NARENDRA KUMAR MAHESHWARI

v.

UNION OF INDIA & ORS.

MAY 3, 1989

[SABYASACHI MUKHARJI AND S. RANGANATHAN, JJ.]

Capital Issues (Control) Act, 1947/Capital Issues (Exemption) Order, 1969: Sections 2, 3 and 12—Controller of Capital Issues—Scope of power and exercise of function in according sanction—Extent of.

Companies Act, 1956: Section 81(5)—'Compulsorily convertible debentures'—Floating charge—Debt equity ratio—What are—Whether a Company can deal with its property without the permission of debenture holders.

Practice and Procedure: Grant of Interim Orders—Regard to be had to principles of comity of courts administering same laws throughout the country.

Reliance Industries Ltd. (RIL) and Reliance Petrochemicals Industries Ltd. (RPL) are inter-connected and represented Companies in the large industrial house known as Reliance Group. RIL had promoted RPL. RPL was incorporated on 11.1.1988 and has been a cent percent subsidiary of RIL. It was claimed that RPL would set up the largest petrochemical complex in India with foreign collaboration. RPL proposed to issue convertible debentures for raising capital for the project.

The Controller of Capital Issues (CCI), who functions under the Capital Issues (Control) Act, 1947 had, on 15th September, 1984 by way of press release issued certain non-statutory guidelines for approval of issue of secured convertible and non-convertible debentures. These guidelines were subsequently amended on 8.3.1985. Guidelines were also given by the CCI for issue of convertible cumulative preference shares, and for employees stock option scheme.

RPL had, on 4.5.1988, made an application to CCI for issue of debentures of the face value of Rs.200 crores fully convertible into equity shares on the following terms:

A sum of Rs.10 being 5% of the face value of each debentures by

A way of first conversion immediately into one equity share at par on allotment;

(ii) A sum of Rs.40 being the 20% of the face value of each debenture by way of second conversion after three years but before four years from the date of allotment at a premium to be fixed by the Con-
B troller of Capital Issues;

(iii) The balance of Rs.150 representing 75% of the face value of each debenture as third conversion after five years but not later than seven years from the date of allotment at a premium to be fixed by the Controller of Capital Issues.

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The CCI accorded his sanction for the issue of debentures on 4.7.1988. However, the sanction was amended on 19th July, 1988. The amendment put a non-transferability condition on the preferential share-holders of RPL. It was limited to the corporate shareholders of RIL and relaxed for individual share-holders of RIL. The amendment
D also stipulated that the Company should obtain prior approval of the Reserve Bank of India, Exchange Control Department, for the allotment of debentures to the non-residents as required under the Foreign Exchange Regulation Act, 1973. On 26th July 1988, there was another amendment which restricted the transfer of shares allotted to the employees of RPL and RIL.

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The consent orders issued by the CCI were challenged in various High Courts, by way of writ petitions and a suit. Some High Courts issued injunctions restraining the issue of the debentures.

This Court, on 19th August, 1988, restrained the aforesaid
F issuance of injunctions by the High Courts, and issued directions for the issue of debentures. The cases pending in various High Courts were transferred to this Court.

In these transferred cases the consent orders of the CCI were challenged mainly on the grounds that:

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Despite the fact that RPL did not fulfil the requirements of a proper application and the necessary consent and approval, RPL's application was entertained and processed by the CCI with undue expedition and without application of mind;

H The guidelines issued by the CCI himself were deviated from;

The CCI had processed the application of RPL in a hurry, within two months; A

The CCI did not take into account the fact that RIL had earlier issued debentures for manufacture of identical products;

The CCI failed to note that RPL did not have the necessary licences, consents and approvals, from the relevant departments of the Government of India; B

The CCI failed to consider the financial soundness and feasibility of the project of RPL;

The CCI did not take adequate care to examine the terms of the issue and had blindly accepted the terms as proposed by RPL; C

RPL in its brochures has misled the public by describing the debentures as fully secured convertible debentures;

The security for the debentures was inadequate; D

RPL has been permitted to create securities which would have priority over the securities available to the present debenture holders and without their consent;

RPL has misled the public in that in its prospectus it had stated that security would be provided to the satisfaction of the trustees; E

The CCI had failed to examine whether RIL had misused the funds raised on its debentures;

There has been a discrimination in favour of RIL in that RIL would be entitled to allotment of shares of the face value of Rs.57.50 crores, whereas only 5% of the investment of the debenture-holders could be converted; F

Whereas RIL's loan of Rs.50 crores would be converted into shares at par, the debenture holders would have to pay premium to be fixed by the CCI at the time of second conversion of 20% of the debentures; and G

In the application filed by RPL, no shares were earmarked for the employees of RIL and RPL, but ultimately it was done. H

On behalf of the petitioners, it was contended *inter alia* that the issue of the debentures in question was detrimental to public interest, and that public interest had been ignored.

On behalf of Respondents it was argued that the sanction issued by the CCI had been genuine and valid, and that no irregularity had been committed. It was submitted that it was a misconception that the CCI had not followed his own guidelines relating to sanction of the issue of the debentures, and it was incorrect to say that there had not been proper security.

Dismissing the writ petitions and the suit, this Court,

HELD: 1.1. The CCI functions under the Capital Issues (Control) Act, 1947, an Act to provide for control over the issue of capital. The purpose of the Act must be found from the language used. The scheme and the language used, strictly speaking, do not indicate any positive role for the CCI in discharging his functions in respect of grant of sanction. But it has to be borne in mind that he is a part of State instrumentalities committed to the endeavours of the constitutional aspiration to secure justice—social and economic—and also under Article 39(b) & (c) of the Constitution to ensure that the ownership and control of the material resources of the community are so distributed as to best subserve the common good and that the operation of the economic system does not result in concentration of wealth and means of production to the common detriment. Yet, every instrumentality and functionary of the State must fulfil its own role and should not trespass or encroach/entrench upon the field of others. Progress is ensured and development helped if each performs his role in the common endeavour. [90B; 124F-H; 125A]

1.2. In the changed socio-economic conditions of the country one who is charged to ensure capital-investment has to perform a social role in capital formation and to protect the interest of the capital market, and to oversee the growth of industrialisation and investment in such a manner as to ensure employment and demand in the national economy, to prevent wasteful investment and to promote sound methods of corporate finance. In recent years, there has been a vast increase in the number of members of public who have surplus money to invest. The size of the issues has assumed macro proportions and the type of investments are also more sophisticated. Entrepreneurs with expert legal assistance could easily trap unwary investors and the development of a public interest lobby that can scrutinise issues carefully and advise prospective investors may be desirable. [125A, B, F, G]

1.3. The guidelines are only a guide and nothing more. The application of mind by the CCI before sanction must be in the perspective for which he is enjoined by the Act. He must endeavour to secure a balanced investment of the country's resources in industry, agriculture and social services. The Controller should perform the role of social control and fulfil the social purpose in conjunction with other authorities and functionaries. It is necessary for him in the discharge of his functions to ensure that there is not too much concentration of particular industries in particular areas, and that there is a scientific development and proper investment in key and core projects. [125C-D]

1.4. The duties of the CCI have to be construed in the context of the above, particularly when there is no clear cut delineation of their scope in the enactment. This is also reinforced by the expanding scope of the guidelines issued under the Act from time to time and the increasing range of financial instruments that enter the market. The responsibilities of the CCI in this direction should not be widened beyond the range of expeditious implementation of the scheme of the Act and should, atleast be restricted and limited to ensuring that the issue to which he is granting consent is not, patently and to his knowledge, so manifestly impracticable or financially risky as to amount to a fraud on the public. While it is true that some procedure may have to be evolved to ensure that the CCI gets the benefit of the comments, suggestions and objections from the public before arriving at his decision whether to grant consent or not, and if so, on what terms and conditions, it will be too cumbersome to have a provision that the details of every proposed application for consent should be publicised to the maximum extent by the CCI, that objections and comments from the public should be called for, that there should be public hearing by the CCI and that he should pass a reasoned order granting or withholding consent. That would delay the whole process of approvals which should be as expeditious as possible. [93C-E; 125G-H; 126A-B]

1.5. The CCI has also a role to play in ensuring that public interest does not suffer as a consequence of the consent granted by him. To go beyond this and require that the CCI should probe in depth into the technical feasibilities and financial soundness of the proposed projects or the sufficiency or otherwise of the security offered and such other details may be to burden him with duties for the discharge of which he is as yet ill-equipped. [93D-F]

1.6. Being non-statutory in character, the guidelines are not judicially enforceable. A policy is not law. A statement of policy is not a

A prescription of binding criterion. The competent authority might depart from these guidelines where the proper exercise of his discretion so warrants. In the instant case, the statute provided that rules can be made by the Central Government only. And according to s. 6(2) of the Act, the competent authority has the power and jurisdiction to condone any deviation from even the statutory requirements prescribed, under B sections 3 and 4 of the Act. The CCI applied his mind to the facts of this case and the factors in general. The CCI did not act malafide or on extraneous consideration. [122D-F; 124B-D]

Fernandez v. *State of Mysore,* [1967] 3 SCR 636; *R. Abdullah Rowther* v. *State of Tansport, etc.,* AIR 1959 SC 896; *Dy. Asst. Iron &* C *Steel Controller* v. *Manekchand Proprietor,* [1972] 3 SCR 1; *Andhra Industrial Work* v. *CCI & E,* [1975] 1 SCR 321; *K.M. Shanmugham* v. *S.R. V.S. Pvt. Ltd.,* [1964] 1 SCR 809; *Sagnata Investments Ltd.* v. *Norwich Corpn.,* [1971] 2 QB 614; *British Oxygen Co.* v. *Board of Trade,* [1971] AC 610, relied on.

D *Ramanna Dayaram Shetty* v. *International Airport Authority,* [1979] 3 SCR 1014; *Motilal Padampat Sugar Mills* v. *Uttar Pradesh,* [1979] 2 SCR 641; *Ex P. Khan,* [1981] 1 All. E.R. 40; *IRC* v. *National Federation,* [1982] AC 617; *Reqina* v. *Preston Supplementary,* [1975] 1 WLR 624; *Council of Civil Service Unions & Others* v. *Minister for the Civil Service,* [1985] AC 407, referred to.

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Foulkes' Administrative Law, 6th Edn. pp 181 to 184, referred to.

2. As regards the contention that the sanction of the CCI was accorded with undue haste and favouritism, in the first place, an application of this type is intended to be disposed of with great expedition. In F a project of the type proposed to be launched by the petitioner, passage of time may prejudicially afffect the applicant and it is not only desirable but also necessary that the application should be disposed of within as short a time as possible. It is, therefore, difficult to say that the period of two months taken in granting consent in the present case is so short that an inference of haste must follow. Secondly, on behalf of the Union G of India, a list of various applications received and disposed of by the office of the CCI between September, 1987 and September, 1988 has been produced to show that, generally speaking, these applications are disposed of within a month or two. It is true that none of these issues is of the same colossal magnitude as the present issue. Nevertheless, the CCI could hardly keep the application pending merely because the amount H involved is heavy. It is not possible therefore to say merely from the

short span of time that there was a hasty grant of consent in the present case. [73G-H; 74A-C] A

3.1. The consent of the CCI was not accorded in ignorance of the facts pertaining to the G series of RIL debentures. The application for consent makes it clear that the petitioner company is a new company promoted by RIL and that RIL was promoting this company to manufacture High Density Polyethylene (HDPE), Poly Vinyl Chloride PVC and Mono Ethylene Glycol (MEG). The application refers to the fact that the total cost of the project was expected to be Rs.650 crores and that this cost had been approved earlier in 1985. Considering that RPL had come into existence only on 11.1.1988, this was a clear indication that the projects for which the debenture issue was being proposed were projects which had been mooted even by the RIL as early as 1985. Again in the detailed application form submitted by the RPL it has been mentioned that the RIL had already obtained approval of the Central Government for implementation of the aforesaid projects under the MRTP Act. In part C of the application form it has been mentioned that the promoter company had made necessary applications for endorsement in favour of the company of the Letter of Intent/Industrial Licences already issued by the Central Government under the Industries (Development & Regulation) Act, 1951, in the name of the holding company, viz., RIL. It is, therefore, extremely difficult to agree that the fact of issue of the earlier series of debentures by the RIL or the purposes thereof could have escaped the notice of the CCI, particularly, when it is remembered that the issue of G series of debentures by the RIL was quite recent and had also attracted a lot of publicity. [74D-H; 75C-D] B C D E

3.2. The CCI was not performing the role of a social mentor taking into account the purpose of RIL. If RIL has misutilised any of its funds or the funds had not been utilised for G-series, then RIL would be responsible to its shareholders or to authorities in accordance with the relevant provisions of the Companies Act, 1956. This aspect does not enter into sanctioning the capital issue for the new project in accordance with the guidelines. Even if RIL and RPL have to be treated as one for this purpose and the grant of consent for earlier debenture issues in favour of RIL are to be taken into account in judging the necessity of the issues, there is no illegality or irregularity in the grant of consent to RPL. RIL had not been able to utilise any part of the 'G' series of debentures on the MEG project as there had been a cost overrun and it was decided to have a wholly-owned subsidiary. Hence the projects are those of the RIL to be implemented by RPL. The additional finances were needed for the extension, expansion and diversification of F G H

A the projects originally envisaged. This is one of the objects for which a debenture issue is permissible under the guidelines. [101F-H; 102A, B]

4.1. So far as HDPE is concerned, it appears that there was a valid licence; and it may be mentioned that on 24th August, 1985 pursuant to an application made by RIL under section 22(3)(a) of the B MRTP Act, the Govt. granted approval for the establishment of a new undertaking for manufacture of HDPE. [77F]

4.2. Regarding foreign collaboration, an application was made by RIL in 1984 for approval of foreign collaboration with M/s Du Pont Inc. Canada, for manufacture of HDPE. The approval was given and the validity was extended and the foreign collaboration approval was C endorsed in favour of RPL on 12th October, 1988. Similar other consents were there. Finally, capital goods clearance was endorsed in favour of RPL for the PVC project on 12th August, 1988. Capital goods clearance was also endorsed in favour of RPL for HDPE project on 23rd August, 1988. Thus, it will be seen that all the basic groundwork had D already been done by the RIL. [77G, H; 78A]

4.3. On 16th June, 1987 by a Press Note issued by the Deptt. of Industrial Development in the Ministry of Industry of the Govt. of India declared that where a transferee Company is a fully owned subsidiary of the Company holding the Letter of Intent or licence, the change of E the Company implementing the project would be approved. It is in the light of this that the Board of RIL on 30th December, 1987 passed a resolution to incorporate a 100% subsidiary Company whose main objects were to implement the licences/Letters of Intent received by RIL and to carry on the activities relating to production and distribution. The resolution approved the name of the Company as RPL. On 11th F January, 1988 the RPL was incorporated and the Certificate of Incorporation was issued. Thereafter, on 12th January, 1988 letters were written by RIL for endorsement of licences/Letters of Intent in favour of RPL. The certificate of commencement of business was thereafter issued. [78B-E]

G 4.4. The Press Note is clear that the transfers from one company to an allied company were considered unexceptionable except where trafficking in licences is intended. In this situation the change of name from RIL to RPL, of the licences, letter of intent and other approvals was only a matter of course and much importance cannot be attached to the fact that CCI did not insist upon these endorsements being obtained H even before the letter of consent is granted. In any event the letter of

consent is very clear. Clause (h) of the conditions attached to the consent letter makes it clear that the consent should not be construed as exempting the company from the operation of the provisions of the Monopolies & Restrictive Trade Practices Act, 1969, as amended. Clause (c) makes it clear that it is a condition of this consent that the company will be subject to any measures of control, licensing, or acquisition that may be brought into operation either by the Central or any State Government or any authority therein. Under clause (t) the approval granted is without prejudice to any other approval/permission that may be required to be obtained under any other Acts/laws in force. Having regard to the above and also to the terms and conditions of the consent letter, the grant of consent itself being conditioned on RPL obtaining the necessary approvals, consents and permissions before embarking on the project, there was no impropriety in the CCI granting the consent without waiting for the formal endorsement of the various licences, letters and approvals in favour of RPL. Moreover, CCI is aware of the progress of the various applications made by the company. The Controller is also aware that the ICICI had looked into the financial soundness and feasibility of the project and there is material to show that the comments of the ICICI were made available to him. When a project is being appraised by the institution like the ICICI and when the CCI is also aware, by reason of the participation of his representatives at the meetings of the Department of Industry and the Department of Company Affairs about the stage or outcome of the proposals made under the IDR and MRTP Acts, it is clear that the CCI did not overlook any crucial aspect and that his grant of consent in anticipation of the necessary transfers to the RPL was based on a practical appraisal of the situation and fully in order. [78F-H; 79A, B; 80B-D]

5. There has been sufficient compliance with the guidelines on the quantum of issue, debt-equity ratio, interest rate and the period of redemption. There was sufficient security for the debentures in the facts and circumstances of this case. The preference in favour of shareholders of RIL was justified and based on intelligible differentia. Indeed, if one considers the role of the CCI, he is primarily concerned to ensure a balanced investment policy and not to guarantee the solvency or sufficiency of the security. Most of the criticisms directed against deviation from guidelines were misplaced. [94G, H; 95A, B]

6.1. The discrimination alleged is on two grounds. The first is that RIL is entitled straightway to the allotment of shares of the face value of Rs.57.50 crores whereas only 5% of the investment by the debenture holders can be converted into shares at par simultaneously

A with the issue. The second is that a loan of Rs.50 crores advanced by RIL to RPL will be converted into shares at par at the end of 3 years whereas the debenture holders will have to pay a premium even for converting 20% of their debentures into shares by that time. These allegations do not bear scrutiny. So fas as the first ground is concerned, there is no justification for a comparison between these two categories B of investors. RIL is the promoter company which has conceived the projects, got them sanctioned, invested huge amounts of time and money and transferred the projects for implementation to RPL. It is, therefore, in a class by itself and there is nothing wrong if it is allotted certain shares in the company, quite independently of the debenture issue, in lieu of its investments. So far as the second ground is concerned, it overlooks certain disadvantages attached to RIL in regard to C the loan of Rs.50 crores advanced by RIL as compared with the investor in the debentures. Firstly, RIL's advance is interest free for 3 years whereas the debenture holders got interest at the rate of 12.5% during the period. Secondly, the debenture loan is secured while the RIL's are not. Thus the debenture holders have certain benefits which RIL does D not have and, if the debenture holders have the disadvantage of having to pay a premium, that cannot constitute basis for a ground of discrimination. [103E-H; 104 A, B]

