even global, depending upon the facts in each case. Some factors relevant to geographic dimension are consumption and shipment patterns, transportation costs, perishability and existence of barriers to the shipment of products between adjoining geographic areas. For example, in view of the high transportation costs in cement, the relevant geographical market may be the region close to the manufacturing facility."

51. In the summary, we may notice paragraph-4.8.8, it is stated as follows:

"4.8.8. Summary

1. The State Monopolies, Government procurement and foreign companies should be subject to the Competition Law. The Law should cover all consumers who purchase goods or services, regardless of the purpose for which the purchase is made.

2. Bodies administering the various professions should use their autonomy and privileges for regulating the standard and quality of the profession and not to limit competition.

3. If quality and safety standards for goods and services are designed to prevent market access, such practices will constitute abuse of dominance/exclusionary practices.

4. Certain anti-competitive practices should be presumed to be illegal. Blatant price, quantity, bid and territory sharing agreements and cartels should be presumed to be illegal.

5. Abuse of dominance rather than dominance needs to be frowned upon for which relevant market will be an important factor.

6. Predatory pricing will be treated as an abuse, only if it is indulged in by a dominant undertaking.

7. Exclusionary practices which create a barrier to new entrants or force existing competitors out of the market will attract the Competition Law.

8. Mergers beyond a threshold limit in terms of assets will require pre-notification. If no reasoned order, prohibiting the merger is received within 90 days it should be deemed to have been approved. In adjudicating a merger, potential efficiency losses from the merger should be weighed against potential gains."

52. It is following the said Report, that in the year 2002, the Act came to be enacted. The Preamble to the Act reads:

"An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."

53. We notice the scheme of the Act by taking note of the following provisions.

54. Section 2(h) defines the word 'enterprise':

"2(h) "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

Explanation.-For the purposes of this clause,—

(a) "activity" includes profession or occupation;

(b) "article" includes a new article and "service" includes a new service;

(c) "unit" or "division", in relation to an enterprise, includes

(i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;

(ii) any branch or office established for the provision of any service;"

55. Section 2(i) defines the word 'goods':

"2(i) "goods" means goods as defined in the Sale of Goods Act, 1930 (8 of 1930) and includes—

(A) products manufactured, processed or mined;

(B) debentures, stocks and shares after allotment;

(C) in relation to goods supplied, distributed or controlled in India, goods imported into India;"

56. Section 2(l) defines the word 'person':

"2(l) "person" includes—

(i) an individual;

(ii) a Hindu undivided family;

(iii) a company;

(iv) a firm;

(v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;

(vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);

(vii) any body corporate incorporated by or under the laws of a country outside India; (viii) a co-operative society registered under any law relating to co-operative societies;

(ix) a local authority;

(x) every artificial juridical person, not falling within any of the preceding subclauses;"

57. The words 'relevant market', 'relevant geographical market', 'relevant product market', are all separately defined:

"2(r) "relevant market" means the market which may be determined by the commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;

2(s) "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;

2(t) "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;"

58. Section 3 prohibits anti-competitive agreements. They are declared void.

59. We are, in the main, concerned in this case, with Section 4. Section 4 prohibits abuse of dominant position. Section 4 reads as follows:

"4. (1) No enterprise or group shall abuse its dominant position.

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group.—-

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(b) limits or restricts— (i) production of goods or provision of services or market therefor; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access in any manner; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation.—For the purposes of this section, the expression—

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour.

(b) "predatory price" means the sale of goods or provision of services, at a. price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

(c)"group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5."

60. Section 5 deals with regulation of combinations. At this stage, we may only sum up and state that the law prohibits anti-competitive agreements and also abuse of dominant position. It also regulates combinations as explained in Section 6. Chapter 3 deals with the establishment of the CCI. Section 9 provides that the Selection Committee for appointment of Members of the CCI, including Chairperson, will include the Chief Justice of India or his nominee among others.

61. Section 8 speaks about the composition of the Commission. There must be a chairman and not less than two and not more than six other members to be appointed by the Central Government.

62. Section 8(2) reads as follows:

"8(2) The Chairperson and every other Member shall be a person of ability, integrity and standing and who has special knowledge of, and such professional experience of not less than fifteen years in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission."

63. Section 17 reads as follows:

"17. (1) The Commission may appoint a Secretary and such officers and other employees as it considers necessary for the efficient performance of its functions under this Act.

(2) The salaries and allowances payable to and other terms and conditions of service of the Secretary and officers and other employees of the Commission and the number of such officers and other employees shall be such as may be prescribed.

(3) The Commission may engage, in accordance with the procedure specified by regulations, such number of experts and professionals of integrity and outstanding ability, who have special knowledge of, and experience in, economics, law, business or such other disciplines related to competition, as it deems necessary to assist the Commission in the discharge of its functions under this Act."

64. The duties of the CCI are spelt out in Section 18. It reads as follows:

"18. Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India: Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country."

65. The aforesaid provisions indicate the width of the power lodged with CCI to bring about the sweeping changes in the economy. Section 19 empowers the Commission to make inquiries into agreements which are anti-competitive within the meaning of Section 3. More importantly, Section 19(4) deals with inquiring into the question as to whether an enterprise enjoys a dominant position.

66. Being a crucial provision, we notice the same.

"19(4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—

(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

(d) economic power of the enterprise including commercial advantages over competitors;

(e) vertical integration of the enterprises or sale or service network of such enterprises;

(f) dependence of consumers on the enterprise;

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

(i) countervailing buying power;

(j) market structure and size of market;

(k) social obligations and social costs;

(l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

(m) any other factor which the Commission may consider relevant for the inquiry."

67. Section 19(5) declares that for determining whether the market constitutes a relevant market for the purpose of the Act, the CCI shall have due regard to the relevant geographic market and relevant product market.

68. Section 19(6) deals with the factors which are relevant for determining the relevant geographic market.

69. Section 19(7) deals with matters which are relevant for determining the relevant product market.

70. Section 27 provides for orders which the CCI may pass after inquiring into agreement or abuse of dominant position:

"27. Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—

(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;

(b) impose such penalty, as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent. of its turnover for each year of the continuance of such agreement, whichever is higher.

