C.E.S.C. Limited Vs Union of India (UOI)

Court: Calcutta High Court

Date of Decision: Nov. 23, 2000

Acts Referred: Constitution of India, 1950 â€" Article 226(2)
Electricity (Supply) Act, 1948 â€" Section 57
Electricity Rules, 1956 â€" Rule 26

Citation: (2001) 1 ILR (Cal) 499

Hon'ble Judges: M.H.S. Ansari, J

Bench: Single Bench

Judgement

M.H.S. Ansari, J.
The application G.A. No. 5107 of 1999 as also the writ petition were heard analogously.

2. Brief facts leading to the filing of the instant writ application are that the Petitioner is a licensee under the provisions of the Indian Electricity Act,

1910 and is solely responsible for supply of electricity in the areas specified in its license.

3. One Suresh Agarwal (applicant in G.A. No. 5107 of 1999) claiming himself to be the Hony. Joint secretary of the West Bengal Rolling Mills

Association wrote a letter dated June 6, 1997, addressed amongst others to the Hon''ble Chief Minister of West Bengal, the Finance Minister, the

Minister of power and the Minister of Industries and commerce of West Bengal, the Chief Secretary and the power Secretary to the Government

of West Bengal and also to the Chairman and the Managing Director of the Petitioner wherein allegations have been made inter alia:

i) Abnormal fuel sur-charge charged by the Petitioner C.E.S.C. Ltd. in violation of 9th Schedule of the Electricity (Supply) Act, 1948:

ii) Violation of Sections 45K (3), 45J, 45(2) of Reserve Bank of India (Act 2 of 1934) and Residuary Non-Banking Companies Reserve Bank of

India directions on May 18, 1987:

iii) Inflating the cost of Budge Budge Generating Station and non-compliance of Sections 27, 28 and 29 of the Electricity (Supply) Act, 1948 in

case of revised cost of the Budge Budge Generating Station.

4. A copy of the said letter addressed to the Hon''ble Finance Minister, it is stated, in the affidavit-in-opposition affirmed by H. Banerjee was

served upon the Director General (Investigations,& Registrations) at his office.

5. The said letter dated June 6, 1997, in so far as it related to fuel "sur-charge" charged by C.E.S.C. is concerned, it was treated as complaint

from the Association, allegedly for the reasons that the Petitioner C.E.S.C. has been realising inflated fuel sur-charge from consumers with

retrospective effect. The Director General issued a letter dated August 27, 1997, to the Petitioner u/s 11(2) of the Monopolies and Restrictive

Trade Practices Act, 1969 and thereby proposed to conduct an investigation as in the opinion of the Director General, the complaint has the

ingredient of "restrictive trade practise" as defined u/s 2(o) of the M.R.T.P. Act.

6. The Petitioner has questioned the jurisdiction and authority of the Director General to issue the said letter dated August 27, 1997, or to cause

any investigation on the alleged complaint.

7. The instant writ application is filed by C.E.S.C. praying for a writ upon the Respondents for a declaration that the purported investigation u/s

11(2) of the M.R.T.P. Act is without jurisdiction, ultra-virus, illegal and null and void. Directions have also been sought for declaring the said notice

dated August 27, 1997, as ultra-virus, null and void and of no effect. Consequential directions have been prayed for canceling the impugned notice

dated August 27, 1997, and order of restraint upon the said Respondent to desist from giving any effect and/or further effect thereto.

8. The grounds on which the aforesaid reliefs are claimed by the Petitioner and as averred in the writ application briefly are that;

The fixation of charges by the licensce such as C.E.S.C. is a statutory exercise governed by the provisions of Section 57 read with 6th Scheduled

of Electricity Supply Act and is "not any trade practices." There is no question of violation of the provisions of M.R.T.P. Act.

The profit that a licensee can earn is restricted by the provision of the 6th Schedule of the 1948 Act and the same cannot exceed the reasonable

return permitted under the said Act. In the event, the clear profit of the licensee exceeds the reasonable return in any year of account, the amount in

excess of reasonable return is to be dealt with in the manner prescribed in para. II (1) of the 6th Schedule.