6.2. RPL is a company—not the State or a State instrumentality—that is issuing the shares and debentures. It is entirely for the E company to issue the shares and debentures on such terms as they may consider practicable from their point of view. There is no reason why they should not so structure the issue that it confers certain great advantages and benefits on the existing share holders or promoters than on the new subscribers. It is not permissible for the CCI to withhold consent only for this reason or to stipulate that consent can be given F only if the share holders and promoters as well as prospective debenture holders are all treated alike. The subscribers to the debenture are only lenders to the company who have an option to convert their debt into equity on certain terms. It is perfectly open to the subscribers to balance the *pros* and *cons* of the issue and to desist from taking the debentures if they feel that the dice are loaded unfavourably in favour G of the "proprietors" of the company. [104B-E]

7.1. In the present case, a legal mortgage has been created by RPL in favour of the trustees in respect of its immovable and movable assets, except book debts, in respect of which financial institutions will hold a first charge on account of foreign loan. RPL does not have any H existing loans. Therefore, the charge in favour of the debenture holders

is presently the first charge. No further borrowing is contemplated at this stage except the foreign currency loan to the extent of Rs.84 crores. Even if the value of the foreign currency which has been sanctioned in principle by the three financial institutions is taken into account, the assets coverage goes down at each stage and does not make any critical difference to the value of the security of the debenture holders under the Trust Deed. The purposes of borrowings, namely, term-loan borrowings, deferred payment credits/guarantees and borrowing for financing new projects do not, on analysis, raise any difficulty. There are sufficient in-built checks and controls. The company, being an MRTP company would have to obtain both MRTP permission for creating any security irrespective of its value and fresh CCI consent under the CCI Act, except in case of exempted securities. [119G, H; 120A-C]

7.2. With the escalation in the value of the fixed assets due to passage of time on the one hand and the redemption of a good portion of the debentures by the end of three years on the other, the security provided is complete and, in any event, more than adequate to safeguard the interests of the debenture holders. [96G, H]

8. Clauses 5 and 6 are only enabling clauses and in the nature of permitting the Company, despite the mortgage in favour of the debenture holders, to carry on his business normally. What is referred to therein as residual charge is really a floating charge. The Company's normal business activities would necessarily involve alienation of some of its assets from time to time such as goods manufactured by it as well as procurement and discharge of loan and accommodation facilities from banks, financial institutions and others. The entire progress of the company would come to a standstill in the absence of such enabling provisions. They are not only usual but essential because the basic idea is that the finances raised by the debentures should be employed for running the project profitably and thereby generate more and more funds and assets which will also be available to the debentures holders. Further what the clauses provide is only that the consent and concurrence of the debenture holders need not be obtained by the company before creating securities that may have priority over the present issue of debentures. But the trustees for the debenture holders have to concur before the company can raise any future borrowings and create, therefor, the security which will have priority over the security available to the present debenture holders. The ICICI is not only a financial institution in the public sector but also one of the institutions financing the project and thus has a stake in its success and so can be trusted to safeguard the interests of the debenture holders. The debenture trust

A deed also contains a provision by which at the time of creation of any future charge the terms and ranking have to be agreed upon between RPL and ICICI. Clause 16 of the trust deed authorises the trustees to intervene and crystallise the charge in certain circumstances and stultify an attempt by the company to create higher ranking charges. There are also restraints on the company under the Companies Act and the MRTP B Act involving the consent of public financial institutions, Commercial Banks, the term lenders, share holders, the MRTP Commission, the Central Govt. and the CCI before the creation of such securities. [98B-H; 99A, E, F]

9. In certain brochures and pamphlets issued by RPL, the debentures were described as "fully secured convertible debentures". C The company admitted that there was such a description but explained that this was due to an oversight; the words "fully secured convertible debentures" were printed in some brochures instead of the words "secured fully convertible debentures" without meaning or intending any change. It was stated that the company's representation was that D the debentures were "secured fully convertible" ones. This is also what had been set out in the application for consent. Though the company did claim that the debentures were also fully secured, the emphasis in the issue was that the debentures were fully convertible and secured. This explanation is plausible. No importance or significance need be attached to the different description in some places, E particularly, in the context of the nature of security actually provided for the debentures. [95F-H; 96A]

10. Prospectus issued by RPL is not misleading because it stated that security will be provided to the satisfaction of the trustees and the CCI accepted that statement in the application for consent. The F debenture trustees are well known financial institutions and it is not possible for the CCI to ensure more than the usual practice which was followed in the present case. [100D, E]

11. The CCI modified paragraph 5 of the consent by his letter of the 19th July, 1988 to say that allotment to the employees shall not exceed 50 debentures per individual. It does not appear that the restric- G tion of the allotments to the employees was at the instance of the Company; nor does it seem that any discrimination was intended in respect of the allotments to the employees. Nor has attention been invited to any legal requirements or guidelines prescribing any fixed or minimum quota of allotment to the employees of the Company. Under the circumstances, the question of discrimination does not arise. [107C, D] H

12. The consent order of the CCI clearly indicated that the consent conveyed in the letter shall lapse on the expiry of 12 months from the date thereof. The consent order categorically stated that the approval was without prejudice to any other approval/permission that may be required to be obtained under any other Acts and laws in force. It necessarily follows that the obligation to obtain other permissions continued. There was no legal conditions that other approvals should be examined by the CCI before grant of its own consent. [112E, F]

13.1. As defined in the Companies Act, a debenture need not be secured. Therefore, guideline 10 means that security should be provided as is customarily adopted in corporate practice. In the present case, the debentures are compulsorily convertible and so no repayment is really involved. The debenture is essentially an acknowledgement of debt with a commitments to repay the principal with interest. The question of security becomes relevant for the purpose of payment of interest only in the unlikely event of winding up. The guidelines did not provide for the quantum and the nature of the security. A debenture may, therefore, be secured or unsecured. An ordinary debenture has to be distinguished from a mortgage debenture which necessarily creates mortgage on the assets of a Company. A compulsorily convertible debenture does not postulate any repayment of the principal and so does not constitute a debenture in the classic sense. Even a debenture which is only convertible at option has been recognised as a hybrid debenture. The guidelines for the protection of debenture holders issued on 14.1.1987 recognise the basic distinction between convertible and non-convertible debenture. Comopulsorily convertible debentures in corporate practice were adopted in India sometime after 1984. Wherever the concept of compulsorily convertible debenture is involved, various guidelines issued by the Government of India treat them as equity and not as loan or debt. Even a non-convertible debenture need not always be secured. In fact, modern tendency is to raise loan by unsecured stock which does not create any charge on the assets of a Company. Whenever a security is created, it is invariably in the form of a floating charge. In addition they are frequently secured by a trust deed as in the present case where specific property/land etc. has been mortgaged to the trustees. [116E, F; 117B-G]

13.2. In the instant case, if the permission of the debenture holders were required or is insisted upon to create future security, 2.5 million debenture holders have to be informed and invited for the meeting. The extravagant effects of this course would be collosal especially when a shareholders meeting is also additionally called for the same

A body of persons. It is, therefore, incorrect to say that a floating charge creates an illusory charge because future securities can be created ranking in priority over it. [118D-E]

The British India Steam Navigation Co. v. *The Commissioner of Inland Revenue,* [1881] 7 QBD 165; *Re. Colonial Trusts Corporation,* B [1879] 15 Ch. 465; *Speyar Brothers* v. *The Commissioner of Inland Revenue,* [1907] 1 KB 246; *Lemon* v. *Austin Friars Investment Trust Ltd.,* [1926] 1 Ch. 15; *Florence Land & Public Works Co.,* [1878] 10 Ch. 530; *Re. Panama, New Zealand, and Australian Royal Mail Co.,* [1870] L.R. 5 Ch. 318; *Re. Standard Manufacturing Co.,* [1891] 1 Ch. 627; *Re. Borak Foster* v. *Borax Co.,* [1901] 1 Ch. 326; *Creatnor Maritime Co. Ltd.* v. *Irish Marine Management Ltd.,* [1978] 1 WLR C 966, referred to.

Palmer's Company Law, 24th Edn. pp. 672, 675, 676, 706; *The Encyclopaedia of Forms and Precedents,* 4th Edn., Vol. 6 p. 1094, 1095, 1097, 1098, referred to.

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14. The Court, would be reluctant to interfere simply because one or more of the guidelines have not been adhered to even where there are substantial deviations unless the deviations are by nature and extent such as to prejudice the interests of the public which it is their avowed object to protect. Per Contra, the Court would be inclined to overlook E or ignore such deviations, if the object of the statute and public interest warrant, justify or necessitate such deviations in a particular case. Judicial control takes over only where the deviation either involves arbitrariness or discrimination or is so fundamental as to undermine a basic public purpose which the guidelines and the statute under which they are issued are intended to achieve. In the instant case, there is no F such infraction of the norms required to be followed in granting the sanction. [123F-H; 124A, B]

15. Before the Courts grant any injunction they should have regard to the principles of comity of courts in a federal structure and have regard to self-restraint and circumspection. It may be impossible G to lay down hard and fast rules of general application because of the diverse situations which give rise to problems of this nature. Each case has its own special facts and complications and it will be a disadvantage, rather than an advantage, to attempt and apply any stereo-typed formula to all cases. Perhaps in this sphere, the High Courts themselves might be able to introduce a certain amount of discipline having regard H to the principles of comity of courts administering the same general

laws applicable all over the country in respect of granting interim orders which will have repercussion or effect beyond the jurisdiction of the particular courts. Such an exercise will be a useful contribution in evolving good conventions in the federal judicial system. [126F, G; 127A]

[Having considered the facts and circumstances of the present cases, this Court directed refund of the sum of Rs.one lakh deposited by RPL as ordered by the Court on 9.9.1988. The deposit amount was meant for payment to the petitioners in case they were to spend unduly.]

ORIGINAL JURISDICTION: Transfer Case Nos. 161-165 of 1988.

S. Ganesh, Arun Jaitely, Miss Bina Gupta, Miss Madhu Khatri, A.N. Haksar, Praveen Anand, Anip Sachthey, B.L. Pagaria, P.K. Jain, Udai Holla and T. Sridharan for the petitioners.

G. Ramaswamy, Soli, J. Sorabjee, M.H. Baig, F.S. Nariman, H.N. Salve, R. Sasiprabhu, S.S. Shroff, Mrs. P.S. Shroff and S.A. Shroff for the Respondents.

The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, J. In these transferred writ petitions and one suit, we are concerned with the powers, functions and the role of the Controller of Capital Issues. By an order dated 9th September, 1988 this Court had directed that the four writ petitions and one civil suit i.e., W.P. No. 1791/88 pending before the Delhi High court, W.P. No. 2708/88 pending before the Jaipur Bench of the Rajasthan High Court, W.P. No. 12176/88 pending before the Karnataka High court, W.P. No. 4388/88 pending before the High Court of Bombay and Civil Suit No. 1172/88 pending before the Civil Judge, Junior Division Bench, Baroda, Gujarat, be transferred to this Court for disposal. It would be appropriate to deal with the facts of one of these, i.e., W.P. No. 1791/88, which was filed in Delhi High Court in T.C. No. 161/88. The other writ petitions and the suit raise more or less identical problems and issues on more or less same facts.

The petitioner in that writ petition is one Narendra Kumar Maheshwari and the respondents are the Union of India, the Controller of Capital Issues, and Reliance Petro-chemicals Ltd. (RPL). The case of the petitioner is that he is an individual who is a public spirited

A person and is an existing shareholder of the Company known as Reliance Industries Ltd. (RIL), which was the promoter of Reliance Petrochemicals Limited, being the respondent No. 3. The petitioner held at all relevant times 144 shares of RIL and 100 debentures of different categories. The respondent No. 3, being RPL, was a newly set up public limited company for the purpose of carrying on the busi-
B ness of manufacture of petrochemicals. These petitions were filed in different courts challenging the consent of the Controller of Capital Issues granted for the issue of shares (Rs. 50 crores) and debentures (Rs.516 crores) by the RPL. It was contended in the petition that the respondents Nos. 1 & 2, being the Union of India and the Controller of Capital Issues, ought not to have granted consent to respondent No. 3,
C namely, RPL to issue share and debenture capital at an aggregate value of approx. Rs.600 crores. It may be mentioned that after these writ petitions and suit were filed, attempts were made to obtain injunction restraining the issue of share-capital and debentures as advertised. By an order dated 19th August, 1988 passed by this Court, this Court had restrained the issue of such injunctions and directed that the
D shares and debentures would be issued irrespective of any order of injunction passed by any court or authority in India. Different cases, as mentioned hereinbefore, were thereafter transferred to this Court.

On the basis of the said consent, it was stated that the respondent No. 3 had issued prospectus and at the relevant time had intended to
E open the issue from 22nd August, 1988, of about 3 crores debentures of the face value of Rs.200 each which was the largest convertible debentures issue in India. It was alleged that the respondents had adopted very sharp methods to collect money from the public and ultimately to defraud them. It was stated that under the terms of the prospectus, each debenture of the face value of Rs.200 would be fully
F convertible: Respondent No. 3 would issue one share of Rs.10 at par on the date of allotment. There would, thus, be an equity capital of about Rs.30 crores in all on allotment. Further, it was stated that the Company would convert Rs.40 of each convertible debentures into share after 3 years and the balance of Rs.150 into share at any time between five and seven years. It was mentioned by the Company that
G it would convert at the second stage of conversion at such permium to be allowed by the Controller of Capital Issues. The petitioner alleged that it was not clear as to whether the investors would get 2 shares or 3 shares or 4 shares for each debenture, at the second conversion of Rs.40. Similarly, it was alleged that the last portion of Rs.150 would be converted into shares any time between five and seven years at which
H time again the Controller, would fix the premium for conversion. The

petitioner further stated that it was thus not clear what the equity capital of the Company would be, whether it would be Rs.150 crores or Rs.600 crores or whether the residual amount would go into reserve account or whether a separate account would be opened in respect of the premium. It was alleged that the respondent No. 3 being RPL had been promoted by RIL and the past history of RIL showed that the share prices of RIL had fluctuated widely leaving lot of scope for manipulations. It was alleged in the petition that there was no explanation from the company or anybody from the share market as to why the share prices fluctuated so widely and it was obvious that there were market operators who prop up or bring down the prices depending on how it suited their convenience. The share value of RIL, the promoter company, was subjected to wide fluctuations on account of the purchase and sale operations of certain interested quarters close to the management of the respondent No. 3 Company, it was alleged. On more than one occasion during the past six months, the sale of the share in the stock market was banned in some Stock-Exchanges due to fall in price. It was alleged that it indicated the cooperation and support from the authorities for maintaining the fictitious value of the share in the market; and thus on an equity capital of Rs.152 crores an amount of Rs.800 crores in the premium account has been obtained, but there would be no amount in General Reserve account because the Company had not earned anything worthwhile to put in General Reserve. It was further alleged that the lack of *bona fide* of the Reliance group was well-known; and that RIL had issued debentures of 'G' Series and had assured to pay interest up to 5th February, 1988. It was alleged that the Company did not keep up this assurance, but converted the debentures into equity shares in the month of August, 1987 thereby avoiding payment of interest. In this manner, it was alleged, the Company saved interest of Rs.30 crores whereas in fact it incurred a loss. The case of the petitioner was that the Company was obviously trying to repeat the same game through the new Company by maintaining the share price only on an equity capital converted on each debenture. The paramount duty of respondents Nos. 1 & 2 before according permission was, it was asserted, to ensure that the requirement of the Company in raising such capital was *bona fide*. It was observed that no public interest was intended to be served by respondent No. 1, as it had chosen to allow respondent No. 3 to collect such huge amounts in excess of the requirement.

It is further the case of the petitioner that the operations of RIL (Promoter) subsequent to the raising of past issues made by it were subjected to severe criticisms both in the press and in the public. It was

A pointed out that though the issue proposed was of shares of Rs.50 crores and debentures of Rs.516 crores, the company was allowed to retain over-subscription to the tune of 15% amounting to Rs.77.40 crores. It was alleged that the respondent No. 3 was a new Company and it should not be allowed 15% retention; and if it wanted to raise Rs.600 crores, it should have come out with an issue of that amount. It B was further alleged that the respondent No. 2, without considering the propriety of the situation, allowed the respondent No. 3 to make issue of the capital for the interest of a few people. Hence, the sanction of the issue of convertible debentures of respondent No. 3 calls for judicial review. It was also alleged that the sanction was approved at exorbitant terms: 5% of the face value (equal to nothing) according to the petitioner, would be converted at par on allotment, another 20% C (Rs.40) at a premium to be decided by the Controller of Capital Issues after 3 years but before 4 years of allotment and the balance of Rs.150 at such premium as might be permitted by the Controller of Capital Issues after 5 years but before the end of 7 years from the date of allotment. It was stated that the investors would be completely left D thrown at the mercy of respondents Nos. 3 & 4; and that till date no convertible debenture had been issued on such vague terms. In those circumstances, it was submitted, the consent of the Controller of Capital Issues was bad, illegal on the ground hereinafter alleged:

The consent order was hit by arbitrary and capricious exercise of E jurisdiction by respondent No. 1. It was further alleged that the respondent No. 3's promoters i.e. RIL had been obtaining from respondent No. 1/2 such Consent Orders on the ground that it was in a position to raise such huge moneys from the public for the purpose of implementation of its projects without recourse to the Financial Institutions. According to the petitioner, for the first time, in the F corporate history of India, RIL (Promoter) was allowed to raise Rs.100 crores by way of issuance of 'F' Series debentures. On account of the campaigning through Brokers for attractive returns, the public was misled and RIL wooed the public and collected Rs. 406 crores. RIL had not made any allotment on a proper basis but made allotments on some basis of 'Private Placement'. It was further alleged that G the management of RIL through its associate companies obtained huge borrowals from nationalised banks; and several bank employees got into trouble due to advancing of loans for the purpose of subscription in the 'F' Series debentures through the associated companies of respondent No. 3/RIL which had popularly come to be known as 'Reliance Loan Mela'. It was alleged that the Controller of Capital H Issues and Union of India acted *mala fide* in issuing the consent order

which was designed to benefit respondent No. 3 and prejudice the interests of the investing public. It was further alleged that in giving the consent order the respondent No. 1 blatantly overlooked the magnitude of the sum of Rs.600 crores, proposed to be raised from the public through the new issue of debentures.

It was alleged that the act of respondent No. 1/2 was vitiated as in issuing the consent order respondent No. 2 was influenced by extraneous considerations not germane to the public interest. The Capital Market in India has undergone turbulent changes in the recent years. Small investors such as employees, workers and small business community were coming forward, according to the petitioner, for the purpose of investment in corporate sector. It was further stated that the small investors had no means of verifying the correctness or otherwise of the statements and the soundness/financial viability of any company. It was further alleged that the respondents Nos. 1/2 had acted wrongly and illegally in allowing the respondent No. 3 to raise share-capital on premium for financing new projects. It was contended in the petition of the petitioner that the consent order was a fraud.