(c) Omitted by Competition (Amendment) Act, 2007

(d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

(e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;

(f) Omitted by Competition (Amendment) Act, 2007

(g) pass such other order or issue such directions as it may deem fit.

Provided that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause (b) of the Explanation to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group."

71. Section 28 provides for power to order division of enterprise enjoying dominant position.

72. The CCI is given power to pass interim orders in Section 33. The CCI can regulate its procedure as provided in Section 36. Section 41 provides for the duty of the Director General. He is to assist the CCI by investigating into any controversies. Penalties are contemplated under the Act. An appeal is provided to the Tribunal and Section 53T provides for an appeal to the Supreme Court against the order of the Tribunal. Section 54 deals with the power to exempt. It reads:

"54. Power to exempt.— The Central Government may, by notification, exempt from the application of this Act, or any provision thereof, and for such period as it may specify in such notification—

(a) any class of enterprises if such exemption is necessary in the interest of security of the State or public interest;

(b) any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries;

(c) any enterprise which performs a sovereign function on behalf of the Central Government or a State Government:

Provided that in case an enterprise is engaged in any activity including the activity relatable to the sovereign functions of the Government, the Central Government may grant exemption only in respect of activity relatable to the sovereign functions."

73. Section 60 reads as follows:

"60. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

74. We must proceed on the basis that there is no challenge to the Act. This means that we must take the Act as it is and place an interpretation on it as would be most suitable in accordance with well-established principles. In other words, this is not a case where the Court has been invited to pronounce on the vires of the Act.

75. Coal continues to be an important and scarce natural resource. Nothing more is required to establish the same than the very *lis* over it. It forms an important raw material in the production of vital final products. Also, it forms a kind of fuel, which drives power plants. A monopoly, undoubtedly, stood created by the Nationalisation Act. The mines, which were the subject matter of the Act, stood vested with the Central Government. The first appellant is a Government Company, which came into being, as contemplated under Section 5 of the Nationalisation Act. The appellant-Company operates the mines. It is tasked with the power and the duty to distribute coal. This attracts the Directive Principle enshrined in Article 39(b). The said Directive Principle contemplates that the 'State' should direct its policy towards securing that the ownership and control of the 'material resources' are so 'distributed' so as to 'subserve the common good'. The argument of the appellants is partly based on the dictate of Article 31(B), which, together with the Ninth Schedule, the insertion in which Schedule, immunizes laws from being invalidated on the ground that they take away or abridge Fundamental Rights. The Nationalisation Act was inserted in the Ninth Schedule on 10th August, 1975. We are not, in this case, called upon to sit in Judgment over the insertion of the Nationalisation Act on the basis that it is violative of the basic structure of the Constitution in terms of what has been laid down in I.R. Coelho *(supra)*. We proceed on the basis, therefore, that the Nationalisation Act was insulated by virtue of Article 31B. Equally, we proceed on the basis that it can be treated as a law giving effect to the policy of the State towards securing the principles enshrined in Article 39(b).

76. Here we are not dealing with a plea to overturn the Nationalisation Act on the score that it is violative of any of the Fundamental Rights. The Nationalisation Act was enacted to vest in the Central Government, the rights of the lessees in the coal mines so that they could be operated so as to ensure the rational, coordinated and scientific development and utilization of the coal resources consistent with the growing requirements of the country. The Preamble clearly indicates that the Law-Giver had in mind the goal in Article 39(b), viz., acquiring ownership over coal mines so that coal mined from the mines could be so distributed so that common good was best subserved. The Statement of Objects and Reasons of Act 67 of 1976, by which the Nationalisation Act was amended, indicated that after the nationalisation took place, persons holding mining leases took to unauthorized mining and in a most reckless and unscientific manner. This was noted to be without bearing in mind considerations of conservation, safety and the welfare of the workers. A valuable national asset was being destroyed. There were safety concerns. Large profits were being reaped but by paying very low wages to the workers. All privately held coal leases were brought under the umbrella of the Nationalisation Act except those held by privately owned steel companies. The Nationalisation Act came to be again

amended by Act 22 of 1978. Thereafter, again it was amended by Act 57 of 1986 and finally by Act 47 of 1993. Suffice it to notice that with the commencement of the Coal Mines Nationalisation (Amendment) Act, 1976 on 29.04.1976, carrying on a coal mining operation or leasing for mining coal by any private party, was prohibited.

77. Section 11 of the Nationalisation Act contemplates that the general superintendence, direction, control and management of the affairs and business of a coal mine, where the right of an owner, stood vested in the Central Government under Section 3, would stand vested in the Government Company specified in terms of the direction made by the Central Government under Section 5. The first appellant is a Government Company, which was wholly owned by the Central Government and was the Company contemplated under Section 5 and, therefore, the general superintendence, direction, control and management of all the mines, ownership of which stood vested in the Central Government, vested with the first appellant. The first appellant is the holding Company and there are subsidiary companies. Reliance is placed on the Judgment of this Court rendered in the context of Article 324 of the Constitution. It is true that the said Article, which deals with the powers of the Election Commission of India, employs the words general superintendence, direction and control of, inter alia, for the conduct of all elections to Parliament and the State Legislatures, apart from elections to the Office of the President and the Vice-President. It is, undoubtedly, true that this Court has held that the words 'superintendence, direction and control', are words of the widest import. It is subject to limitations, flowing from constitutional provisions, binding laws and directions, which may be issued by the Courts. It is true that the Election Commission of India has been clothed with the plenary jurisdiction. We must, no doubt, not lose sight of the fact that Article 324 deals with one of the most important Constitutional Functionaries. The importance of holding free and fair elections, cannot be understated. Even, according to the appellants, the appellants are bound to act in accordance with Presidential Directives and the extant policy in the superintendence, control and management of the affairs of the nationalized mines. It may not be appropriate to describe the power, therefore, as fully akin to the powers that vests with the Election Commission of India under Article 324. However, we do agree that subject to such directives and policy considerations, there is a large measure of power with the appellants. The appellants cannot, however, seek immunity from the operation of laws, which otherwise bind them. In fact, Shri K.K. Venugopal did state at the bar that the appellants are not impervious to the operation of laws, which would otherwise apply.