9. It is further averred that the Petitioner C.E.S.C. has been complying with the provisions of Section 11 of the 1910 Act read with Rule 26 of the

1956 Rules and submitting its statutory annual statement of account to the State Government and the West Bengal State Electricity Board. The

cost of fuel and also fuel related cost such as freight and handling cost rises from time to time. Whenever, there is a rise in fuel cost, it is stated,

there is a rise not only in C.E.S.C"s generating costs but also a rise in the charges levied by the West Bengal State Electricity Board and the

Damodar Valley Corporation. The impact of rise in the price of fuel is felt by C.E.S.C. in three ways viz., incremental costs of its own generation,

incremental cost of buying power from the West Bengal State Electricity Board and incremental cost of buying power from the Damodar Valley

Corporation.

10. It is specifically averred that it has become the practice to levy fuel sur-charge separately with the sole objective of recovery of the actual

additional expenditure incurred on the cost of fuel and fuel related items including fuel sur-charge paid/payable for power purchased.

11. it is further stated that the basic tariff of the licensee is based, inter alia, on a pre-determined cost of fuel and the cost of power purchased

based on the pre-determined cost of fuel. Therefore, it is averred, increases above, such (i) pre-determined cost of fuel and (ii) the cost of power

purchased based on predetermined cost of fuel is passed on to the consumers through a formula set out in the tariff schedule.

12. C.E.S.C"s schedule of rates contains a fuel clause, it is averred, which specified the manner in which the fuel sur-charge rate is to be

determined. A copy of the same is annexed to the writ application being Annex. "D".

13. The mechanism of recovery is through provisional computation and thereafter a final computation. The provisional computation is on an

estimate basis i.e. projected Cost of fuel whereas the final computation is done after the end of the financial year based on actuals i.e. the actual

cost of fuel in that year and the final fuel sur-charge rates applicable for the power purchased rates.

14. It has been further averred that both West Bengal State Electricity Board and the Damodar Valley Corporation also levied fuel sur-charge on a

provisional basis from time to time and after the end of each six months period of a year whenever all the fuel related cost are available with them,

they made a final computation of fuel sur-charge rate and adjust the fuel sur-charge rate accordingly.

15. It is the case of the Petitioner that C.E.S.C. has been realising fuel sur-charge from its consumers for many years strictly in accordance with the

formula contained in the schedule of rates.

16. The provisional fuel sur-charge is being realized after taking the State Government into confidence and after considering the suggestion of the

State Government in that regard.

17. It is averred that the government by its letter dated August 1, 1996, forwarded its opinion regarding finalization of fuel sur-charge for the years

1992-93, 1993-94 and 1994-95. A copy of the said letter has been annexed and marked as Annex. "E". The said letter also dealt with

provisional fuel sur-charge far the years 1995-96 and 1996-97. The Government, it is stated, by its letter dated December 24, 1996, made certain

revisions in its earlier opinion regarding the finalization for 1992-93, 1993-94 and 1994-95. Thereafter, C.E.S.C. published a notice dated January

7, 1997, notifying the additional fuel sur-charge payable for the year 1992-93, 1993-94, 1994-95, 1995-96 and 1996-97.

18. In the affidavit-in-opposition, it is stated that the letter of West Bengal Rolling Mills Association dated June 6, 1997, was treated as a

complaint, inasmuch as, it has been contended therein that the Petitioner has been realizing inflated fuel sur-charge from consumers with

retrospective effect. The Director General has the statutory duty to make necessary investigation into the complaint and to make appropriate

recommendation to the Commission under the relevant provisions of the M.R.T.P. Act. The complaint based on which the notice was issued by

the Director General, it has been stated in the affidavit-in-opposition, was such that it has the ingredients of restrictive trade practices as defined u/s

2(o) of the M.R.T.P. Act, 1969.

19. Further, it has been stated that the impugned notice dated August 27, 1997, issued to the Petitioner was lawfully issued u/s 11(2) of the said

Act in discharge of the statutory duties. The investigation sought to be conducted u/s 11 of the said Act is in the nature of preliminary fact finding

investigation. Rules of natural justices have been complied with and, therefore, the Petitioner can raise all its objections in reply and there is no just

cause or reason for the Petitioner to avoid the said investigation under the said Act.