In those circumstances it was prayed that the court should exercise its jurisdiction under Art. 226 and set aside the consent order which was for the public issue on 22nd August, 1988.

The facts and the circumstances leading to this consent order have been stated in the affidavit on behalf of respondent No. 3 to the writ application. After disputing the locus of the petitioner, who challenged the consent order for making the public issue of 12.5 Secured Convertible Debentures by 3rd respondent, the respondent No. 3 stated that the petition suffers from laches and delays. On behalf of respondent No. 3 it was asserted that the public issues made by the 3rd respondent had been promoted by RIL. The RIL and RPL are inter connected and represented companies in the large industrial house known as 'Reliance Group'. According to respondent No. 3, they represented India's fastest growing private sector companies and comprised the world's second largest investor family of over 30 lakhs investors. It was further asserted that the 3rd respondent would have India's largest private sector Petrochemical Complex for the manufacture of critically scarce raw-materials. It was stated that the 3rd respondent would manufacture versatile raw-material which was behind the plastic revolution, particulars whereof have been mentioned in the Annexure. It was further stated that the petrochemical complex of the 3rd respondent would come up at Hazira, District Surat in the

A State of Gujarat and the production was planned to start in a phased manner between the next 18-24 months. The 3rd respondent would be setting up a state-of-art world class plant in collaboration with the world leaders in the respective fields, i.e. (a) Du Pont, Canada for HDPE (b) B.F. Goodrich & Co. for PVC, and (c) Scientific Design Co. for MEG.

B

The terms of the issue of debentures of the face value of Rs.200 being fully converted into equity shares were the following:

> "(i) A sum of Rs. 10 being 5% of the face value of each debentures by way of first conversion immediately into one equity share at par on allotment;

C

> (ii) A sum of Rs.40 being the 20% of the face value of each debenture by way of second conversion after three years but before four years from the date of allotment at a premium to be fixed by the Controller of Capital issues;

D

> (iii) The balance of Rs. 150 representing 75% of the face value of each debenture as third conversion after five years but not later than seven years from the date of allotment at a premium to be fixed by the Controller of Capital Issues."

E The premium, it was stated on behalf of respondent No. 3, that would be charged at the time of conversion into equity shares would be as fixed and decided by the prescribed statutory authority, namely, the Controller of Capital issues, and the 3rd respondent and its Board of Directors would not have any say in the matter or be entitled to fix the same on their own. It was further stated that, subject to the necessary F approvals being obtained in that behalf, the shareholders and the convertible debenture holders of the respondent No. 3, promoter company, would be entitled to participate in all the future issues of the 3rd respondent. The fully convertible debentures of the 3rd respondent would thus be a growth instrument with different rights, viz., earning a fixed rate of interest from the first day till it was converted into equity G and thereafter entitled to dividend that might be declared after conversion into Equity. It is to that extent different from a purely equity share on which investor would earn dividend only when profits are declared. Thus, the instrument proposed by the 3rd respondent, according to it, has the best features of share as well as debenture. Apart from the above, in accordance with the application for listing H made by the 3rd respondent to the Bombay Stock Exchange and

Ahmedabad Stock Exchange, the 3rd respondent has proposed that all the three components or parts of the instrument, namely, Part 'A' representing an equity share on first conversion, Part 'B' being 20% of the face value of the debenture and Part 'C' being the balance 75% of the face value of the debentures, would all be listed separately and independently so that after allotment, an investor can sell if he so desires the convertible portion of the debentures being Part 'B' and 'C', and just retain the equity share being Part 'A'. It was intended to ensure both liquidity and appreciation in the hands of the investor.

The products which were intended to be manufactured by the 3rd respondent were many, namely, (a) High Density Polyethylene (HDPE) and Poly Vinyl Chloride (PVC) which are raw-materials behind plastic revolution; (b) Mono Ethylne Glycol (MEG) is a critical polyester raw-material; HDPE and PVC being vital thermo plastic play an important role in the core sector and are used for manufacture of everything from films to pipes, auto parts to cable coatings, and containers to furnishings. It is not necessary for the issues involved in these applications to set out in detail the very many particulars given by the respondent No. 3 in support of the contention that a petro-chemical complex proposed to be set up by the new Company—respondent No. 3—would be beneficial socially and economically for the country as well as for the investors.

The advantages of convertible debentures proposed to be issued at that time by the respondent No. 3 were also highlighted. It is stated that debentures are treated as equity. The 3rd respondent's borrowing capacity remains unutilised and this would help it in implementing the future projects expeditiously. The first phase of the project is financed by the proposed issue of debentures and not by large capital borrowings from the public financial institutions (except to the extent of foreign currency loans of Rs.85 crores from them). The interest which would, therefore, have been payable to the financial institutions will be paid to the debenture holders ensuring them a return and simultaneously the convertible clause which would have been applicable to term-loans obtained from the financial institutions would be available to the investors thereby ensuring them growth in equity value. It was further stated that since the preferential allotment of 50% of the total issue was made to RIL shareholders, the shareholding pattern of the 3rd respondent will be the most widely held people's shareholding in the country and it was pleaded that there will be at least 20 lacs shareholders of the 3rd respondent which would be a world market record.

A It was further stated that RIL, who are the promoters of the project, have one of the best track records for setting up of the Projects such as Polyester Staple Fibre (PSF), Polyester Filament Yarn (PFY), Linear Alkyl Benzene (LAB) and Purified Terphthalic Acid (PTA) plants at Patalganga in record time. Business records of Reliance's 'Vimal' and 'Recorn' were also emphasised. It is, however, B not necessary for the purpose of the issues involved in these applications either to dilate upon these or to consider the correctness or otherwise of these assertions. Reliance's plant at Patalganga complex in the State of Maharashtra and its beneficial effects to the community and the State, as asserted on behalf of respondent No. 3, are also not relevant. It was stated that Reliance is privy to the technology of the world leaders, such as Du Pont of U.S.A. and Imperial Chemical C Industries of UK. Mr. Pageria, learned counsel appearing for one of the petitioners, Radhey Shyam Goyal tried to impress upon us that among the world leaders of technology, Du Pont of USA and Imperial Chemical Industries of UK cannot claim such high position. Neither is it necessary nor is it possible for us to consider these assertions and D denials.

The industrial licences have been applied for and it was stated that pending the formation and incorporation of RPL on 4.1.1988 under the Companies Act, 1956, RIL had undertaken and performed various acts and deeds, particulars whereof have been mentioned in E the Statement of Facts. In the Statement of facts filed on behalf of respondent No. 3, a list of consents and approvals obtained by the 3rd respondent, has also been indicated.

It was further stated that pursuant to the order of this Court, dated 19th August, 1988 the public issue was made under the F prospectus dated 27th July, 1988 which opened on 22nd August, 1988 and closed on 31st August, 1988. There had been an overwhelming response to the issue from all categories of investors including non-residents, RIL shareholders/employees and the issue was heavily oversubscribed. On behalf of the RPL, it was stated that the time frame of 10 weeks commencing from 1st September, 1988 and ending on 10th G November, 1988 had to be strictly adhered to. The provisions of Section 73 and other applicable provisions of the Companies Act, 1956, the provisions of the Securities (Contract and Regulation) Act, 1956 and the listing requirements of the Stock Exchanges were also complied with.

H It was stated on behalf of the 3rd respondent that for the purpose

of finalising the means of finance of HDPE, PVC and MEG Projects, RIL as the promoters of the 3rd respondent had engaged the services of the Merchant Banking Division of ICICI which is a public financial institution and one of the foremost consultants in the field. During the discussions which were initiated in the second half of 1987 with ICICI, the idea of implementing these projects through a new independent Company instead of RIL had taken shape duly taking into account the financial aspects, management aspects, issues related to management and operation control of setting up the projects within the existing company vis-a-vis the setting up of the projects in the new company, namely the 3rd respondent company, was taken up. The 3rd respondent company and ICICI also considered various alternative means of financing project keeping in view the following criteria:

> (a) That the project should be financially beneficial to the company. (b) That it should be financially attractive to the investor. (c) That it should be operationally easy for the company and the investor. (d) That it should meet the institutional/stock exchange/Ministry of Finance norms and guidelines as regards financing of projects. (e) That it should be sustainable and attractive enough in terms of the profitability/servicing capability of the project. (f) That it should reduce the dependence of the company on institutional finance. (g) That it should encourage the capital market activity in India.

The various alternative means of issue of security such as equity share and/or convertible cumulative preference shares (CCP) and/or partially convertible debentures and/or non-convertible debentures and/or equity linked debenture issue and/or fully convertible debentures were all examined by the management and ICICI at length from various aspects including the aforesaid aspect, it was asserted on behalf of respondent No. 3.

It was reiterated that the Contoller of Capital Issues had applied his mind and considered all relevant, pertinent and proximate matters and the Controller *bona fide* bestowed painstaking consideration by examining the entire gamut of means of finance, the volume of finance needed and types of securities, marketability of securities, conditions of the capital market and other relevant considerations as are normally and properly to be evaluated by him as an expert authority. A specialised expert statutory authority or agency under a valid and legal enactment has been set up for the purpose of examining on what basis securities such as share and/or convertible debenture should be issued

A and the merits of his conclusions are not open to judicial review.

It has to be borne in mind that the writ petitioners were only potential investors in the shares and debentures proposed to be issued at the time when a large part of the averments had been made. It was open to them, if they felt that the scheme was not attractive not to B subscribe to the issues. It was, however, not possible for them, contend the respondents, to prohibit the issue or prevent the taking of other steps in pursuance thereof. Respondents 3 and 4 have set out various reasons why an interim injunction should not be granted. These are unnecessary to be dealt with now when the matter is being finally disposed of.

C Two other affidavits are necessary to be referred to. One is the rejoinder affidavit on behalf of the petitioner in writ petition No. 1791 of 1988 before the Delhi High Court, and the other is on behalf of the Government. So far as the petition of Narendra Kumar Maheshwari is concerned, it is necessary to note that he has stated that the capital D market had undergone changes in raising issues and the investors had no means of verifying the correctness and soundness of the financial viability of the scheme. It was stated that the Central Govt. did not take the responsibility for financial soundness of the scheme. It was asserted that a new share of a new company could not be raised at a premium but the Govt. had improperly permitted the issue of shares of E a new company at a premium in the instant case. It was stated that the consent order of the Controller of Capital Issues stated that premium would be payable on the shares to be allotted on conversion which, according to the deponent, amounted to fraud on the investing public and the subterfuge to boost up the market value of shares of RIL.

F It was reiterated that the RPL had been promoted by RIL whose shares had fluctuated in the share market so widely for which no explanation came forth from the company. These fluctuations in the share market were, according to the petitioner, on account of purchases/sales made by certain interested quarters close to the management. On many occasions the sale of the share of RIL in the stock market was G banned in some stock exchanges due to fall in prices which, according to the deponent, was a clear indication of cooperation and support from the authorities.

It was further alleged that there was discrimination in respect of time period of conversion of loan/investment into equity between the H shareholders of RIL and the investing public. Immediately on allot-

ment the conversion of percentage of investment of the rights holders is 53.49% whereas that of the investing public is only 5%. At the end of 3 years from the debenture allotment date, percentage debenture conversion of investment of the rights holders is 46.51% and that of the investing public is *nil*. Hence, after the end of 3 years time the percentage of conversion in investment of rights holders is 100% whereas that of the investment of right holders at the end of 3 years in figures is approx. Rs.107.50 crores and the investing public is only 29.67 crores. Between 3 and 4 years of debenture allotment the percentage of conversion of allotment of rights holders is *nil* and that of the investing public is 20%. Between 5 and 7 years of the debenture allotment date the percentage of conversion of investment of the rights holders was nil and that of the investing public is 75%. Thus the conversion of the debenture allotment between 3 and 7 years of rights holders is nil and that of the investing public is 95%, which in figures comes to about Rs.563.73 crores.

In a democratic set up in the country, it was asserted on behalf of the petitioners, the sanction of the issue amounted to concentration of wealth in one hand which brought danger to the national economy and was against the Directive Principles of State policy enshrined in the Constitution. It was submitted that the validity of the consent order had to be decided on the merits of the case in the background of the aforesaid. The petitioner had every right to question the validity of the consent order, it was stated.

One consolidated reply to all these writ petitions on behalf of the Union of India through the Secretariat, Ministry of Finance, Deptt. of Economic Affairs and Controller of Capital Issues was filed by means of an affidavit affirmed by Mr. Prabhat Chandra Rastogi who, at the relevant time, was the Under-Secretary in the Ministry of Finance, and Deputy Controller of Capital Issues in the office of Controller of Capital Issues. He has mentioned that the consent of Capital Issues was granted on 4th July, 1988 and the same was amended to a certain extent on 19th & 26th July, 1988. He has explained in his affidavit the background of the circumstances leading to the consent order.

In relation to the 3 projects, namely, (i) for manufacture of 1,00,000 tonnes per annum Polyvinyl Chloride (PVC), (ii) 60,000 tonnes per annum of MEG (Mono Ethylene Glycol); and (iii) 50,000 tonnes per annum of HDPE (High Density Polyethylene), RPL submitted an application for issue of capital on or about 4th May, 1988 in

the prescribed form. RPL proposed raising of capital by various instruments, like, equity shares, cumulative convertible preference shares (CCP), partly convertible debentures, intended to be issued to the public, to the shareholders of RIL, debenture-holders and deposit holders of RIL. The original proposal for approval related to the following instruments:

Instrument	*Amount in Rs. (Crores)*
Equity	
Reliance Industries Ltd.	47.00
Shareholders, debentureholders and deposit holders of Reliance Industries Ltd.	4.00
Public	6.00
Cumulative convertible Preference Shares (CCPS)	
Non-resident Indians/Foreign Collaborators/Indian Resident Public	81.00
Convertible Debentures	
Sharesholders, debentureholders and deposit holders of Reliance Industries Ltd.	214
Public	241

The instrument of convertible cumulative preference shares was proposed to be converted at a price to be fixed by the 2nd respondent at premium not exceeding Rs.40 per share between the third and fifth year from the date of allotment. The debentures proposed were to be of the face value of Rs.500 each and the conversion was to be of Rs.200 into 10 shares as follows:

"6% of the face value (Rs.30) would be compulsorily converted into equity at par at 1 year from allotment.

16% of the face value (Rs.80) would be compulsorily converted at 2 years from allotment into equity at a premium to be decided at the time of conversion but not greater than Rs.20 per share.

18% of the face value (Rs.90) would be compulsorily converted into equity at 3 years from allotment at a premium decided at the time of conversion but not greater than Rs.30 per share. A

60% of the face value (Rs.300) would be redeemed between 8th and 10th years from allotment by draw of lots." B

It appears that the Industrial Credit and Investment Corpn. of India Ltd. (for short ICICI), was the lead financial institution and lead manager for the issue of capital of RPL, and its merchant banking department, having the necessary expertise, was interacting between the 2nd respondent, namely, the Controller of Capital Issues and RPL. C Discussions were held with ICICI to evaluate whether the company could proceed with the proposal by respondent No. 3 (RPL) by removing the instrument of cumulative preference shares as also the non-convertible portion of the debentures. This would have been necessitated by the sluggishness in the capital market, the market reactions D to non-convertible debentures and the discount at which such instruments were traded after they came into existence, the complexity of cumulative convertible preference shares and the general reaction anticipated from the public for investment. It was stated that it was necessary to encourage investments and draw out savings from the home saving sector so that investments into productive and industrial E sectors are promoted. The need to encourage growth of the Capital Market and to provide impetus for investment in a depressed market condition through several liberalisation steps, were factors in the consideration of the Controller of Capital Issues so that on balance investment in the industrial sector in high priority industries could be encouraged. RPL revised its proposal under which it proposed to raise F equity shares of Rs.50 crores from RIL—its promoter. The fully convertible debenture issue of Rs.516 crores from public was sought to be subscribed to in a manner that 50% on preferential share basis to be allotted to shareholders, debenture-holders and fixed deposit holders of RIL. RPL made a suggestion for issue of debentures of the face value of Rs.200 each with the following terms and conditions: G

(i) 5% of the face value of the debentures at par on allotment;

(ii) 20% of the face value (inclusive of premium) at a premium as may be decided in consultation with the Controller of Capital Issues at the end of the fourth year from the date of H allotment.

(iii) the residual portion (inclusive of premium) at a premium as may be decided in consultation with the Controller of Capital Issues at the end of the seventh year from the date of allotment.

In view of the revised project cost it was felt that the promoter's contribution of Rs.50 crores was less and RIL as promoters were told, as asserted in the affidavit, to increase the promoter's contribution to 15% of the total project cost of Rs.700 crores. RIL in view of this requirement, agreed to bring in Rs.107.50 crores as its contribution to RPL, out of which a sum of Rs.50 crores was directed to be kept as interest-free unsecured loan at the time of allotment which would be converted into equity at par at the expiry of 36 months from the date of allotment of convertible debentures.

As a practice, it is asserted, respondent No. 2 being the CCI, observed that debenture holders/fixed deposit holders of RIL were not eligible for preferential reservation in the capital issue of RPL, and thus RPL was not permitted to issue capital to these categories on preferential basis and only the shareholders of RIL were permitted preferential entitlement in accordance with the practice.

By a Press Release dated 15th September, 1984 the 2nd respondent had issued certain non-statutory guidelines for approval of issue of secured convertible and non-convertible debentures. These guidelines had been subsequently amended by Press Release dated 8.3.1985. Guidelines were also issued by Press Release on 19.8.1985 for issue of convertible cumulative preference shares. There are guidelines issued by Press Release dated 1.8.1985 for employees stock option scheme. In accordance with the guidelines of 15.9.1984, as amended on 8.3.1985, the consent for capital issue for secured fully convertible debentures was issued as the projects originally to be established in RIL were permitted by the Deptt. of Company Affairs to be transferred to RPL. The application for industrial licences and endorsements thereof from RIL to RPL had already been filed including, *inter alia,* the endorsement of the letters of intent for the MEG Project. The scheme of finance for setting up of 3 projects, namely, PVC, HDPE and MEG had already been approved by the Deptt. of Economic Affairs in favour of RIL, promoter of respondent No. 3 and the Deptt. of Company Affairs also approved the transfer of project to RPL, and a revised scheme of finance was to be submitted by RPL. It was asserted that it was on the basis of appraisal by the ICICI, a public financial institution which had evaluated the project cost for the 3

projects for the purpose of implementation of RPL. ICICI had evaluated the estimated project cost at Rs.700 crores for setting up 3 undertakigs of RPL—post transfer from RIL, to RPL for implementation. Applications for the endorsement of industrial licences and the Letter of Intent had been filed with the Deptt. of Industrial Development, Secretariat for industrial Approvals and these were pending consideration. The object of the issue was setting up of a new project and was within the scope of the guidelines.