78. Exception, however, is taken by the appellants to the applicability of the Act. This objection is founded upon the inconsistencies and consequent anomalous results, which would arise from the Act being applied to the appellants. We have already captured the various perceived inconsistencies in paragraphs-10-12.

79. Before we proceed to deal with the grievances of the appellants, we must undertake a survey of the Act to ascertain, whether the Act, in any manner, advances the case of the appellants. The Act has been made in the year 2002 and it was not a pre-existing Statute. When the National Act was made, central to the scheme of the Act, is the expression 'enterprise', as defined in Section 2(h) of the Act. Let us decode it. An 'enterprise' is defined as a person or a Department of the Government. Let us pause here for a moment. The word 'person' has been defined in Section 2(l) as including a company, a corporation established by or under any Central, State or Provincial or a Government Company, as defined in Section 617 of the Companies Act, 1956. We need not probe further. The appellant is a Government Company within the meaning of Section 617 of the Companies

Act, 1956. Therefore, the appellant is a person within the meaning of Section 2(h). The next limb of Section 2(h) contemplates that the person is one, 'who' or 'which is'. Being an artificial person, the appropriate word is 'which'. Therefore, the first appellant is a person, which is or has been engaged in any activity. The activity must relate to the production, storage, supply, distribution, acquisition or control of articles or goods. There can be an enterprise under Section 2(h) equally, if the activity relates to the provision of services of any kind, inter alia. We need not deal with the wide width of the other part of Section 2(h). The word 'goods' has been defined in Section 2(i) to mean goods, as defined in Sale of Goods Act, 1930 and includes products manufactured, processed or mined. There cannot be the slightest amount of doubt that the appellant is a person, which is engaged in activity relating to production, storage, supply, distribution and control of goods, as defined in the Act. It may also be within the ambit of Section 2(h) in regard to services it may provide, having regard to the wide words used in Section 2(h).

80. It is noteworthy that the Law-Giver has taken care to expressly include even Departments of the Government separately within the ambit of the word 'enterprise'. Things could not be more clear. The only activity of the Government, which has been excluded from the scope of Section 2(h) and therefore, the definition of the word 'enterprise' is any activity relatable to the sovereign functions of the Government. Sovereign functions would include, undoubtedly, all activities carried on by the Departments of the Central Government, dealing with atomic energy, currency, defense and space.

81. As we have noted earlier on, in answer to a specific query, as to whether the appellants are carrying on any sovereign functions, both Shri K.K. Venugopal and Shri Yaman Verma, would contend that they are not carrying on any sovereign functions. This relieves the Court of undertaking a discussion, which, even otherwise, may be unnecessary, having regard to the nature of the function. The first appellant is not a Department of the Government. It is a Government Company. In fact, what is excluded from the definition of the expression 'enterprise', is a Government Department carrying on Government functions. Carrying on business in mining, cannot, by any stretch of imagination, be described as a sovereign function. There is nothing in the definition which excludes a State monopoly which is even set up to achieve the goals in Article 39(b) of the Constitution.

82. As mentioned earlier, the Act aims at tabooing anti-competitive agreements and thereby promoting competition. It also prohibits abuse of dominant position. What is prohibited is, however, abuse of dominant position by an enterprise or a group. A group has been defined in the context of Section 5 which deals with regulation of combination. We find that the appellant answers the description of an enterprise as defined.

83. When it comes to Section 3, dealing with anticompetitive agreements, it encompasses a prohibition of such agreements by not merely enterprises or association of enterprises but by any person or association of persons.

84. Dealing with abuse of dominant position being the theme of the *lis*, Section 4(1) declares that no enterprise or group shall abuse 'its' dominant position. What is dominant position? The second explanation in Section 4(2) defines that dominant position for the purposes of Section 4 to be 'a position of strength enjoyed by an enterprise in the relevant market in India'. Relevant market has been defined in Section 2(r) to mean "the market which may be determined by the CCI with reference to the relevant product market or the relevant geographic market or with reference to both the markets". The words, relevant product market has been defined in Section 2(t) as meaning "a market comprising all of

those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of its products or services, their prices and intended use". Section 2(s) defines 'relevant geographic market', as meaning "a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas". Thus, the lawgiver has provided for a position of strength enjoyed by an enterprise not in the vacuum. It is not based on any subjective criteria. The question of dominant position must stand answered with reference to carefully thought-out objective norms, as aforesaid. Continuing with the definition of the words 'dominant position', it means a position of strength enjoyed by the enterprise in the relevant market which in turn involves adverting to the relevant geographic market or relevant product market or both as defined and it should enable the enterprise to enjoy the position of strength to operate independently of competitive forces prevailing in the relevant market. Another test to find out whether the enterprise enjoys a dominant position is to find out the said position with reference to its ability to "affect its competitors or consumer or the relevant market in its favour".

85. The Act further expatiates and dwells on the method to find out dominant position. Section 19(4) enumerates the factors to be considered. We have referred to Section 19(4)in paragraph-66.

86. The CCI is bound to take into consideration the factors which have been indicated. Section 19(4) in fact, empowers the CCI to have regard to "all" or "any" of the factors to arrive at the finding that an enterprise enjoys a dominant position or not. Does not this mean that even a single factor being "any" factor may form the foundation to find whether an enterprise enjoys dominance? We would think that in a given case the answer would be in the affirmative. Closer home in the facts we find that Section 19(4)(g) declares that "monopoly" or "dominant position", whether acquired as a result of the Statute or by virtue of being a Government Company or a Public Sector Undertaking or otherwise, is to be a relevant factor. We will at once notice that this is a clear indication that far from excluding governmental bodies like a government company, a public sector undertaking or a body under a Statute from the purview of the Act, the lawgiver has evinced its intention to include government companies, public sector companies and bodies acquired under a Statute within the ambit of the Act. Now, we proceed on the basis that the appellant is a monopoly. Further that it is a government company within the meaning of Section 5 of the Nationalisation Act. The interplay of Sections 3, 5 and 11 of the Nationalisation Act has the said inevitable effect. A monopoly position under Section 19 (4)(g) is treated essentially as being in the league of a dominant position.

