M/S. PEICO ELECTRONICS AND ELECTRICALS AND ANR. A

v.

UNION OF INDIA AND ANR.

MARCH 9, 2004

[P. VENKATARAMA REDDI AND S.H. KAPADIA, JJ.] B

Monopolies and Restrictive Trade Practices Act, 1969; Ss. 2(0)(ii), 10, 33, 37 & 38:

Dealership agreement—Notice—Termination on ground of non-performance as per terms of the agreement—Complaint—Commission holding that the Company indulged in certain restrictive trade practices prejudicial to public interest—Directed the Company to continue supply of the goods and take measures to amend the offending clause from dealership agreement—On appeal, Held: Allocation of an area/market for disposal of the goods amounting to restrictive trade practice—Restricting one dealer to sell the products in certain area while allowing the other dealer, amounts to discriminatory treatment—The Company could not impose such restrictions—However, in the absence of any finding on the issue of discriminatory treatment, charges of favourable treatment against other dealer not proved. Restrictive trade practice—Scope of s.2(0)(ii) and Section 33(1)—Discussed. C D E

Dealership Agreement—Clause 7—Validity of—Held: since manufacturer could intentionally or arbitrarily withhold supply of goods and yet disown liability, it is **per se** *restrictive trade practice.*

Jurisdiction of the Commission—Held: Commission vested with power to enquire into any restrictive/monopolistic trade practice upon information or **suo motu***—omission to record proceedings framing an issue does not vitiate the findings, however, adequate opportunity ought to have been given to the affected party—Court, while testing validity of actions taken by the Commission on the procedural aspects, should avoid a narrow approach, and adopt the approach which conforms to objective of the Act—However, Commission cannot assume the role of a Civil Court—In absence of findings as to how termination of the agreement would per se give rise to restrictive trade practice/circumvent any trade practice, the Commission should not have gone beyond its powers by reviving the Contract, and resuming supply of* F G H

goods—To that extent, direction of the Commission unsustainable.

Appellant-Company manufacturing audio products, had a dealer since long and subsequently appointed another dealer, Respondent No.2, on certain terms and conditions. Later, the Company after serving a notice terminated the dealership of Respondent No.2 in terms of Clause 29 of the agreement. Respondent-dealer filed a complaint before the Commission alleging certain restrictive trade practices being followed by the Company. The Commission held an enquiry, framed five charges of restrictive trade practices against the Company and came to a finding that the appellant had indulged in certain restrictive trade practices prejudicial to public interest; that Clause 7 of the agreement *per se* amounted to restrictive trade practice and directed to amend the clause from the dealership agreement and not to terminate the dealership of Respondent No.2. Hence the present appeal.

It was contended for the appellant-Company that the Commission arrived at its findings arbitrarily without regard to evidence on record and so its findings are perverse; that the Commission exceeded its jurisdiction by directing restoration of dealership and for deletion of Clause 7 of the agreement; and that it failed to give a finding to the effect that the alleged trade practice was prejudicial to public interest while passing the cease and desist order against the Company.

Disposing of the appeal, the Court

HELD: 1.1. By virtue of Section 33, read with Clause (g) of the Monopolies and Restrictive Trade Practices Act, an agreement to allocate any area or market for the disposal of the goods is deemed to be an agreement relating to restrictive trade practice as the allocation of a particular area or market for the disposal of the goods likely to hamper or restrict the competition. The Company could not impose such restriction in the course of dealings with its dealers. [891-D-F]

1.2. The charge of discrimination against the Company was held established by the Commission only on the ground that the other dealer was given freedom to sell the Company's products from a market, but the complainant, other dealer, was not allowed to sell the products from the same market. This has resulted in discriminatory treatment against the complainant, attracting Section 2(0)(ii) of the Act. To the extent that the area restriction was placed on the complainant but not on the other

dealer, it would be an instance of discrimination and the finding of the Commission to this extent cannot be faulted. However, the Commission did not record any finding with reference to the charge that there was discrimination in the matter of supply of goods. Yet, the Commission proceeded on the basis that the charge as a whole was proved. Be that as it may, there is a formidable difficulty in sustaining this charge. The Commission held that the act of discrimination is a restrictive trade practice within the meaning of Section 2(0)(ii) of the Act. There is no finding whatsoever with respect to one of the crucial ingredients of Section 2(0)(ii). Moreover, nothing found in the evidence to enable the Commission to arrive at a finding on the question whether the act of the appellant in disallowing the complainant from effecting the sales from its shop at the same market had resulted in or likely to result in the imposition of unjustified burden on the consumers. Therefore, the Commission's finding under the charge that by giving favourable treatment to other dealer, the appellant resorted to restrictive trade practice within the meaning of Section 2(0)(ii) was legally erroneous. [892-B-E; 893-E-F]