The proposal contemplated was within the debt-equity norms and ratio in accordance with para 4 of the non-statutory guidelines as the debt in the proposal aggregated to Rs.471 crores. This is because debentures are considered as debt only when they are unredeemed beyond the period of 5 years as per Explanation to Section 5(ii) of the Capital Issues (Exemption) Order, 1969. In the present case, 25% of the face value of the debenture would stand redeemed by the 3rd and 4th year and before the 5th year, and it would therefore not be considered as debt for evaluating debt-equity-ratio as per the guidelines. Similarly, the promoter's contribution of Rs. 100 crores plus 25% converted debentures at the end of 5 years would be categorised as equity representing share-capital and free-reserves converted from the total investment of Rs.516 crores proposed by RPL. It was assumed to aggregate to Rs.229 crores and debt-equity-ratio thus came to 2.05:1—which approximates the ratio of 2:1.

It was further asserted that these guidelines being non-statutory and not rigid, a relaxation in the norm of debt-equity-ratio of 2:1 is considered favourably for capital intensive projects like petrochemicals which require large investments as would appear from the Note annexed to the guidelines. The guidelines postulate that these debentures should be secured. The proposal itself contemplated that the security would be in such form and manner as required by the trustees for the debenture holders for convertible debentures. It was asserted that it was not a requirement of the guidelines that the debenture issue be compulsorily under-written. The guidelines themselves contemplated that the 2nd respondent could satisfy himself that the issue need not be underwritten. An application to this effect had been made by RPL and was granted by the 2nd respondent after carefully examining this issue. The guidelines contemplated simultaneous listing of shares and debentures. In the present case, upon allotment, there was simultaneous compulsory conversion of 5% of the face value of the convertible debentures. It was stated that it was not an equity linked debenture as was asserted on behalf of the petitioner.

However, it was further stated that, in view of the size of the issues, there was a modification dated 19th July, 1988 of the consent order which restricted and put a non-transferability condition on the preferential entitlement of the shareholders of RPL. It was limited to the corporate shareholders of RIL and relaxed for individual shareholders of RIL. The restrictive condition on their right to sell, transfer and hypothecate their shareholding was thought necessary in order to ensure that they do not disinvest soon after the issue and thus dilute their stake in the Company.

On behalf of the Controller it was asserted that the guidelines should not be construed in a manner which would fetter, constrict or inhibit statutory discretion vested in the 2nd respondent for taking decisions in the interest of the Capital-market and for national purpose of furthering the growth of industrialisation and investment in priority sectors so as to encourage employment and demand in the national economy. The objectives of the control, according to the deponent, contemplated under the Capital Issues (Control) Act was to prevent wasteful investments and to promote sound methods of corporate finance. It was asserted that the administrative guidelines were only enabling in nature and could not and ought not to be construed as preventing the statutory authority from adopting or modifying varying norms in operational area of implementing the purposes of the Act especially when there were no fetters under the Statute.

The Controller of Capital Issues had issued, it was stated, guidelines as a result of the war-time needs and controls, since the year 1947 and flow from the experience gained under the Defence of India Rules 1939. Hence, according to the deponent, these controls have been progressively reduced and the Capital Issue (Exemption) Order, 1969 was brought into force so as to reduce the rigours of the Act. In the absence of any control for capital issues for securities, according to the deponent, there would be no fetter or restriction on the part of the Company to borrow or raise capital from the market. It is to check raising of wasteful capital and to avoid investment being made in non-productive, non-priority sectors and non-commensurate with the needs that the Act in question was brought into force. This is being implemented with the aid of competent bodies. It is further stated that the stipulation for fixation of premium at the time of conversion is not a new practice and had been applied in the year 1986 in the case of Standard Medical Leasing as also in ATV Projects Ltd. and the Industrial Credit & Investment Corpn. of India Ltd. As regards Convertible Debenture Issue, it was asserted that there is no violation of the provi-

sions of Section 81(5) of the Companies Act, 1956 as the section contemplates only an optional conversion of Government loan into equities. In the instant case,there is a compulsory conversion of publicly held debentures of the convertible type. In the premises, Sec. 81(5) of the said Act has absolutely, according to the deponent, no application to the facts and circumstances of the case.

All these petitions challenge only the grant of sanction by the Controller of Capital Issues, though different aspects have been highlighted in the different petitions and we have heard different learned counsel. We have, therefore, to examine what is the scope of the powers and functions of the Controller of Capital Issues while discharging his statutory functions in according sanctions to capital-issues. It is further necessary to examine if that role has in anyway, changed or altered due to the present economic and social conditions prevailing in the country. It has also to be considered whether the guidelines or the provisions of law under which the Controller has functioned or has purported to function in this case, were proper or there had been deviations from these guidelines. If so, were such deviations possible or permissible? It is further necessary to examine whether the Controller has acted *bona fide* in law. These are the broad questions which have to be viewed in respect of the challenge to the consent order. It is, therefore, necessary to examine the broad features as have emerged.

Counsel for the petitioners contended that the RPL's application had been entertained even without the company fulfilling the requirements of a proper application and furnishing the necessary consents and approvals, processed with undue expedition within a very short time and sanctioned without any application of mind to the crucial terms of the issue which were detrimental to public interest. This contention, when analysed, turns on a number of aspects which can be dealt with separately.

(a) It is submitted that the application was made on 4.5.88 and sanctioned on 4.7.88—within hardly a period of two months; this reflects undue haste and favouritism, particularly if one has regard to the magnitude of the public issue proposed to be made and the various financial and other intricacies involved. We are unable to accept this contention. In the first place, an application of this type is intended to be disposed of with great expedition. In particular, in a project of the type proposed to be launched by the petitioner, passage of time may prejudicially affect the applicant and it is not only desirable but also

A necessary that the application should be disposed of within as short a time as possible. It is, therefore, difficult to say that the period of two months taken in granting consent in the present case is so short that an inference of haste must follow. Secondly, on behalf of the Union of India a list of various aplications received and disposed of by the office of the CCI between September 1987 and September 1988 has B been placed before us to show that, generally speaking, these applications are disposed of within a month or two. It is true that none of these issues is of the same colossal magnitude as the present issue. Nevertheless, the Controller of Capital Issues could hardly keep the application pending merely because the amount involved is heavy. It is not possible therefore to say merely from the short span of time that C there was a hasty grant of consent in the present case.

(b) Secondly, it has been submitted that the RPL was a company which was incorporated only on 11.1.88. RIL had issued a 'G' series of debentures as recently as 1986 for the same projects. In granting consent to the present issue the Controller of Capital Issues has D completely over-looked the fact that in respect of the same projects the RIL had been permitted to raise debentures on earlier occasions. We do not think that the petitioners are correct in saying that the Controller of Capital Issues has over-looked or was not aware of the debenture issues by the RIL or the purposes for which these debenture issues had been sanctioned. The application for consent makes it clear E that the petitioner company is a new company promoted by RIL and that RIL was promoting this company to manufacture HDPE, PVC and MEG at Hazira. The application refers to the fact that the total cost of the project was expected to be Rs.650 crores and that this cost had been approved earlier in 1985. Considering that RPL had come into existence only on 11.1.1988, this was clear indication that the F projects for which the debenture issue was being proposed were projects which had been mooted even by the RIL as early as 1985. Again in the detailed application form submitted by the RPL it has been mentioned that the RIL had already obtained approval of the Central Government for implementation of the aforesaid projects under the MRTP Act. In part C of the application form it has been mentioned G that the promoter company had made necessary applications for endorsement in favour of the company of the Letter of Intent/Industrial Licences already issued by the Central Government under the Industries (Development & Regulation) Act, 1951, in the name of the holding company, the RIL. In the context of these statements it is extremely difficult to agree that the fact of issue of the earlier series of H debentures by the RIL or the purposes thereof could have escaped the

notice of the CCI, particularly, when it is remembered that the issue of G series of debentures by the RIL was quite recent and had also attracted a lot of publicity. We have elsewhere discussed the contention raised on behalf of the petitioners that the consent given has contravened the guidelines because finances were being raised for no new project but for the same old projects for which RIL had collected funds. We have there pointed out that, MEG project, for all practical purposes, was a new project that was to be implemented by the RPL and the funds raised by the RIL had been insufficient for even the PAT and LAB projects launched by it. The learned Addl. Solicitor General states that there was earlier correspondence between the RIL and the CCI regarding the cost over-run of the PTA and LAB projects. We have not gone into the details of this correspondence as it is not our purpose to enquire into the details of the matter. We are referring to it only for indicating that the CCI was fully aware of the earlier series of debentures, of the stage of the various projects proposed therein, of the actual implementation of the projects, of the cost over-run, of the proposal to transfer to some of those from RIL to RPL and the exact requirements of the present issue. It is not possible to accept the contention that the consent of the CCI was accorded in ignorance of the facts pertaining to the G series of debentures.

(c) Thirdly, it is submitted that having regard to the requirements of the *pro forma* prescribed under the rules, the application for consent could not have at all been considered by the CCI until the RPL produced the industrial licence in its favour, the collaboration agreements, the approvals of the financial institutions and the approvals under the MRTP Act. It is submitted that the application of the petitioner was cleared hurriedly without insisting upon these clearances and this was done specially to oblige the company. We must first of all point out that the *pro forma* relied on indicates a general procedure and should not be understood as a rigid requirement. It is, of course, the duty of the CCI to be satisfied that before the debentures are actually issued the applicant company has all the necessary licences, consents, orders, approvals, etc. in its favour. We are satisfied that in the present case there is no reason to doubt that he had been so satisfied if one remembers that those projects had been initiated by the RIL which had gone through the necessary exercises and all that remained to be done was a formal approval of their transfer for implementation to the RPL.

We shall first refer to the steps taken by the RIL in this regard.

A On 10th October, 1983 as RIL proposed to engage in manufacture of MEG, it filed an application for grant of an Industrial Licence under the Industries (Development & Regulation) Act, 1951. On 16th August, 1984 RIL received a Letter of Intent No. 653(84) Regn. No. 1323(83)-IL/SCS issued by the Govt. of India for the manufacture of 40,000 TPA of MEG. Thereafter, from time to time on the applica-
B tions made by the RIL, the Govt. of India by various letters extended the validity of the period ending up to 30th June, 1989. The last of such extensions was made by a letter dated 2nd September, 1988. On 11th May, 1988 pursuant to an application made, the Govt. of India permitted expansion of capacity for manufacture of MEG from 40,000 TPA to 60,000 TPA. From 12th January, 1988 to 22nd July, 1988 applica-
C tions were made by RIL for change of Company from RIL to RPL for the MEG Project. It appears that on 11th August, 1988 approval/sanction was granted by the Govt. of India for change in the implementing agency from RIL to RPL. On or about 19th January, 1985 a letter from the Govt. of Maharashtra was issued, stating that there was no objection to the Company's proposal for change of location for the MEG
D Project from Maharashtra to Gujarat. It also appears from the various documents which are mentioned in Vol. IV of the present Paper-Books at different pages (from 22 to 44) that by various orders under the MRTP Act, sanctions and modifications were approved, the latest sanction being dated 11th October, 1988 whereby the Govt. approved the proposal of RPL for modified scheme of Finance. It is also signi-
E ficant to mention that on 25th January, 1988 an application was made under Sec. 22(3)(d) of the MRTP Act with the proposal to implement the MEG Project along with other projects of RPL. It may be mentioned that by a letter dated 6th June, 1988 RIL had informed that they had originally planned to utilise a sum of Rs.85 crores from 'G' Series debentures for this project. But, however, they were not able to
F utilise this money as the entire 'G' Series amount had been utilised for PTA and Lab projects including the working capital on account of overrun in the cost of LAB and PTA projects. Hence, it applied for permitting a new scheme of finance. By an order dated 21st July, 1988 the Govt. accorded approval to the proposal of RIL for modified scheme of finance to be implemented by RIL. Thereafter, RPL made
G an application for modification of the scheme of finance and the same was approved by the Govt's order dated 11th October, 1988.

It appears that on 9th October, 1984 pursuant to an application made by RIL for foreign collaboration with M/s Union Carbide Corporation, USA, the Govt. of India by its order of that date
H accorded approval to the terms of the foreign collaboration for a

period of six months for this project. It further appears that on 14th March, 1986 pursuant to an application made by RIL, the Govt. accorded approval for foreign collaboration with M/s Scientific Design Company. It may, however, be mentioned that there was a letter dated 30.4.1986 whereby approval was granted by the Reserve Bank of India in respect of foreign collaboration agreement with M/s Scientific Design Co. USA. A B

The next aspect of the matter which has to be borne in mind in view of the contentions urged was regarding the licences. It appears that there was an application on 25th March, 1987, for licence. On 9th August, 1988 the Industrial Licence dated 25.3.1984 granted to RIL for manufacture of PVC was endorsed to RIL. This is important because one of the contentions that Shri Pagaria during the course of his long submissions made was that there was no valid licence. C

It also appears that so far as the MRTP Act is concerned, an application was made by RIL on or about 12th October, 1984 under Sec. 22(3)(a) for manufacture of PVC. Several other steps were taken and on 29th June, 1988 there was an order of the Govt. of India under Sec. 22(3)(d) of the Act, according approval to the proposal for modified scheme of finance. D

There was a further proposal for modification and further orders. Last of such order was dated 11th October, 1988. Similarly, regarding the foreign collaboration, there were approval letters and the last one was dated 12th August, 1988 for endorsement of foreign collaboration approval in favour of RPL. So far as HDPE is concerned, it appears that there was a valid licence; and it may be mentioned that on 24th August, 1985 pursuant to an application made by RIL under section 22(3)(a) of the MRTP Act, the Govt. granted approval for the establishment of a new undertaking for manufacture of HDPE. E F

Regarding foreign collaboration, an application was made by RIL in 1984 for approval of foreign collaboration with M/s Du Pont Inc. Canada, for manufacture of HDPE. Such approval was given and the validity was extended and the foreign collaboration approval was endorsed in favour of RPL on 12th October, 1988. Similar other consents were there. Mention may be made of letters dated 28th April, 11th March, 6th December, 1986, 2nd January, 1987, 15th July, 25th, 26th July, 19th August, 1988 which appear at various pages of Vol. IV of the papers. Finally, capital-goods clearance was endorsed in favour G H

A of RPL for the PVC project on 12th August, 1988. Capital goods clearance was also endorsed in favour of RPL for HDPE project on 23rd August, 1988. Thus, it will be seen that all the basic groundwork had already been done by the RIL.

It is in above perspective that one has to examine the events that B have happened. The question that has to be considered is whether the CCI could take it for granted that these approvals, consents, etc. would stand automatically transferred to the RPL. On 16th June, 1987 by a Press Note issued by the Deptt. of Industrial Development in the Ministry of Industry, the Govt. of India declared that where a transferee Company is a fully owned subsidiary of the Company holding the C Letter of Intent or licence, the change of the Company implementing the project would be approved. It is in the light of this that the Board of RIL on 30th December, 1987 passed a resolution to incorporate a 100% subsidiary Company whose main objects were, *inter alia*, to implement the licences/Letters of Intent received by RIL and the objects of undertaking, processing, converting, manufacturing, for- D mulating, using, buying, dealing, acquiring, storing, packing, selling, transporting, distributing and importing etc. and approved the name of the Company as RPL. On 11th January, 1988 the RPL was incorporated and the Certificate of Incorporation was issued. Thereafter, on 12th January, 1988 letters were written by RIL for endorsement of licences/Letters of Intent in favour of RPL. The certificate of E commencement of business was thereafter issued.

The Press note earlier referred to makes it clear that the transfers from one company to an allied company were considered unexceptionable except where trafficking in licences is intended. In this situation the change of name from RIL to RPL, of the licences, letters of intent F and other approvals was only a matter of course and much importance cannot be attached to the fact that CCI did not insist upon these endorsements being obtained even before the letter of consent is granted. In any event the letter of consent is very clear. Clause (h) of the conditions attached to the consent letter makes it clear that the consent should not be construed as exempting the company from the G operation of the provisions of the Monopolies & Restrictive Trade Practices Act, 1969, as amended. Clause (e) makes it clear that it is a condition of this consent that the company will be subject to any measures of control, licensing, or acquisition that may be brought into operation either by the Central or any State Government or any authority therein. Under clause (t) the approval granted is without H prejudice to any other approval/permission that may be required to be

obtained under any other Acts/laws in force. Having regard to the above history as well as having regard to the terms and conditions of the consent letter, the grant of consent itself being conditioned on the RPL obtaining the necessary approvals, consents and permissions before embarking on the project, we do not think that there was any impropriety in the CCI granting the consent without waiting for the formal endorsement of the various licences, letters and approvals in favour of the RPL.

(d) It is next submitted that under para 3 of the guidelines issued by the Government, the amount of issue of debentures for project financing and other objects will be considered on the basis of the approvals of the scheme of finance by the financial institutions/banks/Government under the provisions of the MRTP Act, etc. The criticism in this respect is that since no approvals of the scheme of finance by the financial institutions/banks/Government under the provisions of the MRTP Act etc. had been produced before the Controller of Capital Issues he could not have been satisfied that the amount of issue of debentures was necessary and adequate on the basis of such approvals. This argument proceeds on a misconception of the Government set up for dealing with these matters. The learned Additional Solicitor General points out that the Controller of Capital Issues does not function in isolation, sitting at his desk and awaiting the varioius types of clearances and consents that are necessary to be obtained from various quarters before granting consent to an issue. He points out that the CCI functions in close coordination with all the concerned departments of the Government. He is in close touch with the progress of various projects. On references from the Department of Company Affairs, the CCI (MRTP) Section furnishes comments on the scheme of finance relating to the proposals of industrial undertakings covered under the MRTP Act for effecting substantial expansion for setting up of new undertakings, merger/amalgamations; and acquisition/take-over of other undertakings. The comments are furnished to the Department of Company Affairs with reference to the norms relating to equity debt ratio, promoter's contribution, dilution of foreign equity, listing requirements for shares on Stock Exchanges and on analysis of balance sheets for cash generation etc. An officer attends regular meetings of the Advisory Committee meetings held in the Department of Company Affairs in terms of the MRTP Act, hearing held in Department of Company Affairs under section 29 of the MRTP Act, inter-departmental meetings held in the Department of Company Affairs to consider specific issues relating to applications received under the MRTP Act, Licensing-cum-MRTP Committee meetings

held in the Department of Industrial Development, screening committee meetings held in the Administrative Ministries to consider applications from MRTP companies and statutory public hearings held in the MRTP Commission. The submission of the learned Solicitor General in short is that, in dealing with application for consent to an issue of capital, the CCI does not act in isolation but the entire Central Government functions with various Departments closely monitoring and coordinating the scrutiny of applications. He, therefore, submits that the Controller of Capital Issues is aware of the progress of the various applications made by the company. The Controller is also aware that the ICICI had looked into the financial soundness and feasibility of the project and there is material to show that the comments of the ICICI were made available to him. When a project is being appraised by the institution like the ICICI and when the CCI is also aware, by reason of the participation of his representatives at the meetings of the Department of Industry and the Department of Company Affairs about the stage or outcome of the proposals made under the IDR and MRTP Acts, it is clear that the CCI did not overlook any crucial aspect and that his grant of consent in anticipation of the necessary transfers to the RPL was based on a practical appraisal of the situation and fully in order.