87. But does the inquiry end on an enterprise answering the description of a monopoly or having a dominant position pertinent to Section 19(4)(g)? In a given case, it may. On the other hand, in the facts, it may provide the CCI with one part of a larger whole. Other factors whether expressly culled out or forming part of the inexhaustibly large residuary clause, viz., Section 19(4)(m), may be projected to contend that, in reality, despite its appearance, it is wholly but deceptive. In other words, the CCI may be invited to have a cumulative view of all the factors which are relevant in a given case. In fact, the learned Additional Solicitor General fairly states that the factors may be read as cumulative.

88. Apposite in the facts is Section 19(4)(k). It requires the CCI to factor in social obligations and social cause. Equally, we may notice Section 19(4)(l). It declares the relative advantage by way of contribution to economic development having or likely to have an appreciable effect on competition to be a relevant factor. What we have

deliberately omitted and now supply are the following words to be found in Section 19(4)(l). They are the words "by the enterprise enjoying the dominant position". Therefore, being found in a dominant position under Section 19(4)(g) is only one of the factors. We do not intend to elaborate further on the scope and impact of the other factors. It would all depend upon the facts of the individual case. Equally, we may only indicate, that, in particular, countervailing buying power would be a relevant factor. Section 26 provides for the procedure for holding the inquiry employing the methods declared in Section 19(4) to find the presence or absence of dominant position. Section 26 contemplates the CCI acting on:

a. Reference by the Central Government or a State Government or a statutory authority.

b. Information given under Section 19 of the Act.

c. On its own motion.

89. Section 26 contemplates that, in such conditions, if the CCI forms an opinion that a *prima facie* case exists, then, it should direct the Director General to cause an investigation into the matter. Under Section 26(2), the CCI may close the matter, if it finds that there exists no *prima facie* case. The Director General is obliged to submit a report on his findings. The CCI is to forward the report to the parties. The Director General may recommend that there is no contravention of the Act. In such an eventuality, the CCI is obliged to invite objections or suggestions on the said report. The CCI may thereafter decide to close the matter after considering the objections or it may order further investigation or further inquiry by the Director General. The CCI may itself proceed with the further inquiry. Under Section 26(8), if the recommendation by the Director General points to contravention of any of the provisions of the Act, and the CCI is of the opinion that further inquiry is to be held, it must hold an inquiry. Section 27 speaks about the orders that may be passed in the case of anti-competitive agreements and abuse of dominant position. The orders which may be passed include a direction to discontinue abuse of dominant position as found in the case of abuse of dominant position. The CCI may impose penalty as provided therein. It can direct modification of the agreement. It can also direct the enterprise to abide by the orders that the CCI may pass. It has a residuary power to pass any other order as is deemed fit. Section 28, no doubt, contemplates a division. Section 31 deals with orders that may be passed on certain combinations. Chapter V deals with the duty of the Director General. The Director General is provided with powers available to the CCI under Section 36(2). We may notice in this regard that the CCI under Section 36 is to be guided by Principles of Natural Justice and subject to the provisions of the Act and any of the Rules made by the Central Government, the CCI is to have powers to regulate its own procedure. Section 36(2) confers powers vested in a civil Court in regard to certain matters on the CCI. Section 36(3) is significant. It reads:

"The Commission may call upon such experts, from the fields of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary, to assist the Commission in the conduct of any inquiry by it."

90. We have already noticed that the CCI itself is to consist of persons of ability, integrity and standing who have special knowledge of and such professional experience of not less than 15 years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy. We notice this for the reason that both the composition of the CCI and it being enabled to call for inputs from experts would go a long way in assuring

the Court that the decision-making process would be meticulous, fair and informed. There is also a provision for an appeal to the Tribunal and further appeal to the Supreme Court.

91. As contended by the learned Additional Solicitor General in the matter of proceeding under Section 4 read with Section 19 of the Act, in the matter of abuse of dominant position, there are three stages. There must be an enterprise as defined or a group as provided under Section 5. Once it is so found, then, it must be inquired as to whether the said enterprise or group enjoys a dominant position. We have explained how this is to be found with the aid of Sections 19(4) and the second explanation to Section 4. After it is found that there is an enterprise or group which enjoys a dominant position, the matter progresses to the third stage. At this stage, the CCI would have to inquire in an appropriate case as to whether there is abuse of dominant position by the enterprise or group. The third stage is embraced by Section 4 (2) of the Act. Under Section 4(2), the law giver has declared certain acts or omissions to constitute abuse of dominant position. We have already extracted the provision. While on Section 4, we posed the question as to whether Section 4(2), which declares that there shall be an abuse of dominant position, if the facts attract Clauses (a) to (e), is a species of a genus, which genus is contained in Section 4(1). In other words, is Section 4(2) exhaustive of abuse of dominant position prohibited under Section 4(1) or is it only illustrative of what can constitute abuse of dominant position? The learned Additional Solicitor General would submit that this question may not be gone into in the facts of this case. We agree with his request.

92. Dealing with what would indeed constitute abuse of dominant position as declared imperatively in Section 4(2), if we take Section 4(2)(a), it forbids imposing of unfair or discriminatory condition in purchase or sale of goods and services either directly or indirectly. It further likewise forbids an imposition of an unfair or discriminatory price in purchase or sale including a predatory price of goods or service. The explanation indicates that discriminatory conditions or prices, which may be adopted to meet competition, is not within the scope of the mischief. Next, under Section 4(2)(b), the Law-Giver has proclaimed that there will be abuse of a dominant position by an enterprise or group if it limits or restricts production of goods or provision of services or market therefor.