Hindustan Lever Ltd. v. *Director General (Investigation & Registration) and Anr.*, [2001] 2 SCC 474, relied on.

2.1. The Commission rightly held that Clause 7 of the agreement, in its present form, has the potential of bringing about a restrictive trade practice and therefore it should be amended. The Clause is heavily weighed in favour of the Supplier. Taking umbrage under the latter part of the Clause, the Supplier could arbitrarily withhold or delay the supply of goods without assigning any reason and yet disown its responsibility or liability arising out of its arbitrary action. Hence, the Commission was justified in holding that it was *per se* a restrictive trade practice. An agreement to limit, restrict or withhold the output or supply of any goods falls within the mischief of clause (g) of Section 33(1) of the Act and therefore it must be deemed to be an agreement relating to restrictive trade practice as per the mandate of Section 33(1) of the Act. [893-H; 894-A-C]

Voltas Limited, Bombay v. *Union of India and Ors.*, [1995] Suppl. 2 SCC 498, relied on.

2.2. The Commission is invested with the power to enquire into any restrictive or monopolistic trade practice upon its own knowledge or information, and take necessary follow-up action. The Commission would be failing in its duty if it does not take note of restrictive trade practices

A that come to its notice in the course of enquiry into a complaint. However, the omission to record a formal proceeding framing an issue or the point for *suo motu* consideration does not by itself vitiate the decision of the Commission. It is implicit in the exercise of such power that adequate opportunity ought to be given to the affected party to meet the point which is the subject matter of *suo motu* enquiry. In testing the validity of the B action taken by the Commission from the procedural angle, the approach of the Court should be such as to promote the objectives of the Act. A narrow or pedantic approach ought to be eschewed. Viewed from this angle, it cannot be held that the Commission did not act within its limits in testing the legality of Clause 7 and that the appellant was handicapped C in meeting its case on account of non-framing of 'charge' relating to the Clause. Therefore, the Commission, in exercise of its power under clause (b) of Section 37(1), directed that the clause should be suitably amended so as to remove the offensive sting in it. [895-G-H; 896-A-E]

2.3. The Commission's directive restraining the appellant-company D from acting on letter of termination of dealership of the complainant and in regard to continue supply of the goods cannot be implemented in so far as the present Agreement is concerned. At the same time, the Company shall not be allowed to perpetuate the unfair trade practice inherent in the Clause of the standard form Agreement. Hence, it would be just and E proper to modify the order of Commission by directing that the Company should take steps to purge the restrictive trade practice by suitably amending the Clause or identical clause wherever it occurs in all the Agreements with its dealers. [896-F-H]

2.4. Normally, the Commission is not empowered to probe into the F question as to the validity of termination of the contract under one Clause or the other of the Agreement. The Commission cannot assume the role of the Civil Court in this regard. It is true that the Commission has incidental and ancillary power to consider whether the termination of the dealership was a device to perpetuate the objectionable trade practices and whether such termination is closely inter-linked with the continuance G of restrictive trade practice. The Commission did not hold that the termination under clause 29 would *per se* give rise to restrictive trade practices or that the termination under Clause 29 is a cloak to circumvent Clause 28 in order to go ahead with the restrictive trade practices. In fact, some of the findings of the Commission indicate that there was some H justification to feel dissatisfied with the manner of conducting business by

the dealer. The fact also remains that a number of letters which he had been writing to the appellant company protesting against alleged unfairness and discriminatory treatment, evoked no response from the Company. No reason, whatsoever, has been given as to why the contract which was terminated ostensibly in exercise of the right reserved under the Agreement should be revived. Obviously, such direction cannot be construed to be one made with a view to compensate the loss to the complainant. As far as the compensation for the loss is concerned, it is open to the Commission to pass suitable orders on that application; but, the direction not to give effect to the termination letter, thereby reviving the contract goes clearly beyond the powers of the Commission, especially for the reason that the Commission did not record a finding that the termination of the contract was in the teeth of the provisions of the Act and was resorted to only with a view to perpetuate the restrictive trade practices. Consequently, the direction to resume supplies of the products in equally unsustainable. [897-F-H; 898-A-D]