The assumptions behind the petitioners' arguments that the terms of the issue as proposed by the RPL were approved *in toto* by the CCI without examination is also unfounded. The record before us indicates that there were frequent discussions leading to alterations in the original proposals from time to time as well as changes in the conditions of consent both before and even after the letter of consent dated 4.7.1988. Some aspects of these have been referred to elsewhere and some are referred to below and these will show that consent was not granted as a matter of course. The allegation that consent was accorded without any application of mind is, on the materials before us, clearly untenable.

It is stated in the affidavit that in March/April, 1988 discussions centered around the concept of cumulative convertible preference shares (CCP) which was mooted as an instrument for the means of finance. The instrument offered would have been equity shares to the extent of Rs.57 crores, cumulative convertible preference shares to the extent of Rs.81 crores and convertible debentures to the extent of Rs.478 crores with four conversions. In this connection, reference may be made to Annexure 1 at page 39 of the reply affidavit filed in these proceedings by RPL. Thereafter, on 4th May, 1988 RPL made an

application to the Controller of Capital Issues seeking permission to make an Issue of Capital on certain conditions. Specific details thereof are not necessary to be set out here. It also made a proposal for issue of 81 lakhs 10% cumulative convertible preference shares of Rs. 100 each for cash at par through prospectus to non—resident Indians/resident Indian public—81 crores. It is stated that in accordance with the present guidelines issued by the Govt. of India, the Company intended to retain excess subscription amount to the extent of 15% of Rs.566 crores, i.e., a right to retain an additional amount.

It was further stated that in accordance with the Guidelines issued by the Government of India, the Company had intended to retain excess subscription amount to the extent of 15% of Rs.566 crores, i.e., a right to retain an additional amount of Rs.85 crores. The idea was that the company would in the event of over-subscription request the CCI for allotment of such additional amount of Rs.85 crores. It was further proposed to issue a part of the cumulative convertible preference shares to NRIS and a part to the foreign collaborators.

Terms of the proposed convertible debentures were:

(a) Convertible debentures upto 12.5% (interest) taxable: Each convertible debentures of Rs.500 would be converted into 10 equity shares of Rs. 10 each as per scheme envisaged. The residual portion of each Convertible Debenture would be redeemable at the end of 10th year from the date of allotment with an option to the company to repay these amounts in one or more instalments by drawing lots at any time after the end of 5th year from the date of allotment.

(b) Cumulative Convertible Preference Shares 10% (dividend) taxable. Each CCP would be fully converted into equity share of Rs. 10 each at such a premium not exceeding Rs.40 per share as might be approved by the CCI at any time between the 3rd and/or 5th year from the date of allotment to be decided by the company, by draw of lots, if necessary.

Then there are other conditions regarding securities, underwriting, allotment of equity shares to RIL shareholders. In May, 1988, several NRIS also evinced interest in equity participation in RPL. It was stated that though the CCP shares appeared to be most appropriate instrument, the computation of reserved/preferential entitle-

ment resulted in very low entitlement to the existing shareholders of RIL. It was then contemplated to increase the preferential entitlement of RIL investors on partially convertible debentures and the ratio of convertible debentures was altered so as give equal share between RIL investors and the members of public. A three stage conversion was contemplated. Thereafter, in June 1988, a revised proposal to the CCI was made by RPL. It is not necessary to set out in detail the said revised proposal. After several discussion, on or about Ist June, 1988, between the company, RPL, the Merchant Bankers, ICICI and the Office of CCI, it was asserted on behalf of the respondent No. 3 that serious reservations were expressed that the marketability of CCP shares and the investors resistance was likely to be there. It was in this context and also after considering the reservations that might be there on the part of the foreign collaborators and NRIs, that the CCI required the issue of fully convertible debentures. The institutional proposal of the project cost emerged at Rs.700 crores instead of Rs.650 crores and it was then felt that RIL should increase its own contribution to the project by way of a promotors' contribution at Rs.100 crores, thereby increasing its stake to 14% at the suggestion of CCI. It was stated that this was also a requirement of the CCI guidelines and MRTP conditions. At the end of June, 1988, there was an amendment of the Order by the Department of Company Affairs in favour of RPL for PVC. Similarly, on 21st July, 1988, the order for MEG passed for RIL was amended permitting RPL to undertake the new projects for implementation of the MEG Project. It is not necessary to set out in detail these proposals. On 4th July, 1988, CCI granted the consent under the Capital Issues (Control) Act, 1947 to the public issue. There were variations between the proposal and the Order of consent of the CCI.

It may be necessary at this stage to refer to the Order dated 4th July, 1988, which is as follows:

> "With reference to your letter No. BOK/DKG/505(c) dated 8.6.1988, I am directed to say that the Central Govt. in exercise of the powers conferred by the Capital Issues (Control) Act, 1947, do hereby give their consent to an issue by M/s Reliance Petrochemicals Ltd., a company incorporated in the State of Maharashtra, of capital of the value of Rs.650.90 crores (inclusive of retainable excess subscription to the extent of Rs.84.90 crores). (A) 5,75,00,000 Equity shares of Rs.10 each for cash at par to M/s Reliance Industries Ltd. (inclusive of retainable excess

subscription to the extent of Rs.7.50 crores). (B) 2,96,70,000 12.5% secured, redeemable, convertible debentures of Rs.200 each for cash at par to public by a prospectus (inclusive of retainable excess subscription of 77.40 crores).

2. Out of (B) above, reservations for preferential allotment will be made as follows:

(i) Shareholders of M/s Reliance Industries Ltd. 50%.

(ii) Employees (including Indian working Directors)/ workers of the company and of M/s RIL. 5% Unsubscribed portion, if any, of the reservations will be added to the public offer.

The Convertible debentures will carry interest 12.5% p.a. (taxable). The Debentures will be fully and compulsorily convertible in the following manner:

(a) 5% of the face value at par on allotment of the debentures.

(b) 20% of the face value at a premium if any, as may be decided by this office after three years but before four years from the date of allotment of debentures.

(c) The balance at such a premium if any, as may be decided by this office after 5 years but before the end of 7 years from the date of allotment.

3. The consent given as aforesaid is qualified by the conditions mentioned in the Annexure and the company shall comply with the terms of the conditions so imposed.

4. I am to make it quite clear that the grant of consent to the issue of capital represents no commitment of any kind on the part of the Central Govt. to render assistance in the matters of priorities or licences for supplies of raw materials, machinery, steel, etc., of transport facilities or any other governmental assistance, including the provision for foreign exchange.

A

> 5. This order also conveys the approval of the Central Govt. under proviso to Rule 19(2)(b) of the Securities Contracts (Regulation) Rules, 1957 subject to the condition that the allotment to the employees shall not exceed 200 shares per individual.

B

> 6. This letter is issued in the name and under the authority of the President of India."

There was Annexure to the said Order. In that Annexure, certain conditions were laid down and condition (a) stipulated that in any prospectus or other document referred to in section 4 of the Capital Issues (Control) Act, 1947, relating to this issue, the statement C required by that section must be worded as follows:

> "Consent of the Central Government has been obtained to this issue by an order of which a complete copy is open to public inspection at the Head Office of the Company. It D must be distinctly understood that in giving this consent the Central Govt. do not take any responsibility for the financial soundness of any scheme or for the correctness of any of the statements made or opinions expressed with regard to them."

E It further imposed the condition (b) that the consent to lapse on the expiry of twelve months from the date of consent. Order also stipulated that the consent should not be construed as exempting the company from the operation of the provisions of the Monopolies & Restrictive Trade Practices Act, 1969, as amended. The consent also indicated that the company would be subject to any measures of con- F trol, licensing, or acquisition that might be brought into operation either by the Central or any State Govts. or any authority therein. It also enjoined the company to ensure that the prospectus for the issue of securities consented to should be printed subject to certain conditions. It also enjoined, *inter alia,* that the convertible debentures should be allotted to the employees of the company and of M/s RIL G and the shareholders of M/s RIL. On conversion the equity shares so converted should not be transferred/sold/hypothecated for a minimum period of three years from the date of allotment of convertible debentures. The other special conditions contained the following:

> "(v) The equity shares to be allotted to the promoters of H the company shall not be sold/hypothecated/transferred for

at least three years from the date of allotment.

(w) It is a condition of this consent order that the proceeds from the issue of debentures should be invested in fixed duration deposits/instruments with the cooperative/ nationalised banks, UTI, Financial Institutions, Public Sector Undertakings (other than public sector bonds) and be used strictly for the requirements of the projects mentioned in the application and not for any other purpose.

(x) M/s Reliance Industries Limited will bring in additional amount of Rs.50 crores as interest free unsecured loans, at the time of allotment of the above convertible debentures as additional promoters contribution which will be converted into equity at par on the expiry of 36 months from the date of allotment of convertible debentures.

(y) (i) The company shall scrupulously adhere to the time limit of 10 weeks from the date of closure of the subscription list for allotment of all securities and despatch of allotment letters/certificates and refund orders.

(ii) The company shall, at the time of filing its application for listing to the regional Stock Exchange, furnish an undertaking for compliance of the above condition, along with a scheme incorporating the necessary details of the arrangements for such compliance. This undertaking shall be signed by the Chief Executive or a person authorised by the Board of the company.

(iii) The company shall file, with the Executive Director or Secretary of the regional Stock Exchange, within five working days of the expiry of the stipulated period as above, a statement signed by the Chief Executive or a person authorised by the Board, certifying that the allotment letters/securities and the refund orders have been despatched within the prescribed time limit as per the condition above. A copy of the statement shall be endorsed to the office of the CCI quoting this consent order and date.

(iv) Non-compliance of conditions above shall be

A punishable by the Stock Exchange, in addition to the action that may be taken by other competent authorities."

The other conditions mentioned therein are not very relevant. These only enjoin certain procedural safeguards. The said consent order was amended on the 19th July, 1988, which clarified that the B intention for imposing condition (w) as set out above, was not to block all the funds raised out should be invested in terms of the conditions laid down aforesaid. The amendment enjoined that the approval of the Central Government should be subject to the condition that allotment to the employees should not exceed 50 debentures per individual. It was further added that the company should obtain prior approval of the Reserve Bank of India, Exchange Control Department, for the C allotment of debentures to the non-residents as required under the Foreign Exchange Regulation Act, 1973. There was a further amendment of the Consent Order on the 26th July, 1988 which added condition (s) to the following effect:

D "(s) The convertible debentures to be allotted to the employees of M/s RPL and M/s RIL and the corporate shareholders of M/s RIL (other than individual shareholders of M/s RIL) shall not be sold/transferred/hypothecated till the end of 3 years from the date of allotment of debentures. On conversion the equity shares so converted E shall not be transferred/sold/hypothecated for a minimum period of 3 years from the date of allotment of convertible debentures."

It was stated that between 4th January, 1988 to 24th July, 1988, news about the formation of RPL and to set up the projects at Hazira, F Gujarat and the consent granted by CCI for convertible debentures for RPL—all these were widely reported in various newspapers and magazines including national dailies such as Times of India, Indian Express, Financial Express, Gujarat Samachar, Hindustan Times, Bombay Samachar, Business Standards and other magazines and news items. Thereafter, till mid August, 1988, there were detailed advertise- G ments about the company and nearly 1600 insertions in nearly 200 newspapers and dailies were made advising the opening of the issue. There were from mid July, 1988 onwards till August, 1988, advertisement campaigns in television and radio to attract investments in Petrochemicals advising the public about the issue of Rs.593.40 crores of convertible debentures of RPL. It is asserted on behalf of the H respondents that the public issue of these shares was made known

since mid July, 1988. As mentioned hereinbefore since the words "till conversion" were capable of wide interpretation and might have rendered the shares/convertible debentures non-transferable for upto 7 years, the CCI modified the consent and limited this restriction to a period of 3 years. On July 27, 1988, the prospectus of RPL was filed with the Registrar of Companies, Gujarat and the Stock Exchanges at Bombay and Ahmedabad. On August 22, 1988, the issue of RPL opened for subscription. A letter was addressed to the CCI on August 23, 1988, requesting for the lifting of embargo for non-transferability for three years for the corporate shareholders of RIL also. It is asserted that by August 31, 1988, the issue of RPL was fully/over subscribed and closed. By October 25, 1988, the basis of allotment was approved by Ahmedabad Stock Exchange. A resolution of the Board of Directors of RPL was passed on October 27, 1988 to allot the debentures/shares. On November 4, 1988, lease deed for land at Hazira between RPL and GIDC was executed. There was no objection certificate obtained from GIDC. It is asserted that the Debenture Trust Deed between RPL and ICICI was executed at Surat and was lodged for registration on November, 7, 1988. Certificate of Mortgage under Section 132 of the Companies Act, 1956 was issued by the Registrar of Companies, Gujarat regarding the creation of charge for the Debentures on November 11, 1988 itself.

In this context, on behalf of the respondents, Mr. Baig drew our attention to certain dates indicating that the writ petitioners were aware of this and it was stated that on July 20, 1988, Mr. Radheyshyam Goyal, the Writ Petitioner in Rajasthan High Court, wrote a letter to the Editor of the Financial Express that the premia for the issue of shares upon the second and third conversion had not been fixed and the terms and conditions were vague. Shri Goyal also made certain other allegations. Though, of course, no complaint was ever made to RIL or RPL on this aspect, on August 16, 1988, one Mr. J.P. Sharma filed a complaint of Unfair Trade Practices under the MRTP Act before the MRTP Commission seeking injunction against the issue opening on 22nd August, 1988 and alleging the same breaches as claimed by the petitioners in the Transfer cases.

On being moved, this Court, on August 19, 1988, passed an order in Transfer Petitions No. 192-193 of 1988 staying the three pending Writ Petitions in the three High Courts, namely, Bangalore, Delhi and Jaipur and further stayed the proceedings in the suit being Civil Suit No. 1172 of 1988 filed in Baroda. It was directed that the issue of debentures would proceed without hindrance notwithstanding any

A proceedings instituted or orders passed and that any order or direction or injunction already passed or which might be passed would remain suspended till further orders of this Court. It was mentioned that on August 29, 1988, the complaint filed by Shri Sharma before the MRTP Commission was dismissed. On August 31, 1988, one Shri Arvind Kumar Sanganeria issued notice through his Advocate advising that a B Writ Petition was being preferred in the Bombay High Court. On September 1, 1988, this Court granted an ex-parte stay of the proceedings in Writ Petition No. 4388 of 1988 pending before the Bombay High Court. As mentioned hereinbefore, on September 9, 1988, this Court had transferred the four Writ Petitions in the four High Courts and civil suit to this Court. It appears that there was a further writ petition filed by Shri Sunil Ambani in the High Court of Allabahad on C the basis of two articles published in the Indian Express.

Shri Ganesh made submissions in Transfer Case No. 164 of 1988. Shri Haksar made his submissions in T.C. No. 161 of 1988. Shri Pagaria argued T.C. 162 of 1988. Shri Udai Holla who was the counsel D for the petitioner in Karnataka matters, appeared in T.C. 163 of 1988 and made his submissions. We heard Mr. G. Ramaswamy, Additional Solicitor General. Shri Soli J. Sorabjee, Shri Baig and Shri Salve argued on behalf of respondents 1 and 2 and Shri F.S. Nariman for respondent No. 3 in T.C. No. 162 of 1988.

E Inasmuch as the charge is the non-evaluation by the CCI in enforcing and applying the principles of guidelines properly, it would be appropriate at this stage to refer to the said guidelines. It appears that from time to time, in exercise of the powers conferred by section 12 of the Capital Issues (Control) Act, 1947, the Central Government had issued rules and guidelines. On or about April 17, 1982, guidelines F were issued by the Government of India under the said Act for the "Issue of Debentures by public Limited Companies". It is not necessary to set out in detail these guidelines, but it may be necessary to refer to clauses (4) and (6) of the said guidelines. Clause (4) reads as follows:

G "4. *Debt-equity:* The debt-equity ratio shall not normally exceed 2:1. For this purpose:

"*Debt*" will mean all term loans, debentures and bonds with an initial maturity period of five years or more, including interest accrued thereon. It also includes all H deferred payment liabilities but it does not include short-

term bank borrowings and advances, unsecured deposits or loans from the public, shareholders and employees, and unsecured loans or deposits from others. It should also include the proposed debenture issue. A

"*Equity*" will mean paid-up share capital including preference capital and free reserves. B

Notes: (1) The computations under guidelines 3 and 4 mentioned above will be based on the latest available audited balance-sheet of the company.

(2) A relaxation in the norm of debt-equity ratio of 2:1 will be considered favourably for capital-intensive projects such as fertilizers, petro-chemicals, cement, paper, shipping etc." C

Clause (6) of the said guidelines deals with the period of redemption and is as follows: D

"6. *Period of Redemption:* Debentures shall not normally be redeemable before the expiry of the period of seven years except in the following cases:

(i) A company will have the option of redeeming the debentures from the 5th to the 9th year from the date of issue in such a way that the average period of redemption continues to be seven years. While exercising such an option the small investors having debentures of the face value not exceeding Rs.5,000 will have to be paid in one instalment only. E F

(ii) In case of non-convertible debentures or non-convertible portion of convertible debentures a company may have the option of getting the debentures converted into equity fully with the approval of and at such price as may be determined by the Controller of Capital Issues. The debenture holders will, however, be free not to exercise this right." G

Clause (8) provides for the denomination of debentures. Clause (9) enjoins the listing of debentures on the Stock Exchange. Clause (10) stipulates that *only secured debentures would be permitted for issue to* H

the public. Clause (11) enjoins the underwriting of the debentures and clause (12) also provides for listing of the shares of the company proposing debenture issue. Clause (13) permits linked issue of shares and debentures. There were certain amendments to these guidelines which would be noted at the relevant time.

While considering the questioin of the application or non-application of mind or infringement of guidelines, it is necessary to bear in mind the role of the CCI in this respect. The CCI functions under the Capital Issues (Control) Act, 1947. This is an Act to provide for control over the issue of capital. Section 2(e) of the said Act defines "securities" and states that the "securities" means any of the following instruments issued or to be issued, or created or to be created, by or for the benefit of a company, namely:

(i) shares, stocks and bonds;

(ii) debentures;

(iii) mortgage deeds, etc.; and

(iv) instruments acknowledging loan or indebtedness.