93. The appellants are Government Companies. They were brought into being in the context of Sections 3 and 5 of the Nationalisation Act. Undoubtedly, they were created to take the place of the Central Government in the matter of supervising control and managing the affairs of the mines. Still further, and, more importantly, the Nationalisation Act itself was intended to achieve the goals in Article 39(b) of the Constitution. This means that the Nationalisation Act contemplated coal to be a material resource and it was to be distributed so as to subserve common good. The exclusive right in regard to the mines as also the power to manage and supervise the mines was vested with the first appellant company and its subsidiaries. The ambit of the power is unquestionably wide. We proceed on the basis that the appellants cannot be oblivious to its duty to bear in mind the sublime goal in the Directive Principle, *viz*., "distribution", so as to subserve the 'common good'. We agree further that the expression State for the purpose of Part IV of the Constitution is to be understood with reference to its meaning in Article 12 contained in Part III having regard to Article 36 of the Constitution. The appellants may qualify as State for the purpose of Chapter IV if it fulfills the requirement of State under Article 12. We bear in mind in this regard the argument of the appellants that a remedy is open to a party against the appellant in proceedings under Article 226 or Article 32 of the Constitution. Thus, the appellants also, even if the appellants are Government Companies but being State, have a duty to keep uppermost, in their minds, the goal in Article 39(b). The argument runs that

it would require countenancing an irreconcilable conflict between such a duty and the mandate of Section 4 (2) of the Act. To be more specific, the contention goes that the appellants would have to follow the policy of the Government of India in regard to coal, be it in the matter of pricing or any other matter. There may be necessity to resort to differential pricing so as to encourage captive coal production. If this is to be treated as being discriminatory or unfair within the meaning of Section 4(2)(a), the question that is posed is how can the appellant company which is the product of the Nationalisation Act, a monopoly under the same and obliged to observe the mandate of Article 39(b) achieve its undoubted goal or perform its unquestionable duty under law. The answer of the respondents is that questions are being raised in the abstract. The Act overrides all laws to the extent of their inconsistency with the Act. It is also contended that as far as the question relating to compliance with Presidential Directives is concerned, if there is a bona fide adherence to Presidential Directives, it may pass muster. In fact, Shri Matrugupta Mishra, learned Counsel, would point out that it is his complaint that the appellant is not even following the Presidential Directives. The respondents would point out that questions are being raised in the air without there being foundation on facts. Next, coming to the placing of restrictions or limits on the production of a mineral like coal, there may be Doctrines like Public Trust and Intergenerational Equity.

94. The State and its agencies may have to put a cap on production of vital resources if they are not inexhaustible. A question may be raised if a bona fide decision is taken by the appellants that 'slaughter mining' which leaves little for the future must be avoided, would it fall foul of Section 4(2)(b) of the Act? Appellants also contended that as State, the dictate of common good contained in Article 39(b) may require of it to promote the interest of backward areas. The question posed is would it be brushed with the paint of unfairness or discrimination which is anathema to the Act.

95. We have already noticed the report of the Raghavan Committee. We have also perused the scheme of the Act. We have culled out the consequences, which flow from the Nationalisation Act. The economic condition of the country at the time of its independence in 1947 stands in stark contrast to its condition at varying points of time thereafter. In the initial stages, for understandable reasons, particularly, bearing in mind the need for the State to be the prime mover of the economy, huge investments by the State had to be made. Public sector units became the arm for the State to realize its economic goal, which, at the earlier point of time, was to consist of building up the requisite infrastructure. The public sector units fulfilled more roles than one. Not only were the units to produce goods but they were also burdened with the goal of providing employment. The economic policy of the State had a distinct socialist flavour. No doubt, under the Five-Year Plans, what was contemplated was, a mixed economy. The economy was highly regulated. Out of sheer necessity, perhaps, taxation had to be maintained at high levels. From being a toddler, the economy slowly grew. As the life of the nation progressed, the aspirations of its people, not unnaturally, also expanded. The economic life of a nation can never be perceived in isolation. No nation can remain unaffected by the changes in the state of the world economy. Policies, which are suitable at a given point of time, are not cast in stone. Each generation of people have the right as also the duty to revisit economic policies which found favour with the past. The present cannot put posterity in chains. Equally, the past cannot hold the present hostage to ideas which would then degenerate into what was once original and suitable into dogma which no longer can serve the people.

96. The expression 'common good' in Article 39(b) in a Benthamite sense involves achieving the highest good of the maximum number of people. The meaning of the words

'common good' may depend upon the times, the felt necessities, the direction that the Nation wishes to take in the future, the socio-economic condition of the different classes, the legal and Fundamental Rights and also the Directive Principles themselves. As far as the time dictated content of common good goes, it simply means that 'economics' itself not being bound in chains, but it is a dynamic concept. The attainment of common good would be dependent on the appreciation and understanding of a generation as to how economic common good is best achieved. The debate between the advantages and disadvantages of pursuing the policy of State intervention in economic policy which emasculates private enterprise and competition has almost reached its end. The advantages of a fearlessly competitive economy have been realized by the Nation. There is a backdrop to it. In the year 1991, the Nation was in a manner of speaking compelled to revisit its economic policy having regard to the precarious condition of its foreign exchange reserves. The permit raj, which involved acute regulation of economic activity by the State with all its attendant evils, cried out for reforms. A slew of highly liberal reforms in 1991 set the stage for the Nation to make a paradigm shift. As discussed in the Raghavan Committee Report, things moved further in the direction of attaining faster economic growth. The Act is a measure which is intended to achieve the same. The role which was envisaged for the public sector company could not permit them to outlive their utility or abuse their unique position. Disinvestment done in a proper manner was perceived as a solution. However, sans disinvestment, State Monopolies, Public Sector Companies and Government Companies were expected to imbibe the new economic philosophy. The novel idea, which permeates the Act, would stand frustrated, in fact, if State monopolies, Government Companies and Public Sector Units are left free to contravene the Act. Now that the Nation was more than 50 years old after it became a Republic and it no longer was the infant it was, Parliament which best knows the needs of its people, felt that the time was ripe for ushering in the wholesome idea of fair competition. Can it be said that free competition as envisaged under the Act which involves avoidance of anti-competitive agreements, abuse of dominant position and regulation of combinations are against the common good? As to how common good is best served is best understood by the representatives of the people in the democratic form of Government. We must bear in mind the wholesome principle that when Parliament enacts laws, it is deemed to be aware of all the existing laws. Properly construed and operated fairly, the 'Act' would, in other words, harmonise with common good. being its goal as well.