20. After the receipt of the impugned notice, it is stated in the affidavit-in-opposition, that Solicitors of the Petitioner by a letter dated September

17, 1997, called upon the Respondent No. 2 to supply a copy of the complaint alleged to have not been received by the Petitioner. Thereafter, the

said advocates by their letter dated September 24, 1997 sought for six weeks time for and on behalf of their client to file a reply to the impugned

notice. Inspite of extension of time granted by the Director General till November 6, 1997, the Petitioner failed and neglected and otherwise

avoided to reply to the impugned notice.

21. On or about November 15, 1997, the said advocates addressed a letter to Respondent No. 2 stating that the matter cannot and does not

attract M.R.T.P. Act and with reference thereto a writ application was filed in the High Court. However, no particulars of the said petition were

disclosed. It was also alleged in the said letter that the matter was sub-judice.

22. As regards the averernents in the writ application in paras. 6 to 36 of the writ petition, the same have not been admitted and it is stated that the

said averments pertain to the investigation and, therefore, the deponent was refraining from dealing with the same. It has, however, been disputed

that the complaint of the West Bengal Rolling Mills Association is not one under the provisions of the M.R.T.P. Act or that the said complaint does

not disclose any restrictive or unfair trade practice. The correctness of such contentions, it is stated, can be considered upon making necessary

enquiry. Similarly stand has been taken with regard to the averements in paras. 42 to 60 of the petition.

23. Before we take up the contentions urged in the writ application, it will be appropriate, in my opinion, to dispose of the impleading application

filed by Suresh Agarwal being G.A. No. 1297 of 1998.

24. Appearing as party in person, Mr. Suresh Agarwal submitted that it is on the basis of his representation dated June 6, 1997, that the

proceedings under the M.R.T.P. Act, 1969 has been instituted against the writ Petitioner. The applicant is thus concerned about the out come of

the investigation so commenced and would be virtually affected by these proceedings. The writ Petitioner filed an affidavit-in-opposition and the

contentions raised therein are that the Petitioner is neither a necessary nor a proper party, no legally enforceable right will be affected if the

Petitioner is not added as a party to the writ petition. The application, it is contended, is patently misconceived and motivated. The misconceived

representation dated June 6, 1997, was addressed to various persons and allegations made therein are motivated, misconceived besides being

false. How the said representation was taken cognizance by the M.R.T.P. Commission is not understood as the. said representation dated June 6,

1997, was not addressed to the Director General of Investigation.

25. Mr. Pal, Learned Senior Advocate for the Petitioner submitted that the applicant is neither a necessary nor a proper party. The alleged

complaint not having been made to the Commission or to the Director General, the applicant cannot be treated as the complaint and cannot claim,

therefore, to be either a necessary or proper party, it was contended by Mr. Pal.

26. In the affidavit-in-opposition filed on behalf of the Director General, an objection has been taken that the complainant is not made a party to

the writ petition despite the Petitioner being aware of the complaint. It has further been stated therein that a copy of the letter of West Bengal

Rolling Mills Association dated June 6, 1997, addressed to Hon''ble Finance Minister was served by complainant upon Director General. The

investigation has been taken up as in the opinion of the Director General, the complainant has the ingredient of restrictive trade practice ad defined

u/s 2(o) of the M.R.T.P. Act.

27. It is thus clear that based upon the complaint the Director General has initiated the enquiry and issued the impugned notice.

28. The applicant, may not be a necessary party but it cannot be said that the applicant is not a proper party.

29. The law as to who are necessary or proper parties to a proceeding is well settled. A necessary party is one without whom no order can be

made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final

decision on the question involved in the proceeding. Being a proper party in that the applicant is the complainant, the application for impleading is

to be allowed and is hereby allowed. Applicant shall be impleaded as a party Respondent to the writ application.

30. As regards the merits of the controversy in the writ application, it must be stated that the newly impleaded party has taken an objection as to

the territorial jurisdiction of this Court. According to Mr. Suresh Agarwal, the party in person, this Court has no territorial jurisdiction to entertain

or hear the instant writ application.

31. The Director General has not raised the question of jurisdiction of this Court nor his learned Counsel Mr. Roy Chowdhury, in his submissions,

raised any objection as to the jurisdiction of this Court.