Section 3(1) of the said Act enjoins that no company incorporated in the States shall, except with the consent of the Central Government, make an issue of capital outside the States. The other sub-sections of Section 3 deal with the modalities of such consent.

It may be mentioned that the Statement of Objects and Reasons of the Act states that the object of this measure is to keep in existence .... the control over capital issue which was imposed by Rule 94-A of the Defence of India Rules in May, 1943 and continued in force after the expiry of the Defence of India Act by Ordinance No. XX of 1946. The Statement further states that although there has been an appreciable change in the general conditions which constituted the principal reason for the introduction of the control during war-time, it was thought in the light of experience gained that the control was still necessary to secure a balanced investment of the country's resources in industry, agriculture and the social services. (See Gazette of India, 1947, Part V, p. 264).

In this connection, Shri G. Ramaswamy, learned Additional Solicitor General for the Union of India drew our attention to the

Debates of the Lok Sabha and the Rajya Sabha in February-March, 1956 when the question of continuance of the control of the capital issues came up for consideration. The Minister of Finance, Shri C.D. Deshmukh stated that the control of capital issues was first introduced in May, 1943 under the Defence of India Rules. It was continued after the termination of the war by an Ordinance, thereafter in 1947 by an Act for a term of three years and it was again successively extended in 1950 and 1952. The Act as it stood expired on the 31st March, 1956. The main purpose which the Minister explained was *to prevent the diversion of investible resources to none-essential projects* (emphasis supplied), the control had also been used for many other purposes and the most important of these purposes which might be called ancillary purposes were the regulation of the issue of bonus shares, regulation of capital reorganisation plans of companies including mergers, and amalgamations which involved the use or re-issue of capital and the regulation of the capital structure. Shri Ashok Mehta, then a Member of Parliament, suggested that the purpose of the Act might be used for evolving a national investment policy. The Minister of Finance further observed that many things might have been done to give a proper form and shape to the *national investment policy* (emphasis supplied), but the Minister expressed his surprise how these could have been secured through a *negative piece of control* (emphasis supplied) like the Capital Issue Control Act. He observed that there were other provisions like the Industries (Development & Regulation) Act, under which licences were given to new industries. But this, according to the Minister, was not the purpose of the negative control of the capital issue. Various suggestions were made by the members of the Parliament about the role of the Act, for instance, to encourage public companies, not too much concentration of particular industries at particular areas, etc. The Minister referred to the various other Acts which control the industry and the Minister also referred that there should not be undue delay. Similar statements were made by Mr. M.C. Shah in Rajya Sabha, who was then the Minister for Revenue and Civil Expenditure. One Member in Rajya Sabha made it particularly clear that the consent of the Government had been misleading to some investors and thought that by a regulation, it was essential that in the prospectus it should be clearly stated that the sanction by the Government did not mean any guarantee about the suitability or the successful running of the industry. Therefore, this sanction of the Government should be stated more clearly and the public should be clearly warned that a sanction of the Government did not imply any sort of guarantee by the Government.

A B C D E F G H

A We have referred to the debates only to highlight that the purpose of the Bill was to secure a balanced investment of the country's resources in the industry and not to ensure so much the soundness of the investment or give any guarantee to the investors. The section of the Act in question in express terms does not enjoin the CCI to discharge such obligations nor does the background of the Act so B encompass.

There was considerable discussion before us as to the scope of the powers and responsibilities of the CCI while granting his consent to an issue of shares and debentures proposed by a company. As stated above, the learned Additional Solicitor General submitted that the restrictions on issue of capital were introduced as part of the control C measures found necessary during the period of the first world war and that, after the war ended, the control was continued as it was thought "in the light of experience gained that control is still necessary to secure a balanced investment of the country's resources in industry, agriculture and the social services" (vide, the statement of Objects and D Reasons of the Act in 1947). He urged, relying also upon the speech of the concerned Minister at the time of moving the amendment bill of 1956 in Parliament, (which placed the measure on a permanent footing) that all that the CCI is concerned with is to ensure that the investible resources of the country are properly utilised for priority purposes and are not invested in non-essential projects or in a manner which E runs counter to the accepted investment policies of the Government. The CCI, he submitted, has neither the duty, nor the staff, the facilities or the expertise to enquire about, or investigate into, the financial soundness or acceptability of the issue proposed to be made. He pointed out that one of the conditions on which all consent is granted is that the Central Government does not take any responsibi- F lity for the financial soundness of any scheme or the correctness of any statement made or opinions expressed in the prospectus and the condition is also explicitly set out in the prospectus.

We are unable to agree fully with this somewhat narrow aspect of the CCI's role. In the very speech in Parliament to which the learned G Additional Solicitor General referred, the Minister also stated:

> "Apart from this main object of the Bill which is thus to prevent the diversion of investible resources of non-essential projects, *the control has also been used for many other purposes*. The more important of these purposes which H may be called ancillary purposes are the regulation of the

issue of bonus shares, regulation of capital reorganisation plans of companies including mergers and amalgamations which involved the issue or re-issue of capital, *the regulation of the capital structure of companies with a view to discouraging undesirable practices*, namely, issue of shares with disproportionate voting rights and *encouraging the adoption of sound methods and techniques in company floatation*, regulation of the terms and conditions of additional issues of capital etc."

(emphasis added)

That apart, whatever may have been the position at the time the Act was passed, the present duties of the CCI have to be construed in the context of the current situation in the country, particularly, when there is no clear cut delineation of their scope in the enactment. This line of thought is also reinforced by the expanding scope of the guidelines issued under the Act from time to time and the increasing range of financial instruments that enter the market. Looking to all this, we think that the CCI has also a role to play in ensuring that public interest does not suffer as a consequence of the consent granted by him. But, as we have explained later, the responsibilities of the CCI in this direction should not be widened beyond the range of expeditious implementation of the scheme of the Act and should, at least for the present, be restricted and limited to ensuring that the issue to which he is granting consent is not, patently and to his knowledge, so manifestly impracticable or financially risky as to amount to a fraud on the public. To go beyond this and require that the CCI should probe in depth into the technical feasibilities and financial soundness of the proposed projects or the sufficiency or otherwise of the security offered and such other details may be to burden him with duties for the discharge of which he is as yet ill-equipped.

Shri Ganesh submitted that the CCI is duty bound to act in accordance with the guidelines which lay down the principles regulating the sanction of capital issues. This is especially so because the guidelines had been published. It was submitted that the investing public is, therefore, entitled to proceed on the basis that the CCI would act in conformity with the guidelines and would enforce them while sanctioning a particular capital issue. It was submitted that it is not permissible to deviate from the guidelines. In this connection, reliance was placed by him as well as by Shri Haksar, appearing for the petitioner in T.C. No. 161/88, upon the observations of this Court in *Ramanna Dayaram Shetty* v. *International Airport Authority*, [1979] 3

A SCR 1014, where this Court observed that it must be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licence or granting other forms of largess, the government could not act arbitrarily at its sweet will and, like a private individual, deal with any persons it please, but its action must be in conformity with standard B or norm which is not arbitrary, irrational or irrelevant. We accept the position that the power of discretion of the government in the matter of grant of largess including award of jobs, contracts, quotas, licences etc. must be confirmed and structured by rational, relevant and non-discriminatory standard or norm and if the government departed from such standard or norm in any particular case or cases, the action of the C government would be liable to be struck down, unless it could not be shown by the government that the departure was not arbitrary but was based on some valid principle which in itself was not irrational, irrelevant, unreasonable or discriminatory. Mr. Haksar drew our attention to the observations of this Court in the case of *Motilal Padampat Sugar Mills* v. *Uttar Pradesh,* [1979] 2 SCR 641, where this Court reiterated D that claim of change of policy would not be sufficient to exonerate the government from the liability; the government would have to show what precisely was the changed policy and also its reason and justification so that the Court could judge for itslef which way the public interest lay and what the equity of the case demanded. It was contended by Shri Haksar that there were departures from the guidelines and there was E no indication as to why such departures had been made.

We are unable, however, to accept the criticism that there has been deivations from the guidelines which are substantial. We have referred to the guidelines. We do not find that there has been any requirement of such guidelines which could be considered to be man-F datory which have not been complied with. We have considered this carefully and found that there have been no deviations from paras 3, 5, 12, 13 and 14 of the guidelines. Nor has there been, as pointed out by the respondents, any infraction of guidelines nos. 2 and 4. The fact that debentures of the face value of Rs.200 have been approved as against the normal face value of Rs. 100 envisaged under para 8 or that G the requirements of the service of underwriters have been dispensed with in exercise of the discretion conferred by para 11 do not constitute arbitrary, substantial or unjustified deviations from those guidelines. There has been sufficient compliance with the guidelines on the quantum of issue, debt-equity ratio, interest rate and the period of redemption and also guideline No. 10 about the security of the H debenture and there was sufficient security for the debentures in the

facts and circumstances of this case. The preference in favour of shareholders of RIL was justified and based on intelligible differentia. Indeed, if we consider the role of the CCI, it is primarily concerned to ensure a balanced investment policy and not to guarantee the solvency or sufficiency of the security. In our opinion, most of the criticism directed against deviation from guidelines were misplaced.

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It was submitted by Shri Ganesh that there was an obligation cast on the CCI to ensure that the guideline regarding security for the debentures was fulfilled. Shri Ganesh took us through the documents filed before the CCI including, in particular, the draft prospectus which, according to him, clearly showed that there was in reality no security for the debentures. We are unable to accept this contention.

C

Perhaps the most important of the arguments addressed on behalf of the petitioners was that the scrutiny by the CCI of the prospectus was so cursory that the most glaring travesty of truth contained therein has passed unnoticed by him. Sri Ganesh points out that the guidelines were clear that a company can issue only secured debentures and draws attention to the fact that the company proclaimed the issue to be of "fully secured convertible debentures". Yet, the prospectus, on its very face, disclosed that the debentures were unsecured. Shri Ganesh urges that, if only the CCI had perused carefully the figurues and statements made in the prospectus he could never have accepted, at face value, the assertion of RPL that the debentures were "secured" ones within the meaning of the guidelines or accorded his consent to the issue. This argument is in three parts and may be dealt with accordingly.

D

E

(i) The first criticism of the petitioners is that, in certain brochures and pamphlets issued by RPL, the debentures are described as "fully secured convertible debentures" which they are not. The company admitted that there was such a description but explained that this was due to an oversight; the words "fully secured convertible debentures" were printed in some brochures instead of the words "secured fully convertible debentures" without meaning or intending any change. It is submitted that the company's representation was that the debentures were "secured fully convertible" ones. This is also what had been set out in the application for consent. Though the company does claim that the debentures were also fully secured, it is submitted that the emphasis in the issue was that the debentures were fully convertible and secured. We think this explanation is plausible and do not think that any importance or significance need be attached

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A to the different description in some places, particularly, in view of our discussion below as to the extent and nature of the security actually provided for the debentures.

(ii) The second contention is that the security offered, on the face of it, falls far short of the face value of the debentures. Sri Ganesh B analysed before us some statements indicating the inadequacy of the security. It was submitted by him that as per page 6 of the prospectus issuing the debentures, after implementation of the projects only the following assets would be available with the company:

		Rs. in Crores
C Land and site development		11
Buildings		26
Plant and Machinery		305
	Total	342

D The assets of Rs.51.25 crores, mentioned in the balance sheet as at 31.5.88 as per the Auditor's report, are also included in the above because the above figures are of the total assets which would come in existence after implementation of the project. This, according to Shri Ganesh, clearly showed the inadequacy of the security.

E On behalf of RPL, it is submitted that there is no justification to exclude, from the figures of assets shown on p. 6 of the prospectus, items such as technical know-how fees, expatriation fees and engineering fees amounting to Rs.79 crores and preliminary and pre-operative expenses amounting to Rs.138 crores as these are capitalised in the accounts and result in accretion to the value of the company's capital F assets. The calculation also ignores miscellaneous fixed assets of the value of Rs.70 crores shown on the page. If these are added, the value of the investment in assets would work out to Rs.629 crores which far exceeds the value of the debentures after the first conversion which comes to Rs.563.73 crores. This figure of Rs.629 crores takes into account only the investment in assets made out of the borrowed funds G and not the future profits and assets acquired therefrom. But, even taking this as the basis, it is clear that, with the escalation in the value of the fixed assets with the passge of time on the one hand and the redemption of a good portion of the debentures by the end of three years on the other, the security provided is complete and, in any event, more than adequate to safeguard the interests of the debenture H holders. There is substance in this contention.

(iii) The third loophole, according to the petitioners, is the insecurity created by the terms of clauses 5 and 6 of the prospectus dealing with 'security' and 'borrowings'. Sri Ganesh submits that clauses 5 and 6 severely qualify the rights of the debenture holders under the present issue in several respects.

(a) There is, in their favour, only a residual charge on all or any of the assets of the company at Hazira and other places which shall "rank expressly subject to subservient and subordinate" to all existing and future mortgages, charges and securities as may be hereafter created by the company in any manner whatsoever;

(b) The company need not obtain the consent or concurrence of the debenture holders for creating any such mortgages etc. which will have priority over the present debenture issue or for disposing of any of the assets of the company;

(c) Not only is the residential complex of the company excluded from the purview of the security, it is also open to the company and the trustees of the debenture holders to agree to the exclusion of any of the assets of the company from the purview of the security.

(d) The current assets or the bankers' goods such as stocks, inventories, book debts, receivables, work in progress, finished and semi-finished goods etc. stand excluded from the security.

(e) Clause 6 again emphasises that the company shall be at liberty to raise any further loans and secure the same in priority to the present security and/or on such terms as to security, ranking or otherwise as may be mutually acceptable to the company and the trustees of the debenture holders without being required to obtain any further sanction from the debenture holders.

If these clauses are closely perused, Sri Ganesh urges, it will be seen (a) that the charge in favour of the debenture holders has a very poor priority as it can rank subservient to any securities that may be created by the company in future in respect of further borrowings, (b) that the company and debenture trustees, by mutual agreement, can take any of the assets of the company outside the purview of the present security and (c) that the company can create such future securities as have a priority over the present issue or exclude assets from the purview of the security without the consent or concurrence of the present debenture holders.

A We think, as has been urged on behalf of the company, that these arguments proceed on a mis-apprehension of the true nature and scope of clauses 5 and 6 above as well as of the nature and legal effect of a floating charge—what has been described in this prospectus as a 'residual charge'—that is created at the time of issue of such debentures. In the first place, these clauses are only enabling in nature B so as to permit the company, despite the mortgage in favour of depenture holders, to carry on its business normally. It will be appreciated that the company's normal business activities would necessarily involve, *inter alia,* alienation of some of the assets of the company from time to time (such as, for example, the sale of the goods manufactured by the company) as well the procurement and discharge of loans and accommodation facilities from banks, financial institu- C tions and others (such as, for example, entering into agreements for hire purchase of plant and machinery and making payments of instalments towards their price). The entire progress of the company would come to a standstill in the absence of such an enabling provision. Such a provision is not only usual but also essential because the basic idea is D that the finances raised by the debentures should be employed for running the project profitably and thereby generating more and more funds and assets which will also be available to the debenture holders. Secondly, we think—and indeed RPL also conceded both in arguments as well in an affidavit filed on its behalf by Sri Mohan Ramachandran dated 10th January, 1989—that what the two clauses E provide is only that the consent and concurrence of the debenture holders need not be obtained by the company before creating securities that may have priority over the present issue and that, under clauses 5 and 6 read harmoniously together, the trustees for the debenture holders have to concur before the company can raise any future borrowings and create therefor a security which will have prio- F rity over the security available to the present debenture holders. The Trustees here are not stooges of the company. The ICICI is not only a financial institution in the public sector but is also one of the institutions financing the project and thus having a stake in the success of the project. It can be trusted to adequately look after the interests of the debenture holders. Thirdly, as has been pointed out by the company, G the misapprehensions of the petitioners are more imaginary than real. The company, in its affidavit, has pointed out that the Debenture Trust Deed dated 7.11.1988, which has since been executed in the present case, contains a provision by which, at the time of creation of any future charge, the terms and conditions as to ranking have to be agreed upon between the RPL and ICICI. Also clause 16 of the H Debenture Trust Deed authorises the debenture trustees to intervene

and crystallise the charge in their favour, *inter alia,* in the following circumstances:

> "If the Company sells the Mortgaged Premises or any part thereof not in the ordinary course of business except a sale, transfer or disposition allowed under the terms of these presents to be made with the consent of the Trustees."
>
> (Sub-clause (f))

> "If the Company (except as hereinafter expressly provided) creates or attempts or purports to create any charge or mortgage of the Mortgaged Premises or any part of parts thereof prejudicial to the interests of the Debentureholders."
>
> (Sub-Clause (i))

> "If, in the opinion of the Trustees, the security of the Debentureholders is in jeopardy."
>
> (Sub-clause (k))

Thus if at any time the company proposes to create such higher-ranking charges, the trustees for debenture holders can stultify the same by taking immediate action. Fourthly, the impression sought to be created by the petitioners that the company may go on creating encumbrances, left and right, to the detriment and prejudice of the present debenture-holders overlooks several restraints imposed on the company in this respect under the Companies Act, the CCI Act, the MRTP Act and involving the consent of public financial institutions, commercial banks, the term lenders, the shareholders, the MRTP Commission, the Central Government and the CCI before the creation of such securities. Lastly, the contention of the petitioners completely overlooks the basic principles underlying the commercial law concept of debentures secured by a floating charge as evolved in British Jurisprudence over the past two hundred years. Clauses like clauses 5 and 6 are usually inserted in debenture issues and the company has drawn our attention to two like instances in certain issues approved in December 1988 and January, 1989. It has also been argued for the company that a fully convertible debenture is not a debenture at all in the true sense of the term and is more akin to an issue of equity and that, therefore, there is no need that it should be covered by adequate security at all. These aspects of the matter are dealt with by us at some length later; it is sufficient here to say that we are unable to accept the contention that the security in favour of the debenture holders is illu-

A sory and inadequate because of the wide language of clauses (5) and (6) of the prospectus. Both these clauses have to be read together and so read, we have no doubt, do not permit the creation of any charge ranking in priority to the charge created under these debentures save with the consent of the trustees of debenture holders.