97. Therefore, we proceed on the basis that Parliament was aware of the Nationalisation Act. We must also take into consideration the fact that coal stood removed from the list of essential commodities under the Essential Commodities Act in February, 2007. The express reference in Section 19(4)(g) of the Act to monopolies created under Statutes as also Government Companies and Public Sector Units for determining existence of dominant position, undoubtedly, indicates the intention of Parliament to bring State Monopolies, Government Companies and Public Sector units within the purview of the Act. The Raghavan Committee Report provides an invaluable input.

98. We may bear in mind that Government Departments are also expressly covered within the expression 'enterprise' under the Act. No doubt, Departments discharging sovereign functions are excluded but save those Government departments which are excluded, the Government Departments being State, are equally obliged to bear in mind the Directive Principles. The radical nature of the law contained in the Act has made a perceptible departure from the erstwhile law contained in the MRTP Act. We have noticed Section 3 of the MRTP Act, which sought to protect Government entities, as provided therein, from the reach of the MRTP Act. The fact that Government Departments, which

follow policies of the Government, are expected to comply with the Act, has a deep impact on the contentions of the appellant that they are outside of the purview of the Act. It would involve elevating the appellants to a status above that of a Government Department to approve of the argument that Article 39(b), would allow the appellants to resist action under the Act, when it does not allow the Government Department, under which, in fact, the appellants operate to do so.

99. What actually Article 31B and Article 31C purport to provide for is constitutional immunity for the laws covered by the same from challenge on the ground that they fall foul of the Fundamental Rights as provided therein. In other words, the Courts cannot invalidate the laws covered by the said Articles. We may agree with the appellants that apart from providing protection to the laws, the Directive Principles would continue to govern 'State', which would include its instrumentalities, having regard to Article 12 read with Article 36. Here, we may notice one aspect. Even where State and its instrumentalities are obliged to follow the Directive Principles, it cannot, in their actions, act in an unfair or discriminatory fashion. Even the appellants agree that judicial review, under Article 226, is permissible.

100. It is the appellants' contention that Section 60 of the Act may not avail the respondents to contend that the Nationalisation Act would pale into insignificance and irrelevance when it cannot square with the provisions of the Act. Section 28 of the Nationalisation Act, on the other hand, is set up to counter the argument. What is more, decisions of this Court in *Employees Provident Fund Commissioner* v. *Official Liquidator of Esskay Pharmaceuticals Limited*[23] and *Sanwarmal Kejriwal* v. *Vishwa Coop. Housing Society Ltd. and Others*[24] are enlisted in support. In *Sanwarmal Kejriwal* (supra), the question, which was considered was, whether the protection under Section 15A of a rent control law would not be available to a person on whom a fictional status of tenant was conferred. This was as Section 91 of the Maharashtra Cooperative Society Act provided for eviction of a person from a flat. The Court harmonized both the Acts by holding that in matters governed by the earlier Rent Act, its provisions would continue to apply.

101. In *Employees Provident Fund Commissioner* (supra), the question which arose was whether the priority given to the dues payable by an employer under the employees under Section 11A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 was subject to Section 529A of the Companies Act, 1956. Under Section 529A, workers' dues and debts due to secured creditors was to be paid in priority to all other debts. This Court held that the EPF Act was a social welfare legislation. Section 11(2) of the EPF Act declared that any amount due under the Act shall be the first charge in priority to all other debts including debts due to a Bank which was found to be falling under the category of a secured creditor. It is in the context of the statutes and the object sought to be achieved that this Court held that a non-obstante clause contained in the later Act, viz., the Companies Act, 1956, would not prevail. This Court held, in paragraphs-42 and 44, as follows:

"42. The argument of Shri Gaurav Agrawal that the non obstante clause contained in the subsequent legislation i.e. Section 529-A(1) of the Companies Act should prevail over similar clause contained in an earlier legislation i.e. Section 11(2) of the EPF Act sounds attractive, but if the two provisions are read in the light of the objects sought to be achieved by the legislature by enacting the same, it is not possible to agree with the learned counsel. As noted earlier, the object of the amendment made in the EPF Act by Act 40 of 1973 was to treat the dues payable by the

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[23] (2011) 10 SCC 727

[24] (1990) 2 SCC 288

employer as first charge on the assets of the establishment and to ensure that the same are recovered in priority to other debts. As against this, the amendments made in the Companies Act in 1985 are intended to create a charge pari passu in favour of the workmen on every security available to the secured creditors of the company for recovery of their debts. There is nothing in the language of Section 529-A which may give an indication that the legislature wanted to create first charge in respect of the workmen's dues, as defined in Sections 529(3)(*b*) and 529-A and debts due to the secured creditors.

44. Another rule of interpretation of statutes is that if two special enactments contain provisions which give an overriding effect to the provisions contained therein, then the Court is required to consider the purpose and the policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions."

102. Apparently, the Court apart from noticing the objects sought to be achieved by the enactment took into consideration the fact that Section 529A of the Companies Act did not give any indication that the lawgiver wanted to create a first charge in respect of the preferred creditors under the said provision whereas a first charge stood created under the EPF Act.

103. In the context of Section 28 of the Nationalisation Act read with the object of the Act and bearing in mind the scheme of the Act and the language employed as it is, we would think that the later enactment must prevail. This is subject to what we shall hold hereinafter.

104. We do not think that the appellants have indicated any decision of this Court which would establish the appellants' case.

105. In *Ashoka Smokeless Coal India (P) Ltd. v. Union of India*[25], the Court was concerned with the validity of the decision taken by the first appellant herein to go in for e-auction of coal. It must be noticed that the judgment was pronounced on 01.12.2006. At that time, coal was an essential commodity under the Essential Commodities Act. This aspect is echoed in the Judgment. The Court went on to hold that the holding of e-auction did not amount to price fixation. In the course of its Judgment, the Court, *inter alia* held:

"106. It may not be correct to say that any action which is not in consonance with the provisions of Part IV of the Constitution would be ultra vires but there cannot be any doubt whatsoever that the principles contained therein would form a relevant consideration for determining a question in regard to price fixation of an essential commodity. Directive principles of State policy provide for a guidance to interpretation of fundamental rights of a citizen as also the statutory rights.