32. Mr. Pal, Learned Senior Advocate contended that the conduct of the Director General, in the circumstances, would amount to waiver and

submission to the jurisdiction of this Court. Reliance has been placed upon the judgment of Supreme Court in The Bahrein Petroleum Co. Ltd. Vs.

P.J. Pappu and Another,

33. Mr. Pal, Learned Senior Advocate referring to and relying upon the averements in para. 65 of the writ application, wherein, it is stated that the

Petitioner carries on business inter alia, of generation, distribution and supply of electricity within the jurisdiction of this Court, the statutory

accounts are submitted to the Government within the jurisdiction of this Court, the entire statutory, exercise of fixation, of tariff as also imposition of

fuel sur-charge is carried out at Calcutta within the jurisdiction of this Court. The impugned notice as also notices and/or letters of concerned

Respondents have been addressed to and received by the Petitioner at its registered office within the jurisdiction of this Court. The investigation in

relation whereto the impugned notice is issued pertains to the acts of the Petitioner all of which have been carried out within the jurisdiction of this

Court and the effect and impact of such investigation or orders of M.R.T.P. would be felt within the jurisdiction of this Court. A substantial part of

the cause of action, it was strenuously urged, has thus arisen within the jurisdiction of this Court.

34. Mr. Agarwal relied upon a judgment of this Court in Khaitan (India) Ltd. and Ors. v. Union of India and Ors. (supra), wherein a Learned

Single Judge of this Court in A.S.T. No. 641 of 1999 by a judgment and order dated March 18, 1999, dismissed the writ petition, inter alia, on

the ground of lack of territorial jurisdiction on the part of this Court.

35. Mr. Pal drew attention of this Court to the appeal preferred in that case in Khaitan (India) Ltd. and Ors. v. Union of India and Ors. (2) 1999

C.L.T. (H.C.) 478, wherein the Division Bench observed that it was not considered necessary in that case for it to go into the question as to

whether the Court has the territorial jurisdiction or not. It was further observed that the Learned Trial Judge in arriving at the said, finding did not

appear to have assigned any reason whatsoever.

36. The aforesaid judgment in Khaitan''s case (supra) was in relation to the M.R.T.P. Act and in view of the observations of the Division Bench,

noted supra, the question as to the territorial jurisdiction of this Court cannot be said to have been finally adjudicated.

37. It is well settled that in terms of Clause 2 of Article 226 of the Constitution, the maintainability or otherwise of the writ petition in the High

Court depends on whether the cause of action for filing the same arose, wholly or in part within the territorial jurisdiction of that Court. Under

Clause 2 of Article 226, the High Court may exercise its power conferred by Clause (1) of Article 226, if the cause of action, wholly or in part,

had arisen within the territory over which it exercises jurisdiction, notwithstanding that the seat of such Government or authority or the residence of

such person is not within those territories. The words ''cause of action wholly or in part arises'' also appear in Section 20 CPC which section also

deals With the jurisdictional aspect of the Court. As per that Section, the suit could be instituted in a Court within the local limits of whose

jurisdiction the ''cause of action wholly or in part arises''. The same have been interoperated to mean ''the bundle of facts which it would be

necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgment of the Court''.

38. In Oil and Natural Gas Commission Vs. Utpal Kumar Basu and Others, Supreme Court considered at length the question of territorial

jurisdiction under Article 226(2) of the Constitution of India. It was observed therein that in order to confer jurisdiction on the High Court,

Petitioner must show that at least a part of the cause of action had arisen within the territorial jurisdiction of that Court.

39. In the instant case, the question as to the territorial jurisdiction must depend upon whether, the averments made in para. 65 of the writ

application are sufficient in law to establish that a part of the cause of action had arisen within the jurisdiction of this Court.