B The further argument of Sri Ganesh is that the company law in its application as well as the prospectus, carefully skirted round the issue by merely stating that security will be provided to the satisfaction of the trustees and that this is not very helpful as the debenture holders come into the picture only after the funds have been raised. This argument is untenable. We have already pointed out, there was sufficient security as was warranted by the issue. This was an issue of C 12.5% fully secured convertible debentures of Rs.200 each. We have examined the share capital, the present issue and the scheme of conversion. In the premises, it is not possible to accept the submission of Shri Ganesh that the Controller satisfied himself (as stated by him in his affidavit) with the bare statement of the applicant company (RPL) D that security would be created as per the requirements of the debenture trustees. There was this statement that the debenture trustees were well known financial instutitions and they had been entrusted with this obligation. Learned Additional Solicitor General drew our attention to similar debentures and submitted and, in our opinion, rightly that this was the usual practice. It is not possible for the CCI to ensure E more than that. The prospectus was not misleading to that extent. It, therefore, cannot be accepted that the CCI failed to apply its mind to the documents before him. Reliance was placed on the fact that the RIL had proposed the issue of shares for G-series for more or less identical project. It was contended that if capital issues had once been sanctioned for a project and the issue had been converted for that F purpose and then a fresh capital issue could not be applied for or granted for the same purpose. It was urged by Shri Ganesh that the project under those circumstances could not be considered to be a 'new project' within the meaning of para 2(i) of the Guidelines for Issue of Debentures by Public Limited Companies. Secondly, it was urged by Shri Ganesh that the basic object of the Capital Issues (Con- G trol) Act was to ensure sufficient and fruitful utilisation of capital would be completely defeated if more than one capital issue is permitted for the same project. In this connection, Shri Ganesh referred to the affidavit of the CCI which, according to him, clearly indicated that CCI was specifically aware of the fact that the scheme of finance for setting up the very same project had been approved in favour of RIL. H Our attention was drawn to the affidavit filed on behalf of the CCI,

where he had stated at p. 203 of the Paper Book of T.C. No. 164 of 1988, that by a Press Release dated 15th September, 1984, certain guidelines which the said deponent described as "non-statutory guidelines" for approval of issue of secured convertible and non-convertible debentures. These guidelines had been subsequently amended by a Press Release dated 8th March, 1985 and these were released on 19th August, 1985 for issue of convertible cumulative preference shares and also there are guidelines issued by Press Release dated Ist August, 1985 for employees stock option scheme. In accordance with these guidelines, according to the deponent on behalf of the CCI, the consent of the CCI for capital issue for secured fully convertible debentures was issued as the projects originally to be established in RIL were permitted by the Department of Company Affairs to be transferred to RPL and endorsements thereof from RIL to RPL had already been filed including, *inter alia,* for endorsement of the letter of intent for the MEG Project. The scheme of finance for setting up of three projects namely PVC, HDPE and MEG had already been approved by the Department of Economic Affairs in favour of RIL. In that context, in our opinion, to contend that there was violation of the guidelines because the RPL's project was not a new project was too narrow and legalistic view. Shri Ganesh tried to urge that the CCI ought to have been aware of the fact that he had sanctioned a capital issue of Rs.400 crores (subsequently enhanced to Rs.500 crores) to RIL for the same project and that the said issue had been implemented and capital of Rs.500 crores had been mopped up from the public by RIL. The CCI ought to have withheld permission for a fresh capital issue in the name of RPL for the very same project. However, the CCI did not appear to have applied his mind, according to Shri Ganesh. Consent Order, therefore, according to Shri Ganesh, was bad. We are, however, unable to accept this submission. The CCI was not performing the role of a social mentor taking into account the purpose of RIL. If RIL has misutilised any of its funds or the funds had not been utilised for G-series, then RIL would be responsible to its shareholders or to authorities in accordance with the relevant provisions of the Companies Act, 1956. This aspect does not enter into sanctioning the capital issue for the new project in accordance with the guidelines enumerated hereinbefore. That apart, even if RIL and RPL have to be treated as one for this purpose and the grant of consent for earlier debenture issues in favour of RIL are to be taken into account in judging the necessity of the issues, there is no illegality or irregularity in the impugned grant of consent to RPL. As referred to elsewhere, RIL had not been able to utilise any part of the 'G' series of debentures on the MEG project as there had been a cost overrun in

A the PTA & LAB projects. Eventually, for reasons adverted to earlier, it was decided to have the MEG, PVC and HDPE projects undertaken by floating RPL, a wholly-owned subsidiary. In the result, even if we look at the projects not as new ones but only as those of the RIL to be implemented by RPL, the additional finances were needed for the extention, expansion and diversification of the projects originally B envisaged. This is one of the objects for which a debenture issue is permissible under the guidelines.

Shri Ganesh then submitted that Guideline No. 3 for the Issue of Debentures by Public Limited Companies laid down that the CCI would consider an application for capital-issue only after the approval of the financial institutions, banks and Government are received. The C statutory application form prescribed by the Capital Issues (Application for Consent) Rules, 1966 requires, according to Shri Ganesh, that the consent and clearances of the various authorities and institutions should be annexed to the application. Shri Ganesh submitted that in the present case, many of the relevant applications had not even been D filed by RIL and RPL as on 4th July, 1988 when the CCI passed the Consent Order. It was submitted by Shri Ganesh, also by Shri Haksar and especially by Shri Pagaria, that RPL's application had been processed in unseemly haste and without due and proper application of mind. It is true that things moved speedily in the case.

E This has caused us certain amount of anxiety. Speed is good; haste is bad, and it is always desirable to bear in mind that one should hasten slowly. However, whether in a particular case, there was haste or speed depends upon the objective situation or on overall appraisement of the situation. Here, as discussed earlier, the material shows that the details of the proposals have been examined and discussed and F that an examination of the merits has not been a casualty due to the speed with which the application was processed; and especially in view of the fact that no injury has been caused to the investors and no substantial loss to their securities have been occasioned, we are of the opinion that much cannot be made of this criticism. Learned Additional Solicitor General placed before us other instances where applications had been sanctioned within shorter times.

Shri Ganesh tried to urge that RIL had declared itself as a promoter of RPL and the prospectus stated that no benefit was being provided to RIL as promotor. But, the entire amount spent by RIL was being reimbursed to it by RPL. In these circumstances, RIL could H not be treated differently from the general public in the matter of

allotments of the shares of RPL. However, the scheme of allotment was such that gross discrimination resulted against the general investing public and in favour of RIL. The long-term implications, it was urged by Shri Ganesh, of the said discrimination were highly anomalous and unjust for the investing public who had subscribed to the debentures of RPL. However, there had been no application of mind by the CCI, according to Shri Ganesh, to the matter of quantification of the extent of benefits conferred on RIL and consideration of whether the same are justified or not. The CCI, however, had merely mentioned in his affidavit that RIL was a promotor and had given an interest free advance of Rs.50 crores to RPL for a period of three years. In our opinion, these factors were sufficient to justify the treatment of RIL differently from other investing public and thus the treatment does not amount to any discriminatory benefit to RIL in respect of the debentures of RPL. As a matter of fact, this was a known fact and the shareholders or the subscribing debenture holders would be aware of the same. Shri Ganesh sought to urge that the CCI had not made any attempt to appreciate or quantify the extent of the said benefits and advantages and go into the question whether the same are fair, reasonable and just. Consequently, for this reason also, there had not been, according to Shri Ganesh, due application of mind by the CCI before the Consent Order was issued. We are unable to accept this criticism.

The discrimination alleged is on two grounds. The first is that RIL is entitled straightaway to the allotment of shares of the face value of Rs.57.50 crores whereas only 5% of the investment by the debenture-holders can be converted into shares at par simultaneously with the issue. The second is that a loan of Rs.50 crores advanced by RIL to RPL will be converted into shares at par at the end of 3 years whereas the debenture-holders will have to pay a premium even for converting 20% of their debentures into shares by that time. These allegations do not bear scrutiny. So far as the first ground is concerned, there is no justification for a comparison between these two categories of investors. RIL is the promoter company which has conceived the projects, got them sanctioned, invested huge amounts of time and money and transferred the projects for implementation to RPL. It is, therefore, in a class by itself and there is nothing wrong if it is allotted certain shares in the company, quite independently of the debenture issue, in lieu of its investments. So far as the second ground is concerned, it overlooks certain disadvantages attached to RIL in regard to the loan of Rs.50 crores advanced by RIL as compared with the investor in the debentures. Firstly, RIL's advance is interest free

for 3 years whereas the debenture holders get interest at the rate of 12.5% during the period. Secondly, the debenture loan is secured while the RIL's are not. Thus the debenture-holders have certain benefits which RIL does not have and, if the debenture-holders have the disadvantage of having to pay a premium, that cannot consitute basis for a ground of discrimination.

These considerations apart, we would like to observe that we are unable to appreciate how any question of discrimination is at all relevant in the present context. It is a company—not the State or a State instrumentality—that is issuing the shares and debentures. It is entirely for the company to issue the shares and debentures on such terms as they may consider practicable from their point of view. There is no reason why they should not so structure the issue that it confers certain greater advantages and benefits on the existing shareholders or promoters than on the new subscribers to the debentures. We do not think that it is permissible for the CCI to withhold consent only for this reason or to stipulate that consent can be given only if the shareholders and promoters as well as prospective debenture holders are all treated alike. The subscribers to the debentures are only lenders to the company who have an option to convert their debt into equity on certain terms. It is perfectly open to the subscribers to balance the *pros* and *cons* of the issue and to desist from taking the debentures if they feel that the dice are loaded unfavourably in favour of the "proprietors" of the company.

Shri Pagaria, who appeared in T.C. No. 162/88 in the matter of *Shri Radheyshyam Goyal* v. *Union of India & Ors.*, where the petitioner was a Chartered Accountant, prefaced his submission by submitting that ours is a sovereign, socialist, secular democratic republic governed by the Constitution of India. Shri Pagaria drew our attention to Article 19(1)(g) of the Constitution. He submitted that the Capital Issues (Control) Act, 1947 is a pre-constitutional law and the Act was enacted as being expedient to provide for control of issue of capital. Under Article 14 read with Article 38, it was obligatory to ensure that there was no disproportionate wealth. He drew our attention to MRTP Act and other Acts and also to a large number of decisions to highlight that the directive principles should be imported for ensuring that the CCI performs his functions for the welfare of the community and to bring about an egalitarian society. That was his first submission and he further submitted that the petitioner was really in a position to come under the Public Interest Litigation propounding the cause of the public. Secondly, he submitted that the concept of com-

pany being the property of the Board of Directors had undergone a radical change. He submitted that company in a new socio-economic set-up is a social institution having duties and responsibilities towards community for which it functions. According to him, maximisation of social welfare should be the legitimate goal of the companies and the shareholders. He, therefore, stated that the CCI should take upon himself a social role and ensure that Capital issues are satisfactorily implemented.

One may perhaps concede that, with the vast expansion in recent years of the corporate sector and its constant tendency to have recourse to public funds for securing finances for its projects (either by way of share capital or borrowed capital), the scope of the responsibilities of the CCI can no longer be as limited as before. It may no longer be restricted merely to the task of preventing an imbalance of investment in various sectors or the diversion of investment to non-essential projects. The petitioners may perhaps have a point in suggesting that the CCI should be burdened with a duty also to safeguard the interests of the public who are invited to participate in such financing on large scale and at least to satisfy himself that the project for which funds are needed is not in the nature of a "South-sea bubble" and that the volume, terms and conditions of the issue proposed by the company are not such as to constitute a fraud on the public. But we think that the time is not yet ripe for placing on the office of the CCI, as at present constituted, more than a skeltal outline of responsibility in this direction; his shoulders are, as yet, not strong enough to bear such burden. He does not have the time, the staff, the powers of enquiry, the benefit of public hearing, the requisite background, or the economic commercial or financial skill or expertise to so assess the technical, commercial and financial aspects of the projects as to be able to give the public investor a guarantee that he is not being led up the garden path. All that one can say at present is that the parameters of his action have to be found within the four corners of the Act and the guidelines. May be, he can legitimately withhold his consent to a project that is *ex facie* impracticable (for instance, as was put to the parties in the course of hearing, a project to convert base metal into gold) or a project, which in the present state of finances and scientific knowledge and progress of our country, is an impossibility—(for example, to have a transport service to the moon). May be, he also can in a proper case, refuse his consent to a scheme of finance if, *ex facie*, and without any detailed investigation, he is satisfied, that it is too big for the applicant company to handle, or too risky and onerous to be permitted in public interest. But this is a decision which he will have to

venture upon, on his own responsibility, in patent cases where the nature of the project or the scheme of financing is, on its face, startlingly non-feasible, impracticable or risky. He cannot, however, be compelled to withhold consent, or found fault with for having granted consent, in a case such as this, where the proposed project is in a core industrial sector, where there is considerable scope for foreign currency savings and the scheme of financing proposed has been developed in consultation with and scrutinised and approved by, a leading public sector financial institution (which has also agreed to be the trustee for the Debenture-holders). It is too much to suggest that the CCI should be held to have failed in his duty by accepting the opinion of such institutions and not investigating for himself from various angles and in particular, the adequacy of the security offered to the debenture-holders under the scheme.

While we do appreciate that in the changed atmosphere, the corporate sector, when seeking to attract public moneys while raising new capital must perform both responsible and responsive roles, it is difficult to enjoin that the CCI while considering the question of consent/sanction of the capital issues can fulfil any role beyond the policies prescribed under which, as noticed before, it was enjoined to function. There are other various Acts like the Income-Tax Act, Companies Act, MRTP Act to subserve other social objectives which are conducive or ancillary to the directive principles. Nelson, it is reported to have said before the battle of Waterloo, that England expected every man to do his duty. It is well to remember that every authority in a vast developmental society must perform his role keeping in view the part he is expected to play in the background of the whole perspective and should not encroah upon others taking the onus upon himself to do everything. That would lead to chaos and confusion.

Shri Pagaria drew our attention to Section 237 of the Companies Act, 1956. If there was any violation of some of the rights of the parties, they are at liberty to proceed in accordance with law. It was contended that it was an admitted position that RPL is a newly established company though initially financed by RIL. No ceiling had been put on the allotment of the shares to the business associates of Directors whereas at item 5 page 2 of the Consent Order dated 4th July, 1988, the limit of the shares for the employees of the RPL had been reduced from 200 to only 50, thereby, according to Shri Pagaria, depriving the employees having large shareholding in the company which discriminated them vis-a-vis the business associates, for whom no such ceiling had been kept.

We find the factual position to be this. The application for consent to the issue had not specifically earmarked any portion of the issue to the employees of RPL and RIL. In the course of the discussion with the CCI, it was suggested that 12,90,000 debentures should be offered by way of preferential allotment to the employees of the RIL and RPL. Para 5 of the consent order by the CCI conveyed the approval by the Central Government under proviso to rule 19(2)(6) of the Securities Contracts (Regulation) Rules, 1957 "subject to the condition that the allotment to the employees shall not exceed 200 shares per individual". The Company by its letter of 7th July pointed out that "shares" in the above para was a mistake for "debentures" and also suggested that a maximum of 200 debentures—which on first conversion would become 200 shares—be allotted to each of the employees of RPL as well as RIL. The CCI, however, modified Para 5 by his letter of the 19th July, 1988 to say that allotment to the employees shall not exceed 50 debentures per individual. In this context, it does not appear that the restriction of the allotment to the employees was at the instance of the company nor does it seem that any discrimination was intended in respect of the allotments to the employees. Nor has our attention been invited to any legal requirement or guidelines prescribing any fixed or minimum quota of allotment to the employees of the company. We are, therefore, unable to see any discrimination. In any case, the petitioner in this case has no cause for grievance on that score.

It was submitted that the Consent Order suffered from arbitrariness, *mala fides*, unprecedented hurry and with extraneous considerations. We are unable to see any such discrimination. It was submitted that the Consent Order had been passed without satisfying that the pre-requisite condition of the various clearances and no objection certificates and licences under MRTP Act, FERA Act and Petroleum Act and the Essential Commodities Act, Securities Contract (Regulation) Act, Companies Act, and other allied laws had been fulfilled. The CCI has given consent for 12.5% secured redeemable convertible debentures of Rs.200 each for cash at par to the public. This nomenclautre has not been changed, but in the prospectus, fully convertible debentures have been shown. According to Shri Pagaria, the most important is the concentration of wealth in the hands of Ambani family and this aspect has not been considered in granting the consent, which according to him, resulted in violation of Article 39(b) & (c) of the Constitution of India and section 22(3) of the MRTP Act. It was submitted that the consent could not be given in favour of any applicant or company, who had no valid industrial licence nor it pos-

A sessed the letter of intent under the provisions of Industries (Development and Regulation) Act, 1951. It was submitted that the CCI did not give judicial consideration to the application as in this connection reliance was placed on the decision of the Gujarat High Court in *Navjivan Mills Co. Ltd. Kalol,* v. *In re. Kohinoor Mills Co. Ltd. Bombay,* [1972] 42 Co. Cases 265. Some passages of Halsbury's B Statutes of England, 4th edn., vol. 8, were referred. It was submitted that the Directors who had received money without disclosing full facts were bound to refund the same and were constructive trustees of the company. This proposition, in our opinion, is irrelevant in the present context. Shri Pagaria sought to urge that RIL management had passed an *ultra vires* resolution in transferring the industrial licence and letter of intent to RPL and for that act, the office bearers were personally C liable and he referred to certain decisions. Shri Pagaria also submitted that by advertisement on Television, radio and print media under the caption "Your Family Khazana", without first creating a solid and viable security for the fully paid convertible debentures under the impugned invalid consent order, the application money had been D raised to the tune of more than Rs.1,200 crores. According to him, the advertisement given was not only violative of section 58A of the Companies Act but also contrary to provisions of Security Contract (Regulation) Act, 1956 and Rules made thereunder. Shri Pagaria then submitted that in view of what he described as improper or insufficient security, no consent could have been granted and even if the issue was E over-subscribed, the money was repayable to the persons who had subscribed to the issue on the basis of the promises and they were entitled not only to the refund of the money but to all benefits by way of interest, etc. He drew our attention to certain decisions, which in our opinion, are irrelevant. He submitted that the people have a right to know and this right had been violated by not telling the people the F full facts. It was submitted that RPL did not place any material before the Central Government to justify the consent. We are unable to accept this submission. It was next submitted that the guidelines were mandatory. It was next contended by Shri Pagaria that there was non-disclosure of true and correct facts not only in respect of the interest of Directors of RIL in the RPL properties but also the security and with G regard to the approval of the financial scheme under MRTP Act, the licence under the Petroleum Act, Explosive Act, etc., Shri Pagaria has referred to the requirements under a large number of enactments and contended that, until requisite consents, approvals, licences etc. are obtained under the said enactments, the Company cannot be permitted to raise public finances for the projects on hand. In this context, he H referred, in addition to the provisions of the Companies Act, the

MRTP Act, CCI Act, rules and guidelines, and the Industries (Development & Regulation) Act which have been considered by us, to certain provisions of the Petroleum Act, 1934 (and rules and orders made thereunder); Explosives Act (and rules made thereunder); Essential Commodities Act, Atomic Energy Act; Insecticide Act; Air (Prevention and Control of) Pollution Act, 1981; Indian Standards Institution Certification (Marks) Act, 1952 (and rules and regulations thereunder); Foreign Exchange Regulation Act, 1973; Interest Act, 1978; Securities Regulation Act and Dowry Prohibition Act, 1961. We have gone through these provisions. They relate to various types of controls and regulations which have to be observed in the actual running of various types of business. We are satisfied that neither these statutes nor those regulating the grant of consent to the issue of shares and debentures intend that clearances thereunder should all be obtained before filing an application for consent. In our considered view, such requirement is neither practical nor feasible and is not envisaged by the statutes referred to. Some of the contentions of Sri Pagaria alleging misleading statements made by the Company to attract investments, such as the one based on the Dowry Prohibition Act and the description of the issue as the "Family Khazana", are far-fetched and unrealistic besides being irrelevant to the issue to be considered at the stage of consent for the issue by the CCI.