109. It may be true that prices are required to be fixed having regard to the market forces. Demand and supply is a relevant factor as regards fixation of the price. In a market governed by free economy where competition is the buzzword, producers may fix their own price. It is, however, difficult to give effect to the constitutional obligations of a State and the principles leading to a free economy at the same time. A level playing field is the key factor for invoking the new economy. Such a level playing field can be achieved when there are a number of suppliers and when there are competitors in the market enabling the consumer to exercise choices for the purpose of procurement of goods. If the policy of the open market is to be achieved the benefit of the consumer must be kept uppermost in mind by the State."

106. In paragraph-111, the Court, inter alia, held as follows:

"111. The State when it exercises its power of price fixation in relation to an essential commodity, has a different role to play. Object of such price fixation is to see that the ultimate consumers obtain the essential commodity at a fair price and for achieving the said purpose the profit margin of the manufacturer/producer may be kept at a bare minimum. The question as to how such fair

[25] (2007) 2 SCC 640

price is to be determined stricto sensu does not arise in this case, as would appear from the discussions made hereinafter, as here the Central Government has not fixed any price. It left the matter to the coal companies. The coal companies in taking recourse to e-auction also did not fix a price. They only took recourse to a methodology by which the price of coal became variable. Its only object was to see that maximum possible price of coal is obtained. … ."

107. We may notice here that the observations were made at the time when coal was an essential commodity. Coal ceased to be an essential commodity after the date of the Judgment in February, 2007. We are not for a moment holding that coal has ceased to be a vital national resource. All that we are observing is that, the basis for the observations in paragraph-111, stood removed.

108. The Court went on to hold further:

"113. The State or a public sector undertaking plays an important role in the society. It is expected of them that they would act fairly and reasonably in all fields; even as a landlord of a tenanted premises or in any other capacity. (See *Baburao Shantaram More* v. *Bombay Housing Board* [AIR 1954 SC 153 : 1954 SCR 572] SCR at p. 577, *Dwarkadas Marfatia & Sons* v. *Board of Trustees of the Port of Bombay* [(1989) 3 SCC 293 : (1989) 2 SCR 751] SCR at pp. 760, 762 and *Pathumma* v. *State of Kerala* [(1978) 2 SCC 1 : (1978) 2 SCR 537] SCR at p. 545.)"

109. Still further, we find that in paragraph-115, it has been held that "coal companies are monopolies within the meaning of the provisions of the Nationalisation Act".

110. It is again observed in paragraph-118 that the first appellant and its subsidiary company enjoyed the monopoly of production, distribution and sale thereof.

111. We may further notice that in paragraph-167, this Court held:

"167. In fact the decisions of this Court on price fixation also point out that although a reasonable profit may be permissible, profiteering would not be."

112. Finally, we find the following observations to be found in paragraph-193:

"193. However, discussions made hereinbefore should not be taken to lay down a law that the Central Government and for that matter the coal companies cannot change their policy decision. They evidently can; but therefor there should be a public interest as contradistinguished from a mere profit motive. Any change in the policy decision for cogent and valid reasons is acceptable in law; but such a change must take place only when it is necessary, and upon undertaking of an exercise of separating the genuine consumers of coal from the rest. If the coal companies intend to take any measure they may be free to do so. But the same must satisfy the requirements of constitutional as also the statutory schemes; even in relation to an existing scheme e.g. Open Sales Schemes, indisputably the coal companies would be at liberty to formulate the new policy which would meet the changed situation. E-advertisement or e-tender would be welcome but then therefor a greater transparency should be maintained.

113. The appellants rely upon the judgment of this Court in *State of Tamil Nadu and Others* v. *L. Abu Kavur Bai and Others*[26] for the proposition that the scheme of monopoly or nationalisation subserves public good. In the said case, the Court was dealing with a case of nationalisation of transport services. There can be no quarrel with the proposition that the purpose of the Nationalisation Act was indeed to subserve the common good as held in *Tara Prasad Singh and Others v. Union of India and Others*[27]. The purpose of the vesting under the Nationalisation Act was to distribute the resource to subserve the common good. (See paragraph-32)

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[26] (1984) 1 SCC 515
[27] 1980 (4) SCC 179

114. We may, in fact, notice the concern of the Court about coal being not inexhaustible and the need for a wise and planned conservation of the resources being expressed in paragraph-39. No doubt, all this was at the time when the Nation was confronted with the condition of the mines being what it was as brought out in the Statement of Objects.

115. We agree with the appellants and as held by this Court in *State of Karnataka and Another* v. *Shri Ranganatha Reddy and Another*[28] that distribution is a word of wide meaning and it is covered by Article 39(b) of the Constitution. It must be remembered that the Court had occasion to hold so by way of dealing with the argument that nationalisation did not have a nexus with the word distribution.

116. The Judgment of this Court in *Waman Rao and Others* v. *Union of India and Others*[29] holds that laws passed to give effect to Article 39(b) and 39(c) could not be found violative of Article 14. There cannot be any quarrel. We are, in this case, called upon to deal with the case based on the actions taken by the appellant, which is a Government Company based on its powers under the Nationalisation Act, being challenged on the anvil of a later law made by Parliament, the validity of which, relevantly is not under challenge.

117. Distribution of coal is intended to subserve common good holds this Court in *Samatha v. State of A.P. and others*[30]. The content of common good is itself not a static concept. It may take its hue from the context and the times in which the matter falls for consideration by the Court. If Parliament has intended that State monopolies even if it be in the matter of distribution must come under the anvil of the new economic regime, it cannot be found flawed by the Court on the ground that subjecting the State monopoly would detract from the common good which the earlier Nationalisation Act when it was enacted, undoubtedly, succeeded in subserving. We see no reason to hold that a State Monopoly being run through the medium of a Government Company, even for attaining the goals in the Directive Principles, will go outside the purview of the Act.