40. The averments in para. 65 which have been briefly referred to supra, would show that what is under investigation by the impugned notice is the

action of the Petitioner with regard to ''abnormal fuel sur-charge charged by the Petitioner''. The Petitioner C.E.S.C. generates, distributes and

supplies electricity within the jurisdiction of this Court. The averments are to the effect that the statutory accounts are submitted by the Petitioner to

the Government of West Bengal within the jurisdiction of this Court, the entire statutory exercise of fixation of tariff as also imposition of fuel sur-

charge is carried out in Calcutta within the jurisdiction of this Court. The aforesaid action is the subject of investigation by the impugned notice. The

averments made in para. 65 would necessarily require to be traverssed in the proposed investigation and/or before the Commission under the

M.R.T.P. Act. The said averments, in my view, constitute the bundle of facts which would essentially have to be established in the proposed

proceedings before the commission and/or the investigation; proposed under, Section 11 of the Act. In my view, therefore, a substantial part of the

cause of action has arisen within the jurisdiction of this Court and this Court, therefore, has the territorial jurisdiction to entertain the writ

application.

41. I am not, however, inclined to accept the submissions that mere service of the impugned notice at Calcutta would give rise to a cause of action

as in my view, the service of such notice is not an integral part of the cause of action. It may at best give right to take action in relation to the

proposed investigation. A right of action is not synonymous with the cause of action. A right of action is a right to enforce a cause of action. The

distinction though subtle is nevertheless clear and distinct.

42. In the light of the above, the objection as to the territorial jurisdiction of this Court to entertain the instant writ application has to be rejected.

43. Let us now deal with the crux of the matter raised in the writ petition.

44. The Petitioners have questioned the jurisdiction and authority of the Director General in initiating the proceedings for conducting investigation

u/s 11 of the Act. For the enquiry into the contentions in relation thereto, the allegations in the complaint in my view, being the letter dated June 6,

1997, have to be assumed to be correct. It is not in the province of this Court to consider the correctness or otherwise of the complaint in this

proceedings, where the challenge is to the jurisdiction and applicability of Section 2(o) of the M.R.T.P. Act. The only question, therefore, for

consideration is whether the Director General has the jurisdiction to conduct the proposed investigation pursuant to the impugned notice.

45. Though, as noticed above, the complaint being the letter dated June 6, 1997, contains several allegations with respect to various violations said

to have been committed'' by the Petitioner, the impugned notice is only in respect of and pertains to ''abnormal fuel surcharge charged by

C.E.S.C.'' This aspect is amply demonist rated by the averments in the affidavit-in-opposition filed on behalf of the Director General. The only

question for consideration in the circumstances would be whether such complaint that is to say "the manner in which M/s. C.E.S.C. Ltd. Is

increasing the cost of fuel sur-charge with retrospective effect", can be characterized as a "restrictive trade practice" as defined u/s 2(o) of the

M.R.T.P. Act, 1969.

46. It is the specific case of the Respondent authority that investigation has been initiated u/s 11(2) as, in his view, the aforesaid complaint has the

ingredients of restrictive trade practice as defined in Section 2(o) of the Act. The object of the investigation is to satisfy himself whether or not an

application should be made by the Director General to the Commission u/s 10(a)(3) of the M.R.T.P. Act.

47. Mr. Pal, Learned Senior Advocate for the Petitioner contended that even assuming that the allegations in the letter dated June 6, 1997, are

correct they do not attract "restrictive trade practice" as defined in Section 2(o) of the Act.

48. Referring to and relying upon the judgment of the Supreme Court in State of West Bengal and Others Vs. Swapan Kumar Guha and Others,

Mr. Pal, Learned Senior Advocate contended that where on a consideration of the relevant materials, the Court is satisfied that provision of

Section 2(o) are not attracted, it will be the duty of the Court to interfere with the impugned investigation and to stop the same to prevent any kind

of uncalled for and unnecessary harassment to an individual.

49. The sine-qua-non for application of Section 2(o), it was contended by Mr. Pal is "competition". Since the Petitioner has exclusive license to

generate and supply electricity for the specified area by the State Government u/s 3 of the Indian Electricity Act, 1910, there is and can be no

other existing competitor and hence, there can be no "competition", it was submitted by Mr. Pal. Reliance has been placed by Mr. Pal upon the.

judgments of the Supreme Court in Tata Engineering and Locomotive Co. Ltd., Bombay Vs. The Registrar of the Restrictive Trade Agreement,

New Delhi, and Mahindra and Mahindra Ltd. v. Union of India AIR 1979 S.C. 798.