3. The order to discontinue the restrictive trade practice covered by the charge relating to area restriction becomes *otiose* in view of the finding that the dealership agreement which has been terminated, cannot be revived at this stage. The question whether the cease and desist order under Clause 37(1)(a) could be passed in relation to the restrictive trade practice held proved against the appellant therefore becomes academic. [899-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7079 of 1996.

From the Judgment and Order dated 22.11.95 of the M.R.T.P. Commission, New Deilhi in R.T.P.E. No. 1616 of 1987.

Jay Savla for the Appellants.

J.M. Mukhi, Ms. Shakumbhary Singh, M.K. Garg, Tufail A. Khan, Rajiv Nanda and P. Parmeswaran for the Respondents.

The Judgment of the Court was delivered by

P. VENKATARAMA REDDI, J. This is an appeal *under Section 55* of the Monopolies and Restrictive Trade Practices Act, 1969 (referred to hereinafter as 'the Act') against the order of the Commission in R.T.P. Enquiry

A No. 1616 of 1987. The Commission, having held that the appellant indulged in certain restrictive trade practices prejudicial to public interest, directed the appellant to desist from indulging in such practices in future and to amend the offending clause in the dealership agreement. The Commission further directed the appellant not to give effect to the termination of dealership of the complainant (2nd respondent herein) and to ensure the supply of Philips B products "at least to the extent of the supply made in the year 1986" subject to the placement of necessary orders by the complainant.

The factual background leading to the filing of the complaint is as follows:

C The appellant Company manufactures and sells certain audio products. It has a vast network of dealers - about 1800 throughout the country who are appointed on principal to principal basis. In Gwalior, the appellant had a dealer by name M/s. Evergreen operating since long from its shop at Sarafa Bazar. In the year 1985, the appellant appointed the 2nd respondent (hereinafter D referred to as 'R-2' or 'complainant') having its place of business at Gwalior as another dealer. An agreement dated 15.11.1985 which, it is not in dispute, is in standard form was entered into. Clause 29 of the Agreement provided for termination of agreement by either party by giving to the other 30 days notice in writing. In terms of this clause, the appellant by its notice dated 23.9.1987 gave 30 days notice to R-2, terminated the dealership on expiry of E the notice period. According to the appellant, such a step was taken as it was not satisfied with the performance of R-2. R-2 then filed a complaint before the Commission. The complainant alleged that the appellant felt aggrieved by some of the letters addressed by the complainant pointing out preferential treatment to the old dealer M/s. Evergreen to the detriment of R-2. Certain F instances of restrictive trade practices were enumerated in the complaint. The complainant prayed for the issuance of 'cease and desist order' and a direction to restore the dealership and resume supplies of Philips products. The Commission decided to hold an enquiry. Accordingly, a notice of enquiry was sent to the appellant on 21.1.1988. In the said notice, as many as five restrictive trade practices alleged to have been committed by the appellant G were set out. They are as follows:

(i) The respondents prohibited the complainant from dealing in or selling the same type of products of the competitors. The practice is restrictive trade practice within the meaning of Section 33(1)(c) of the MRTP Act;

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(ii) The respondents supplied to the complainant all types of goods irrespective of its order. For instance supply of 252 pcs of infra lamps was made to the complainant on 31st December, 1985 even though the complainant had not placed any order for them. Thus the respondent in a trade practice of full line forcing/ dumping unwanted goods and also delaying with holding the supply of wanted and ordered goods. It is a restrictive trade practice within the meaning of Section 2(o) and Section 33(1)(b) of the Act. The practice is a restrictive trade practice within the meaning of Section 339(1)(b) of the MRTP Act.

(iii) The complainant was allocated a particular territory to which its dealership was confined. The practice of allocating a territory is a restrictive trade practice within the meaning of Section 33(1)(g) of the MRTP Act.

(iv) The respondent fixed the prices at which their products were to be sold without giving liberty to the complainant to sell at prices lower to its customers. The practice is a restrictive trade practice within the meaning of Section 33(1)(f) of the MRTP Act.