118. We have projected some of the concerns of the appellants in the matter of the appellants being disabled to put up a justifiable defense under Section 4 of the Act.

119. It is true that the actions of the appellants can be challenged in proceedings in judicial review as contended by the appellants. Equally, the appellants are justified in pointing out as a matter of fact that there may be forums other than the CCI such as the Controller of Coal whereunder redress may be sought against action of the appellants. But that by itself, cannot result in denial of access to a party complaining of contravention of a law which is otherwise applicable. It must also be remembered that action can also be taken by the CCI *suo motu*. Such is the width of the power vouchsafed for the authority under the Act.

120. We would only clarify that it will be open to the appellant as the State monopoly to take up all contentions to demonstrate that there is no abuse of the dominant position. Be it differential pricing or a decision to limit or restrict production, if it is part of national policy or based on Presidential Directives and the appellant raises such a contention after bonafide following the Directives or policy themselves, it may be a matter, which the CCI would have to consider in deciding whether there is abuse of dominant position. If the appellants answer the description of State in Article 36, then there is a continuing duty to pay obeisance to the Directive Principles. The Act cannot result in transforming the

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[28] 1977 (4) SCC 471
[29] (1981) 2 SCC 362
[30] (1997) 8 SCC 191

appellants into mere profit-making engines or require of them to be oblivious to their obligations under the Constitution. But that cannot equally mean that they can act with caprice, or unfairly or treat otherwise similarly situated persons or things with discrimination. We do not say more as the matter must be considered on its own merits both in the appeal as in all the transferred cases. We may only add that in judicial review the appellants would be held to the standard of fairness as also the duty not to discriminate. The appellants cannot resist the imposition of standards of fairness and the duty to avoid discriminatory practices when a specialized forum has been created by Parliament under the Act where also apart from the CCI being an expert body, it can seek and receive valuable inputs from experts and what is more, the matter is preceded by the report of Director General of Investigation.

CONFLICT BETWEEN SECTION 28 OF THE ACT AND SECTION 32 OF THE NATIONALISATION ACT

121. Section 28 of the Competition Act, 2002, reads as follows:

"28 (1) The Commission may, notwithstanding anything contained in any other law for the time being in force, by order in writing, direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position. (2) In particular, and without prejudice to the generality of the foregoing powers, the order referred to in sub-section (1) may provide for all or any of the following matters, namely:— (a) the transfer or vesting of property, rights, liabilities or obligations; (b) the adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise; (c) the creation, allotment, surrender or cancellation of any shares, stocks or securities; 48(d) [Omitted by Competition (Amendment) Act, 2007] (e) the formation or winding up of an enterprise or the amendment of the memorandum of association or articles of association or any other instruments regulating the business of any enterprise; (f) the extent to which, and the circumstances in which, provisions of the order affecting an enterprise may be altered by the enterprise and the registration thereof; (g) any other matter which may be necessary to give effect to the division of the enterprise. (3) Notwithstanding anything contained in any other law for the time being in force or in any contract or in any memorandum or articles of association, an officer of a company who ceases to hold office as such in consequence of the division of an enterprise shall not be entitled to claim any compensation for such cesser."

122. It is, undoubtedly, true that there has been a vesting of rights in regard to the mines under the Nationalisation Act. Still further, there has been a vesting under Section 5 of the Nationalisation Act of the rights of the lessee in the first appellant. Under Section 11 of the Nationalisation Act, the power of general superintendence, direction, control and management of the vested minds, vest in the first appellant-Company. If Section 28 of the Act is evoked and a direction is given to order division, undoubtedly, it would be inconsistent with the provisions of the Nationalisation Act.

123. There are certain salient features to be noticed. In the first place, there is no challenge to the Act. Secondly, taking the Act as it plainly reads, the power to order division and, what is more, all the things enumerated in Section 28(2), are clearly conferred on the CCI. Apart from the general non-obstante Clause contained in Section 60 of the Act, a noticeable feature about Section 28 of the Act is that it is made even more clear, apparently, by way of abundant caution in Section 28(1), that all that the CCI could order would be notwithstanding anything contained in any other law for the time being in force. Parliament has authored both the Nationalisation Act as also the Act. There is no question of lack of legislative competence. We are not called upon to pronounce on the vires of the Act. There is absolutely no scope, at any rate, for reading down the provision even proceeding on the basis that an attempt can be made even in the absence of the challenge. The words of the provision do not admit of reading down the same. What

follows is, therefore, Parliament has intended, in order to ensure the proper implementation of the Act, confer power to order division of an enterprise enjoying dominant power. This would include the appellants as well. We must, no doubt, understand the provision to mean that it is not a power to be exercised lightly. It is a special power intended to ensure prevention of abuse of dominant position. The generality of the power is revealed in Section 27. We incidentally notice that though there can be abuse of dominant position by an enterprise and a group, which is sought to be prohibited, Section 28 speaks about the division of an enterprise. Having regard to the discussion above, we find no merit in the case sought to be made for escaping from the net of the Act.

124. Section 54 of the Act gives power to the Central Government to exempt from the application of the Act or any provision and for any period, which is specified in the Notification. The ground for exemption can be security of the State or even public interest. It is not as if the appellants, if there was a genuine case made out for being taken outside the purview of the Act in public interest, the Government would be powerless. We say no more.

125. We would hold that there is no merit in the contention of the appellants that the Act will not apply to the appellants for the reason that the appellants are governed by the Nationalisation Act and that Nationalisation Act cannot be reconciled with the Act. This is subject to the appellants having all the rights to defend their actions under the law and as indicated hereinbefore. The transferred cases shall be sent back so that they may be dealt with on their own merits. The transferred cases are disposed of.

126. Equally, the Appeal shall be posted for being dealt with on its own merits. The interlocutory applications seeking interim relief in the pending Appeal shall be listed in the second week of July, 2023. The contempt petition shall stand listed in the second week of July, 2023. The Applications filed in connection with I.A. No. 66587 of 2017 shall stand disposed of.