50. Mr. Roy Chowdhury, Learned Senior Advocate appearing for the Respondent authorities on the other hand contended that the instant writ

application is an abuse of process of this Court. The investigation sought to be conducted is by virtue of the power conferred u/s 11 of the

M.R.T.P. Act and the said investigation is in the nature of a preliminary fact finding investigation. Principles of natural justice have been adhered to

and in compliance therewith, the impugned notice was issued to the Petitioner. The Petitioner is entitled to raise all such objections as it may have in

reply and, therefore, there is and can be no just cause or reason for the Petitioner to avoid the said investigation under the Act or to stultify the

same by invoking the jurisdiction of this Court under Article 226.

51. Mr. Roy Chowdhury further contended that the provisions of the M.R.T.P. Act and regulations made thereunder provide a complete code in

itself for adjudication of the impugned restrictive trade practice with additional provisions for review of the order of the Commission u/s 13(2) of

the M.R.T.P. Act as also for an appeal to the Hon''ble Supreme Court u/s 55 of the Act.

52. Mr. Suresh Agarwal appearing in person of behalf of the West Bengal Rolling Mills Association, inter alia, contended that the advocates for

C.E.S.C. having taken time to file their reply to the complaint after receipt of the impugned notice are stopped from challenging the jurisdiction. The

parameters of charging the fuel surcharge have been settled by the judgment of the Supreme Court in D.C.M. Ltd., etc. Vs. Municipal Corporation

of Delhi and another etc., and the Petitioner is not following the 9th Schedule of the Electricity Supply Act, 1948 for charging fuel sur-charge and,

therefore, it is within the competence of the Commission under the M.R.T.P. Act to investigate into the matter. C.E.S.C, acting in violation of 9th

Schedule, cannot plead in its defense the discussion it had or the approval accorded to it by the State Government with respect thereto C.E.S.C, it

was further contended by Mr. Agarwal, cannot be called a monopoly or that it does not have any competitor. Also, it was further contended that

C.E.S.C. Ltd. cannot claim that they alone have technical know how to install thermal power project in India. It was submitted that there are

several thermal power plants using coal as fuel. Those thermal power plaints, it was submitted are charging fuel sur-charge from its consumers in

terms of 9th Schedule of the Electricity (Supply) Act, 1948. It C.E.S.C. does not follow the 9th Schedule of the Electricity Supply Act, 1948 for

charging fuel surcharge it falls within the jurisdiction of M.R.T.P. Commission to investigate the matter. Huge sums have been collected by

Petitioner towards arrears fuel surcharge in gross violation of 9th Schedule of the Electricity Supply Act, 1948. Such levy should be declared

invalid and directions should be issued for refund of arrears to the consumers along with interest. An application being G.A. No. 5107 of 1999 has

been filed praying for such relief''s which should be allowed and the writ petition should be dismissed.

53. It admits of no doubt that the Petitioner C.E.S.C. enjoys monopoly and has no competitor in the area of generation and supply of electricity in

respect of the specified area in relation whereto, the C.E.S.C. is a licensee.

54. May be, as contended by Mr. Agarwal, C.E.S.C. cannot claim that they alone have technical know how to install thermal power project in

India. It cannot, however, be disputed that C.E.S.C. Ltd. has no competitor in that field in the specified area in respect whereto, it is the licensee.

55. From the contentions urged both by Mr. Roy Chowdhury as also Mr. Suresh Agarwal and the stand adopted by the Respondent authorities in

its affidavit-in-opposition, it will be apparent that the main thrust of the argument of the Respondents appears to be that C.E.S.C. is imposing on its

consumers unjustified costs.

56. Reference in this behalf need only be made to that portion of the affidavit-in-opposition affirmed by H. Banerjee, Additional Director General

(Investigation & Registration) wherein the letter of Mr. Suresh Agarwal dated June 6, 1997, a relevant portion whereof has been extracted. A

relevant part of the said affidavit-in-opposition, for ready reference is extracted herein:

.....the manner in which Messers C.E.S.C. Ltd. is increasing the, cost of fuel-surcharge with retrospective effect, it has become

unbearable on the part of the consumer and there should be some restraint by the State Government if such restrictions are not imposed by the

State Government..... Such complaint has the ingredient of restrictive trade practice as defined u/s 2(o) of the M.R.T.P. Act, 1969.