(v) The respondent discriminated against the complainant and gave a favoured treatment to their other dealer, viz. Evergreen, Sarafa Bazar, Gwalior in making supplies of Philip products. The practice is a restrictive trade practice within the meaning of Section 2(o)(ii) of the MRTP Act.

It appears that during the pendency of the inquiry, the Commission issued an order of ad interim injunction. However, it was stayed by the Bombay High Court on a writ petition filed by the appellant.

The appellant while denying the charges took the stand that the complainant was not conducting the business properly inasmuch as the sales dropped considerably during the period January, 1987 to September, 1987, that the complainant delayed retirement of documents on more than one occasion and even issued a cheque which was dishonoured by the Bank. The appellant pleaded that the power reserved to it under Clause 29 of the Agreement was *bona fide* exercised in its business interest. The Commission came to the conclusion that the allegations 3 and 5 (supra) stood proved and the other allegations were not established. However, while discussing charge No.2, the Commission having held that the allegation of dumping of unwanted products has not been proved and that the refusal to send supplies as per the

A orders of the complainant was quite justified having regard to the defaults on the part of the dealer, declared that Clause 7 of the Agreement *per se* amounted to restrictive trade practice and therefore the respondent shall take action to purge the same.

The Tribunal recorded its findings that the restrictive trade practices
B indulged in by R-2 had an adverse effect on engendering competition, that the 'gateway' pleaded by him in terms of Clause (h) of Section 38(1) did not come to his aid and that the restrictive trade practices in question were prejudicial to public interest *per se*.

C We may now indicate the contentions advanced by the learned Counsel for the appellant.

(1) The findings of the Commission with reference to charges (iii) & (v) are legally unsupportable as the Commission arrived at the findings arbitrarily without regard to the evidence on record. The conclusions are
D perverse.

(2) The Commission exceeded its jurisdiction and acted in violation of principles of natural justice in giving a direction to delete Clause 7. The validity of Clauses in the Agreement should not have been considered at all by the Commission when the Agreement itself stood terminated.
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(3) The direction to restore the dealership and the supplies is beyond the scope of powers of the Commission.

(4) The Commission failed to give a finding that the alleged restrictive trade practice is prejudicial to public interest before passing a 'cease and
F desist' order. **Re : Contention No.**1 [Charges (iii) and (v)]

We shall first deal with the contention of the learned counsel for the appellant that the findings recorded by the Commission in regard to charges (iii) & (v) are without basis and unsupported by the evidence on record.

G *Charge No. (iii)*

In the context of Charge No.(iii), we may notice that under Clause 27 of the Agreement, "the Dealer shall be free to sell the goods to customers from any part of India". As observed by the Commission, the said clause by
H itself "neither gives territorial freedom nor imposes any territorial restriction".

However, the Commission, after discussing the evidence, recorded its conclusion that the 'third charge has been proved in terms of Section 33(1)(g)'. Section 33(1)(g) speaks of an agreement to limit, restrict or withhold the output or supply of any goods or allocate any areas or market for the disposal of the goods. Though the Agreement does not place any restriction of the type envisaged by Clause(g) of Section 33(1), there is a clear finding supported by evidence that the appellant did resort to restrictive trade practice by imposing a restriction on the complainant from selling the products from Sarafa Bazar shop of the complainant. In this context, the affidavit of the complainant's witness and the repeated letters addressed by the complainant have been referred to by the Commission. The Commission took note of the fact that the appellant sent no reply to these letters and at no point of time, made it clear to the complainant that it had no objection to the products being sold from Sarafa Bazar complex. The Commission observed that even if the complainant had occasionally sold some products from Sarafa Bazar, it does not demolish the complainant's case that it was not allowed to sell from Sarafa Bazar where the other dealer was having his showroom. We cannot interfere with this finding of fact. If that be so, the act of the appellant falls within the ambit of restrictive trade practice. By virtue of Section 33, read with Clause (g), an agreement to allocate any area or market for the disposal of the goods is deemed to be an agreement relating to restrictive trade practice. The appellant cannot take the plea that in the absence of any such restriction in the Agreement itself, he is free to impose such restriction in the course of dealings with the complainant. The considerations set out in various clauses of Section 33(1) would be equally relevant in deciding the question whether the restrictions imposed in actual practice amount to restrictive trade practices within the meaning of the Act. Incidentally, we may observe that the allocation of a particular area or market for the disposal of the goods is likely to hamper or restrict the competition as held by the Tribunal and in that sense, even the opening part of the definition in Clause (o) of Section 2 gets attracted. Though we feel that the phraseology used in charge No.3 viz., "allocation of a territory to which the dealership was confined" is inappropriate, the Commission's finding cannot be set aside merely for that reason. The substance of the charge was well understood by the appellant and the complainant put in its defence accordingly.