57. The imposition of such unjustified costs in the guise of fuel sur-charge is the foundation for the assumption of jurisdiction by the Director

General for causing the investigation by the impugned notice.

58. The charge against the Petitioners, as contended by Mr. Pal, is not that the alleged trade practice has any effect actual or probable of

preventing or restricting competition in any manner.

59. Section 2(o) of the M.R.T.P. Act based upon which the impugned notice is to be tested, reads as under: Section 2(o) "restrictive trade

practice" means a trade practice which has, or may have the effect of preventing distorting or restricting competition in any manner and in

particular:

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

(ii) when tends to bring about manipulation of prices,

or conditions of delivery or to effect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers

unjustified costs or restrictions.

60. The definition of "restrictive trade practice" is given in Section 2(o). It defines "restrictive trade practice" to mean a trade practice which has or

may have the effect of preventing, distorting or restricting competition in any manner and Clauses (i) and (ii), particularizes, two specific instances

of trade practices which fall within the category of restrictive trade practice. It is clear from the definition that it is only where a trade practice has

the effect, actual or probable of restricting, lessoning or destroying competition that it is liable to be regarded as a restrictive trade practice. The

question for consideration, therefore, would be as to whether a certain trade practice is restrictive or not. The same has to be decided by inquiring

whether the trade practice has or may have the effect of preventing, distorting or restricting competition.

61. In the case on hand, it appears that Respondent authority seeks to trace the power for the impugned investigation from that portion of Clause

(ii) of Section 2(o) of the M.R.T.P. Act which reads as, ''services in such manner as to impose on the consumers unjustified costs'' to cover the

allegations or bring them within the meaning of Section 2(o) of the Act.

62. It is the submission of Mr. Pal that the said portion of Clause (ii) cannot be read in isolation. It has to be read as a whole. The main ingredient

of ''trade practice'' within the meaning of Section 2(o) is that a trade practice to be ''restrictive trade practice'' has or may have the effect of

preventing or restricting competition in any manner and particularly tends to bring about manipulation of prices of services in such manner as to

impose on the consumers unjustified costs. Section 2(o), it was contended by Mr. Pal, Learned Senior Advocate for the Petitioner, will not be

applicable in a case where a trade practice does not or cannot have the effect of preventing, distorting or restricting competition in any manner.

63. The aforesaid contention of Mr. Pal, Learned Senior Advocate for the Petitioner merits consideration in the light of the judgments of the

Supreme Court, referred to above.

64. In Mahindra and Mahindra Ltd. v. Union of India (supra) Supreme Court has considered and construed the provisions of Section 2(o) and

have also noticed the judgment in the Telco case. A relevant paragraph from the said judgment is extracted hereunder:

It is now settled law as a result of the decision of this Court in the Tata Engineering and Locomotive Co. Ltd., Bombay Vs. The Registrar of the

Restrictive Trade Agreement, New Delhi, (sic) that every trade practice which is in restraint of trade is not necessarily a restrictive trade practice.

The definition of restrictive trade practice given in Section 2(o) is a pragmatic and result oriented definition. It defines ''restrictive trade practice'' to

mean a trade practice which has or may have the effect of preventing, distorting or restricting competition in any manner and in Clause (i) and (ii),

particularizes, two specific instances of trade practices, which fall within the category of restrictive trade practice. It is clear from the definition that

it is only where a trade practice has the effect, actual or probable of restricting, lessening or destroying competition that it is liable to (6) (Supra) be

regarded as a restrictive trade practice. If a trade practice merely regulates and thereby promotes competition, it would not fall within the definition

of restrictive trade practice, even though it may be, to some extent, in restraint of trade. Whenever, therefore, a question arises before the

Commission or the Court as to whether a certain trade practice is restrictive or not, it has to be decided not on any theoretical or a prior reasoning,

but by inquiring whether the trade practice has or may have the effect of preventing, distorting or restricting competition. This inquiry obviously

cannot be in vacuo but it must depend on the existing constellation of economic facts and circumstances relating to the particular trade. The

peculiar facts and features of the trade would be very much relevant in determining whether a particular trade practice has the actual or probable

effect of diminishing or preventing competition and in the absence of any material showing these facts of features, it is difficult to see how a decision

can be reached by the Commission that the particular trade practice is a restrictive trade practice.