Charge No. (v)

As per the charge, the appellant gave a favourable treatment to the other dealer, namely, M/s Evergreen in making supplies of Philips products

A and thus the appellant discriminated against the complainant. In the context of this allegation, the real grievance made out by the complainant is that fast moving and popular products were being supplied to M/s Evergreen, whereas the complainant was mostly getting slow moving items. It was further alleged that M/s Evergreen was free to sell the Philips products from their showroom at Sarafa Bazar to any non Philips products dealers not only at Gwalior but B also in four other Districts whereas the same facility was denied to the complainant. The charge of discrimination was held established only on the ground that M/s Evergreen was given freedom to sell the appellant's products from Sarafa Bazaar, but the complainant was not allowed to sell from its Sarafa Bazaar shop. This, according to the Commission, has resulted in C discriminatory treatment against the complainant, attracting Section 2(o)(ii) of the Act. It may be recalled that the Commission recorded the same finding while dealing with charge No.(iii) i.e., area restriction. To the extent that the area restriction was placed on the complainant but not on M/s Evergreen, it will be an instance of discrimination and the finding of the Commission to this extent cannot be faulted. However, the Commission did not record any D finding with reference to the allegation that there was discrimination in the matter of supply of goods. Not a word is said about it. We are pointing out this particular aspect for the reason that charge No.(v) held to have been proved by the Commission is widely couched and it speaks of favourable treatment to M/s Evergreen in regard to supply of goods. There is no finding E of the Commission on this aspect of the case. Yet, the Commission proceeded on the basis that the charge as a whole was proved. Be that as it may, there is a formidable difficulty in sustaining this charge. The Commission held that the act of discrimination, as found by it, is a restrictive trade practice within the meaning of Section 2(o)(ii)* of the Act. The said provision reads:

F (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) x x x x x

(ii) which tends to bring about manipulation of prices, or conditions G of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions.

If Clause (ii) has to be applied, there must be a further finding that the

H *emphasis supplied

impugned trade practice has the effect of imposing on the consumers unjustified costs or restrictions. Construing the same provision, this Court in the case of *Hindustan Lever Ltd.* v. *Director General (Investigation & Registration) and Anr.*, [2001] 2 SCC 474 observed thus:

> "As the plain reading of the said definition itself discloses, and also as rightly understood by the Commission in issuing the notice, there are two parts to the definition - one is which relates to carrying on of such trade practice which has or may have the effect of preventing, distorting or restricting competition in any manner and secondly, the carrying on of such trade practice which *inter alia* has the effect of imposing unjustified costs or restrictions on the consumers." It was then held in the next paragraph -
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> "....but what we have to see is as to whether the appellant has been guilty of preventing, distorting and restricting competition amongst the dealers which was the allegation levelled against it. In the absence of such a finding and there not being even a whisper in the order that any action of the appellant had the effect of imposing unjustified costs or restrictions on the consumers, the Commission fell in error in passing the order against the appellant."

The same is the situation here. There is no finding whatsoever with respect to one of the crucial ingredients of Section 2(o)(ii). Moreover, we find nothing in the evidence to enable the Commission to arrive at a finding on the question whether the act of the appellant in disallowing the complainant from effecting the sales from its second shop at Sarafa Bazaar had resulted in or likely to result in the imposition of unjustified burden on the consumers. We are therefore of the view that the Commission's finding under charge No.(v) that the appellant resorted to restrictive trade practice within the meaning of Section 2(o)(ii) is legally erroneous and is liable to be set aside. **Re : Contention No.2** (Clause 7 of Agreement)

Clause 7 of the Agreement reads as follows:

> (7) The Company gives no guarantee or undertaking that it will supply the Dealer's requirements of the Company's products against its orders and in any event can accept no responsibility or liability for its failure or refusal to give supply or delay in effecting supply, for any reason whatsoever.

According to the Commission, Clause 7, in its present form, has the

potential of bringing about a restrictive trade practice and therefore it should be amended. We are inclined to endorse the view of the Commission on this point. Clause 7 with its sweeping phraseology, is heavily weighted in favour of the appellant. Taking umbrage under the latter part of clause 7, the appellant can arbitrarily withhold or delay the supply of goods without assigning any reason and yet disown its responsibility or liability arising out of its arbitrary action. The Commission is justified in holding that it is *per se* a restrictive trade practice. An agreement to limit, restrict or withhold the output or supply of any goods falls within the mischief of clause (g) of Section 33(1) and therefore it must be deemed to be an agreement relating to restrictive trade practice as per the mandate of Section 33(1). When once it is held that any clause of the Agreement comes within the sweep of Clauses (a) to (l) of sub-Section (1) of Section 33, no further enquiry is required to find out whether it falls within the parameters of Section 2(o). This legal position has been settled by a three Judge Bench of this Court in the case of *Voltas Limited, Bombay* v. *Union of India and Ors.*, [1995] Suppl. 2 SCC 498. This Court observed.....

> ".....Trade practices enumerated in clauses (a) to (l) of sub-Section (1) of Section 33 shall be deemed to have now been statutorily determined and specified as restrictive trade practices. It cannot, therefore, be urged that although a particular agreement is covered by one or other clauses of sub-Section (1) of Section 33, still it shall not amount to an agreement containing conditions which can be held to be restrictive trade practices within the meaning of the Act.
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> Now it is no more open to the Commission or to the Supreme Court to test and examine any of the trade practices mentioned in clauses (a) to (l) of sub-Section (1) of Section 33 in the light of Section 2(o) of the Act for the purpose of recording a finding as to whether those types of trade practices shall be restrictive trade practices within the meaning of Section 2(o) of the Act. This exercise has to be done only in respect of such trade practices which have not been enumerated in any of the clauses from (a) to (l). Only such trade practices have to be examined in the light of Section 2(o) of the Act, as to whether they amounted to restrictive trade practices....."

Again it was clarified in paragraph 12 -

A ".....But the fact remains that once the Commission is satisfied that a particular agreement which has not been registered under Section 35, falls within any of the clauses from (a) to (l) of sub-Section (1) of Section 33, then no further inquiry is to be done, as to whether such agreement relates to restrictive trade practices or not. The statutory fiction incorporated in sub-Section (1) of Section 33 shall also be B applicable in respect of such agreements apart from the penalty provided under Section 48 of the Act. As such there is not much scope for discrimination between those who have got their agreements registered and those who have not got their agreements registered."

C Referring to the case of *Mahindra and Mahindra Ltd.* v. *Union of India,* [1979] 2 SCC 529 on which reliance has been placed by the appellant's counsel in the present case, the three Judge Bench made it clear in Voltas case that the situation has changed with the introduction of a statutory fiction in the main part of sub-Section (1) of Section 33. It was observed that Clauses (a) to (l) of sub-Section (1) of Section 33 are in the nature of statutory illustrations of restrictive trade practices. Faced with this difficulty, the learned D counsel for the appellant harped on the argument that the offensive nature of Clause 7 was not the subject-matter of charge and enquiry and therefore no direction should have been given by the Commission for the deletion/ amendment of Clause 7, especially when charge No.(ii) has not been sustained. We find it difficult to accept this contention, though plausible it is. E

Though in the notice of inquiry, the Commission did not specifically refer to the invalidity of Clause 7, we find from the pleadings and the order of the Commission that this issue did crop up for consideration and the parties did advance arguments on this point at length. It may be noticed that in the rejoinder the complainant while referring to the averments in para 5 of F the reply, challenged the appellant's version that there were restrictive provisions in the Agreement "giving arbitrary discretion to the Company in meeting with the dealer's requirement". It is not in dispute that arguments were advanced on this aspect as well. It is obvious that the Commission need not confine itself to the points raised in the complaint. Under Section 10 of G the Act, the Commission is invested with the power to enquire into any restrictive or monopolistic trade practice upon its own knowledge or information. In other words, the Commission can suo motu enquire into such trade practices and take necessary follow-up action. The knowledge or information can as well be derived from the facts disclosed in the complaint petition, the pleadings or from the material adduced in the case. The H