The Court further observed (in para 15) that:

It is possible that a trade practice which may prevent or diminish competition in a given constellation of economic facts and circumstances may, in a

different constellation of economic facts and circumstances be found to promote competition. It cannot be said that every restraint imposed by a

trade practice necessarily prevents, distorts or restricts competition and, is therefore a restrict trade practice. There may be trade practices which

are such that by their inherent nature and inevitable effect they necessarily impair competition and in case of such trade practice, it would not be

necessary to consider any other facts or circumstances, for they would be per se restrictive trade practices. Such would be the position in case of

those trade practices which of necessity produce the prohibited effect in such an overwhelming proportion of cases that minute inquiry in every

instance would be wasteful of judicial and administrative resources.

65. Applying the principles laid down, as above, by the Supreme Court to the instant case, it may be noticed that the allegations in the letter dated

June 6, 1997 based whereon impugned investigation has been initiated do not establish the ingredients that the alleged trade practice has the actual

or probable effect of diminishing or preventing competition and in the absence of such ingredients, the alleged acts of the Petitioners cannot be

termed as "restrictive trade practice" within the meaning of Section 2(o) of the M.R.T.P. Act. Once the provision of Section 2(o) are not attracted

or applicable, the impugned investigation would be one without jurisdiction. It has, therefore, to be held that the impugned notice is without

jurisdiction. It is accordingly so declared.

66. It may be appropriate to now deal with certain annicilary issues which have been raised by respective counsel.

67. Mr. pal, learned Counsel for the Petitioner contended that there is no complaint in the eye of law that has been made to the Director General

as required u/s 11(2) of the M.R.T.P. Act. Mr. Pal elaborating the said contention submitted that the letter dated June 6, 1997, was addressed to

the Chief Minister, West Bengal and various other authorities. One such copy was sent to the Hon''ble Finance Minister and a copy of that copy

was served by the alleged complainant upon the Director General. Such a document, it was asserted is not ''a complaint made to him'' within the

meaning of Section 2(o) of the Act and the Director General cannot proceed and exercise his power of making investigation on the basis of such a

document. Reliance has been placed by the Learned Senior Advocate upon the AIR 1936 253 (Privy Council) and Gujarat Electricity Board Vs.

Girdharlal Motilal and Another,

68. The judgments relied upon by Mr. Pal are distinguishable and, in my view, can have no application to the case on hand. Sub-section (2) of

Section 11 confers power on the Director General to make or cause to be made a preliminary investigation to satisfy himself as to whether or not

an application should be made by him to the Commission under Sub-clause (iii) of Clause (a) of Section 10. Such preliminary investigation can be

made by the Director General upon information coming to his knowledge or on a complaint made to him. It is, therefore, not necessary that a

formal complaint per se must be made to the Director General before he can make or cause to be made an investigation. Investigation can be

made by the Director General upon his own knowledge or information.

69. The said contention, has therefore, to be rejected.

70. The Respondents contended that the impugned notice is with a view to make preliminary investigation to the impugned notice, provision of

review of the order of the Commission u/s 13(2) and provision of appeal u/s 55 of the Act is provided for, the instant writ application is not

maintainable as the Petitioner can avail of the alternative remedy.

71. Where the very jurisdiction and applicability of the M.R.T.P. Act founded on Section 2(o) has been questioned, the availability of alternative

remedy will not be a bar to the entertaining of the writ application. The aforesaid contentions are accordingly rejected.

72. In the result, the impugned notice being No. C/ 507/97/DG1 and Rk dated August 27, 1997 proposing to conduct an investigation relating to

restrictive trade practice allegedly attracting Section 2(o) of the M.R.T.P. Act is hereby quashed and set aside.

73. Application G.A. No. 5107 of 1999, for the reasons stated above is dismissed.

74. The writ petition and all the other applications stand disposed of, as above.

75. On the facts and circumstances of the case, there shall, however, be no order as to costs.