A Commission will be failing in its duty if it does not take note of restrictive trade practices that come to its notice in the course of enquiry into a complaint. In our considered view, the omission to record a formal proceeding framing an issue or the point for *suo motu* consideration does not by itself vitiate the decision of the Commission. However, it is implicit in the exercise of such power that adequate opportunity ought to be given to the affected party to B meet the point which is the subject matter of *suo motu* enquiry. There is no bar to the combination of an enquiry into the allegations made by the complainant and the *suo motu* enquiry into a matter coming to its notice. In testing the validity of the action taken by the Commission from the procedural angle, the approach of the Court should be such as to promote the objectives C of the Act. A narrow or pedantic approach ought to be eschewed. Viewed from this angle, we are unable to hold that the Commission out-stepped its limits in testing the legality of Clause 7 or that the appellant was handicapped in meeting its case on account of non-framing of 'charge' relating to Clause 7 of the Agreement.

D The next question is whether in view of termination of Agreement, the Commission was precluded from probing into the validity of the relevant clause in the Agreement. It is not in dispute that the clause of this nature is incorporated in all the Agreements entered into with the dealers. In other words, the Agreement is in a standard form. As held by the Commission, E apart from the fact that Clause 7 *per se* is a restrictive trade practice, it has the potential of giving rise to restrictive trade practices in future. Therefore, the Commission, in exercise of its power under Clause (b) of Section 37(1), directed that the clause should be suitably amended so as to remove the offensive sting in it. Having regard to our decision on Contention No.3, the Commission's directive cannot be implemented in so far as the present F Agreement is concerned. At the same time, the appellant shall not be allowed to perpetuate the unfair trade practice inherent in Clause 7 of the standard form Agreement. We, therefore, consider it just and proper to modify the order of Commission by directing that the appellant should take steps to purge the restrictive trade practice by suitably amending Clause 7 or identical G clause wherever it occurs in all the Agreements with its dealers and file a report to the Commission accordingly.

Re : Contention No.3 (Termination of Agreement)

The next ground of attack is on the order of the Commission restraining H the appellant from acting on letter of termination of dealership and further

directing the supply of Philips products "atleast to the extent of supply made in the year 1986". It is contended that the contract having been terminated, the Commission had no power and jurisdiction to keep the contract alive. To buttress this argument, the learned counsel for the appellant has referred to the provisions of Sections 14 and 41 of the Specific Relief Act and contended that the contract, which is in its nature terminable, cannot be specifically enforced and no injunction can be granted on the ground of breach of contract. Attention has been drawn to Clause 29 of the Agreement under which the contract has been purportedly terminated. Clause 29 reads:

> "This agreement shall remain in force until terminated by either party by giving to the other 30 days' notice in writing."

As against this, it is the contention of the learned counsel for R-2 that the termination was not *bona fide* but it was done only with a view to perpetuate the restrictive trade practices against which R-2 was always protesting. If the appellant-Company felt that R-2, as a dealer, acted in a manner contrary to the interests of the Company or committed breach of any of the terms of the Agreement, Clause 28 should have been invoked and R-2 should have been put on notice regarding the alleged grounds of termination. Termination under Clause 29 was resorted to for extraneous reasons. In regard to the power of the Commission to pass such an order, it is submitted that the termination of dealership was a sequel to and in aid of the restrictive trade practices of the appellant. According to the learned senior counsel for R-2 the termination of dealership had a direct and inextricable connection with the restrictive trade practices adopted by the appellant and in such circumstances the Commission was well within its power to direct the restoration of the contract and the supplies. We find it difficult to accept the contention of the learned counsel for R-2. Normally, the Commission is not empowered to probe into the question whether the contract was validly terminated under one Clause or the other of the Agreement. The Commission cannot assume the role of the civil Court in this regard. True, as contended by the learned counsel for the appellant the Commission has incidental and ancillary power to consider whether the termination of the dealership was a device to perpetuate the objectionable trade practices and whether such termination is closely inter-linked with the continuance of restrictive trade practice. But, we search in vain for a specific finding by the Commission in this regard. The Commission did not hold that the termination under Clause 29 which undoubtedly gives a right to either party to the Agreement to put an end to it by giving 30 days' notice would *per se* give rise to restrictive trade practices or that the termination under

Clause 29 is a cloak to circumvent Clause 28 in order to go ahead with the restrictive trade practices. In fact, some of the findings of the Commission, which we have already adverted to, indicate that there was some justification to feel dissatisfied with the manner of conducting business by R-2. The fact also remains that a number of letters which R-2 had been writing to the appellant protesting against alleged unfairness and discriminatory treatment, evoked no response from the appellant. Thus, when there is much to be said on both sides, the Commission should have recorded a specific finding on the lines indicated above. No reason, whatsoever, has been given as to why the contract which was terminated ostensibly in exercise of the right reserved under the Agreement should be revived. Obviously, the direction of this nature cannot be construed to be one made with a view to compensate the loss to the complainant. As far as the compensation for the loss is concerned, it is Section 12 A which is applicable and an application has already been filed under that provision. Of course, it is open to the Commission to pass suitable orders on that application; but, the direction not to give effect to the termination letter, thereby reviving the contract goes clearly beyond the powers of the Commission, especially for the reason that the Commission did not record a finding that the termination of the contract was in the teeth of the provisions of the Act and was resorted to only with a view to perpetuate the restrictive trade practices. Consequently, the direction to resume supplies of Philips products is equally unsustainable.

Re : Contention No.4 (Legality of 'cease and desist' order)

It is contended that the 'cease and desist' order under Section 37(a) should not have been passed unless the Commission finds that the restrictive trade practice is prejudicial to public interest. By virtue of Section 38(1)(h), the restrictive trade practice would not be treated as contrary to public interest if "the restrictive trade practice does not directly or indirectly restrict or discourage competition to any material degree in the relevant trade or industry and is not likely to do so". It is contended that the alleged restrictions imposed on a single dealer - R-2 cannot affect competition to any material degree, more so when the audio products are not short-supply items. On the other hand it is contended by the learned counsel for the 2nd respondent that there is a presumption under Section 38 that a restrictive trade practice is prejudicial to public interest and therefore the burden is on the appellant to make out a case under Clause (h) of Section 38(1) and such burden has not been discharged by the appellant. Moreover, it is pointed out that there is a specific finding in this regard by the Commission that the 'gateway' pleaded by the

appellant by taking recourse to Clause (h) cannot be sustained. It is submitted that the Commission has given certain reasons such as the trade scenario in Gwalior and those reasons cannot be said to be irrelevant. Though there is considerable force in the argument of respondent's counsel, there is no need to express an opinion in this regard for the reason that the order to discontinue the restrictive trade practice covered by charge No.3 becomes *otiose* in view of our finding that the dealership agreement which has been terminated, cannot be revived at this stage. Further discussion of the question whether the cease and desist order under Clause 37(1)(a) could be passed in relation to the restrictive trade practice held proved against the appellant therefore becomes academic.

A B C

The conclusions we have reached are summed up as follows:

1. The finding of the Tribunal on charge No. iii is upheld.
2. The finding in respect of the charge No.v is unsustainable.
3. The Commission is justified in holding that Clause 7 of the Agreement is a restrictive trade practice within the meaning of Clause (g) of Section 33(1) of M.R.T.P. Act and it has the effect of distorting or restricting competition. The direction of the Commission to amend Clause 7 suitably is correct. Irrespective of the termination of the Agreement between appellant and R-2, the appellant should take steps to amend a similar clause existing in other agreements of similar nature with the dealers.
4. The Commission exceeded its jurisdiction in giving a direction not to give effect to the letter terminating the Agreement and to restore the supplies to the complainant. Such a direction cannot be sustained in the absence of a finding that the termination of Agreement was contrary to the provisions of the Act or it is a device to circumvent the provisions of the Act so as to perpetuate the restrictive trade practice.
5. The 'cease and desist' order passed under Section 37(1)(a) becomes *otiose* and inoperative in view of the fact that the contract stands terminated. The remedy of the complainant (R-2) is to pursue his claim for compensation under Section 12-B for the loss suffered by him on account of the restrictive trade practice covered by charge No. iii.

D E F G

The appeal is disposed of accordingly without costs.

S.K.S. Appeal disposed of.