Sri Pagaria then submitted that the grant of consent was without lawful authority and on extraneous considerations. He referred to certain decisions in support of that broad proposition. If the basis of his submission was correct, undoubtely, the consent was bad but we do not find any merit in the submission. The next submission by Shri Pagaria was that the issue had been made public subject to the injunctive relief granted by this Court on 19th August, 1988 without entering into the merits of the case and it was submitted that RPL did not possess any industrial licence or letter of indent and whatever licence it had, had expired. This position is not factually correct as noted before. It was submitted that there had been violation of several laws. No particular violation had been indicated. Furthermore, it was submitted that the Industries (Development & Regulation) Act, 1951, Companies Act, 1956, Capital Issues (Control) Act, 1947, MRTP Act, 1969, FERA, 1973 have to be read in conjunction and as such the corporate sector should not be permitted to accumulate wealth on account of favour from the Government. The factual position being as indicated before, it is not possible to entertain these bald submissions.

On behalf of the CCI, it was submitted that the contention that

A the CCI had not followed his own guidelines relating to the sanction of the issue is misconceived. It was further submitted that the security for debentures had been properly there. It was submitted that the following facts would establish that there had been no breach of duty or obligation cast on the CCI either under the Act or under the Guidelines or under Capital Issues (Application for Consent) Rules.
B The relevant guidelines for consideration of this question are as follows:

> (a) Guidelines for Issue of Debentures by Public Limited Companies—Press Release 1984.
>
> 4. DEBT-EQUITY RATIO: The debt-equity ratio shall not
C normally exceed 2:1. For this purpose 'debt' will mean all term loans, debentures and bonds with an initial maturity period of five years or more including interest accrued thereon. It also includes all deferred payment liabilities but it does not include short-term bank borrowings and advances, unsecured deposit or loans for the public, shareholders
D and employees, and unsecured loans or deposits from others. 'Equity' would mean paid up share capital including preference capital and free reserves.

Guideline No. 11 is also instructive. The Press Release also was referred to. The trustees to the debenture holders were enjoined to
E supervise the implementation of the conditions regarding creation of the security of the debentures.

It was, therefore, submitted that the trustees of the debenture issue who were to supervise the implementation of the conditions regarding the creation of security, were vested with the requisite powers for
F protecting the interest of debenture holders. Before formulating the guidelines for protection of the interest of debenture holders considerable deliberations took place between the concerned departments in the Ministry and between the Public financial institutions, investment institutions, Department of Banking and CCI and Reserve Bank of India as a large quantum of debentures were coming to the period of
G maturity in 1989 onwards and redemption and a need was felt to protect the interest of debenture holders so that no defaults endanger their interests. Consequently, the question of debenture redemption reserve and the security creation was examined by the financial institutions and the scheme with debenture trustees was formulated with sufficient degree of precision and urgency. The debenture trustees are
H normally public financial institutions and nationalised banks. Public

financial institutions have the necessary expertise and infrastructure to examine the aspects of security creation and the quality of the security offered for protecting the interest of debenture holders. The original guidelines of 14th January, 1987 were continuously being monitored by the CCI and on 25th June, 1987, a further clarificatory guideline was published on the concept of security to be offered for the debentures. In the present case, the application dated 4th May, 1988 as filed by the RPL with the CCI categorically mentioned that "the security will be in such form and manner as required by the trustees for debenture holders". These requirements are contained in Part V(E): Particulars of Issues—Particulars of Preference Shares and Debentures—(e) indicate the security to be offered in the case of debentures. It is in these circumstances that it was not necessary for the CCI to evaluate the security or the adequacy thereof at the stage of grant of consent. The CCI did examine the proposal with reference to the debenture residual value beyond the fifth year of its allotment and in relation to the asset creation and take on record prior to grant of consent the project estimations and cash flows statements of the ICICI for the years 1989 to 1996 which had looked into the projects and also examined the question of creation of security and asset creation for RPL in relation to the issue for three projects. It was further submitted that as per this statement, the debt service coverage ratio was 1.89 in 1991 and going upto 2.55 in 1995. It was therefore inaccurate to say that the CCI had not satisfied himself on the matter of security or had failed to apply his mind to documents before him. It is further stated on behalf of the CCI that the CCI consented to the proposal of RIL for 'G' series for projects including PTA, LAB, MEG and HDPE and also for working capital requirement in November, 1986 and not merely for MEG and HDPE as alleged by the petitioner. During the implementation of projects, there was cost overrun for PTA and LAB which was taken due note of by ICICI in December, 1987 and CCI was informed of this cost overrun in 1987 itself by ICICI. Major part of 'G' Series was utilised for PTA and LAB, CCI was also aware of this cost overrun through the proposal of the company to MRTP Commission much prior to granting consent to RPL as CCI is represented in the process of approval for MRTP. CCI's office was informed by ICICI of likely deployment of 'G' Series funds for projects other than MEG and HDPE much prior to the grant of consent to RPL. It was submitted that RIL had received approval to its modified scheme on 17th May, 1988 for its LAB project and on 13th July, 1988 for its PTA Project. However, these formal communications were preceded by the awareness of the CCI in regard to cost overruns in PTA and LAB projects and consequently the non-implementation of MEG and HDPE.

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A Learned Additional Solicitor General, therefore, submitted that it was incorrect to state that the CCI granted consent for issue of debentures for financing the projects of RPL which were already given financing facilities earlier against the 'G' Series debentures. It was submitted that since the projects of MEG and HDPE were not implemented in RIL and were now being implemented in RPL, for the first time these B were 'new projects' within the meaning of paragraph 2(a) of the guidelines dated 15th September, 1984. Therefore, it is incorrect to say that more than one capital issue was permitted by the CCI to finance the same project. It is clear, according to learned Additional Solicitor General, that CCI satisfied himself before granting the consent on 4th July, 1988 to RPL, that the capital raised by RIL was not used for C HDPE and MEG and the scheme of finance for the G-Series of RIL, as modified, and for the present issue of RPL were different. It was denied that the CCI ought to have withheld permission for a fresh issue of capital in RPL for HDPE and MEG, especially since these two projects were not permitted. It was submitted on behalf of the CCI that there was no bar for receiving finance for either a cost overrun, or D for an unimplemented portion of a project. It is a fact that the MEG and HDPE projects had not been implemented in RIL and they were now being implemented only in RPL. It is further submitted on behalf of the CCI that the public financial institution, namely, ICICI looked into the project and reported to the CCI, in their letter dated 15th June, 1988 that the estimated cost of projects for which the consent E was being sought was Rs.650 crores. The consent order of the CCI clearly indicated that the consent conveyed in the letter shall lapse on the expiry of 12 months from the date thereof. The consent order further categorically stated that the approval was without prejudice to any other approval/permission that might be required to be obtained under any other Acts and laws in force. It necessarily therefore F followed that the obligation to obtain other permissions continued. There was no legal condition that other approvals should be examined by the CCI before grant of its own consent. This was submitted on behalf of the CCI and there is substance in the submission. In the application form prescribed in Schedule A of the Capital Issues (Applications for Consent) Rules, 1956—other than the Bonus shares, G the indications are only directory and not mandatory requirements. The words used are "normally insisted". Therefore, it does not preclude the CCI from granting its consent before the grant of other approvals. Through a chart, it was highlighted before us that there was no undue haste and it is the normal time taken in respect of others also. It is further stated that the statutory information clearly indicated H that no amount had been paid or given to the companies promotors or

officers or offered to them. The prospectus and the terms and conditions were not approved by the CCI at the time of granting of consent. No discrimination had been practised against the existing shareholders of RIL, while according consent to RPL. The proposal of the 8th June, 1988, as submitted by RPL to the CCI, sought approval for equity participation to the extent of Rs.50 crores only. This Rs.50 crores was by way of unsecured interest-free deposit to be converted at the end of the 36 months into equity shares at par. This substantial addition to the promoter's contribution was to ensure an enhanced participation in the project and to ensure its stake. The Petrochemical Industry has a long gestation period for yielding high profits. The convertible debentures have a fixed return as contrasted to equity participation which might earn a flexible dividend. In the initial period, no dividend might be earned. The CCI therefore applied its mind while evaluating this aspect since a sum of Rs.50 crores was to be non-interest bearing and unsecured whilst computing the position on the debt-equity-ratio. The enhanced contribution sought from the promoter was a condition imposed on them. The long term implications and the balance capital structure of the company were placed for consideration of the CCI through the cash flow analysis of ICICI and the CCI applied its mind to the scheme of financing and correctly granted the consent order on relevant considerations. So far as the grievance of alleged discrimination is concerned, it arises from the petitioner's assumption of the possible capital appreciation of equity shares of RIL at the second conversion which might be at a premium, if any, at the time of such conversion. It was submitted on behalf of the CCI that CCI had imposed a condition that any conversion would be at a premium, if any, as might be decided by the CCI's office, at the time of such conversion. It was further submitted that the computation of premium depends on several factors, such as the net worth of the company, the performance of the company, the profit earning capacity value of the company, etc. Since RPL was in the Petrochemical sector, which had ordinarily the gestation period, at the time of grant of the consent, it was not possible for the CCI to forecast or estimate the rate of conversion on the second and the third stage and advisedly the CCI reserved to itself the right to determine this premium on factual data available at the time of conversion. Therefore, this cannot be said to be bad. The convertible debentures would receive interest @ 12.5% on the sum of Rs.190 (3/.5% interest would accrue on this amount). It was, therefore, not necessary for the CCI to quantify the extent of benefits and advantages before grant of consent and had to enter into computation for evaluating this. Naturally, the RIL, as a promoter, stood on a different footing and there were rational intelligible critera distinguishing general

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members of the public from a promoter proposing the capital issue and the establishment of new projects. It was further relevant to notice, it was submitted, that RPL was a 100 per cent subsidiary company of RIL at the time of its conversion and even presently a proposal for a capital issue would have sought that the entire issue of capital be allotted to itself. The CCI had the option to grant the consent in terms of the application or to impose such conditions as were necessary for the balanced capital structure of the company. The consent, it was submitted, could not be evaluated in hindsight, after the issue was closed and subscribed.

It was asserted that today RIL is the third largest industrial house in India. It was stated that the present portfolio of RIL spreads over 2.5 million sharesholders/debenture holders/deposit holders. Till date, it has made 7 debentures issues besides making three equity share capital issues (rights) and 2 bonus shares issue. All the debentures issues were at a premium and over-subscribed. E-Series partly-convertible debentures of Rs.80 crores were issued in 1984-85. F-series non-convertible debentures of Rs.270 crores were issued in 1985-86. G-Series fully-convertible debentures for Rs.500 crores were issued in 1986-87. According to the respondent, the investment in RIL, during this period has proved to be consistently and remarkably profitable to investors. The RIL commenced business in the year 1966 for the manufacture of synthetic cloth made from synthetic yarn and fibre. Their factory was commenced and installed in the vicinity of Ahmedabad at Naroda. In order to manufacture synthetic fabric, the company was importing polyester filament yarn and polyester staple fibre and re-exporting fabrics produced from the same. It was one of the recognised export houses doing business in textiles. In the year 1977, Reliance Textile Industries merged with a company, Minylon Ltd. and, after the merger, changed its name back to Reliance Textile Industries Ltd. Its traditional line of business was manufacturing of synthetic fabrics. However since 1977, through several capital issues, (both of debentures and of equity) it has diversified and backward-integrated. In the first instance, the company decided to instal a plant for the manufacture of polyester staple fibre and polyester staple yarn which item it was previously importing for manufacturing synthetic fabrics. These plants were established at Patalganga in the State of Maharashtra. Thereafter, the company decided to further backward integrate and to manufacture PTA (Purified Teriphthalic Acid) which is one of the raw materials used in the manufacture of polyester filament yarn/polyester staple fibre. Simultaneously, it also diversified horizontally into the manufacture of Linear Aklyl Benzene (LAB)

used in the manufacture of detergents, as this product could also be manufactured from the petrochemical downstream products in which the company was engaged.

RIL's 3rd stage of backward-integration involved, it was asserted, in the manufacture of Mono Ethylene Glycol (MEG), used in the manufacture of polyester staple fibre and polyester staple yarn. It also decided to diversify into the manufacture of critically scarce plastic raw materials like High Density Polyethylene (HDPE), Poly Vinyl Chloride (PVC) and Mono Ethylene Glycol (MEG) a polyester raw material used in the manufacture of polyester fibre, etc. The company had also applied for Gas Cracker Project, which is said to have been cleared recently, whereby (natural) gas oil would be cracked to produce ethylene and other petrochemicals. Thus right from the Naphtha stage to the yarn fibre and fabric stage, the company has attempted the complete range of products necessary for the manufacture of fabrics from the raw material namely, natural gas.

Hazira has been selected with special reference to the availability of natural gas oil from South Sea Basin and it is country's first ethylene handling port and has economies of transportation and terminal facility at Hazira etc. It is not necessary to set out however how the company developed in different stages. The application for consent was filed on 4th May, 1988 as mentioned hereinbefore. The licence and letter of intent were endorsed in favour of the RIL and the scheme for finance in favour of the RPL.

Both Shri Baig and Shri Salve, appearing for the respondents 3 and 4, gave us the factual background of the business of the RPL. It is not necessary to set out these in greater detail than what has been mentioned hereinbefore. It is further submitted by both that the CCI had examined the nature and quantum of security in cases of the debentures. It was submitted that the submission of Shri Ganesh that the security was inadequate was wrong. It was submitted that clauses (5) and (6) of the Prospectus read together indicate how the power has been exercised. These clauses visualise the creation of a residual or floating charge on all or any of the movable or immovable assets and properties of RPL at Hazira and/or at any other location. These further postulate future charge, superior in priority, might be created by RPL. Future charges might be created without the consent or concurrence of the debenture holders. Nor was their consent required for purposes of dealing with the assets and properties of the company. It was submitted that the following properties are excluded from charge, namely,

A (a) Residential complex at Hazira or at any other location.

(b) Current assets or Banker's goods.

(c) Any other property that might be specifically excluded by agreement with the trustees.

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Future charges might be created on such terms regarding ranking, etc. as might be agreed to by the trustees. It was submitted that whereas clause (5) essentially visualised creation of a floating charge in favour of debenture-holders, without any restrictions or limitation, clause (6) incorporated a limitation and a safeguard that controls the C normal characteristics of floating charge.

It has to be borne in mind that convertible debenture is a new type of instrument introduced in this case and these appear to have caught the imagination of the investors. It has been asserted before us that subsequent to RPL issue, others have also gone for this type of D project. Our attention was drawn to rule 2(b)(x) of the Companies (Acceptance of deposits) Rules, 1975 which provided clearly that a convertible debenture was not to be included in the definition of debenture. It was further asserted that the security visualised in clauses (5) and (6) of the Prospectus was one which was prevalent and customary in corporate practice and was regarded as valid and E adequate. Nothing contrary to this was indicated before us.

Our attention was drawn to Sec. 2(12) of the Companies Act under which a debenture need not be secured at all. In that light the guidelines should be interpreted. Therefore, it was submitted, Guideline 10, reasonably interpreted, means that such security should F be provided as is customarily adopted in corporate practice in the matter of issuing debentures. It has to be borne in mind that the debentures issued in the present case are compulsorily convertible. Therefore, no repayment of principal is really involved. The question of security becomes relevant for the purpose of payment of interest on these debentures and the payment of principal only in the unlikely G event of winding up. The debentures need not necessarily be secured. Guidelines do not provide for quantum and nature of the security. A debenture has been defined to mean essentially as an acknowledgement of debt, with a commitment to repay the principal with interest (Palmer's Company Law; p. 672; 24th Edition). Reference, in this connection, may be made to *The British India Steam Navigation Co.* v. H *The Commissioner of Inland Revenue,* [1881] 7 QBD 165; at pages 172

and 173. A debenture may contain charge only on a part of the assets of the company *Re: Colonial Trusts Corporation,* [1879] (15) Ch. 465 or it may not contain any charge on any of its assets (See *Speyer Brothers* v. *The Commissioner of Inland Revenue,* [1907] 1 KB 246 and *Lemon* v. *Austin Friars Investment Trust Ltd.,* [1926] (1) Ch. 15. A debenture may, therefore, be secured or unsecured (Palmer's Company Law; p. 675; 24th Edition). An ordinary debenture has to be distinguished from a 'mortgage debenture' which necessarily creates a mortgage on the assets of a company (See Palmer's Company Law p. 706). A compulsorily convertible debenture does not postulate any repayment of the principal. Therefore, it does not constitute a 'debenture' in its classic sense. Even a debenture, which is only convertible at option has been regarded a 'hybrid' debenture by Palmer's Company Law (Para 44.07 at page 676). In this connection, reference may be made to the guidelines for the "Protection of Debenture Holders" issued on the 14th January, 1987 which have recognised the basic distinction between a convertible and a non-convertible debenture. It is apparent that these were issued for the purpose of ensuring the serviceability and repayment of debentures on time. It has been asserted before us that the compulsorily convertible debentures in corporate practice was adopted in India some time after the year 1984. Wherever the concept of compulsorily convertible debentures is involved, the guidelines treat these as "equity". This is clear from Guideline IV(i) read with IV (iii) of the Guidelines for Issue of Cumulative Convertible Preference Shares and Guidelines No. 8 and 11 of the Employees Stock Option Guidelines. These two sets of Guidelines clearly indicate that any instrument which is compulsorily convertible into shares, is regarded as an "equity" and not as a loan or debt. Even a non-convertible debenture need not be always secured. In fact, modern tendency is to raise loan by unsecured stock, which does not create any charge on the assets of the Company (The Encyclopaedia of Forms and Precedents; 4th Edn. Vol. 6 para 17 at pages 1094, 1095 and para 22 at pages 1097-98). Whenever, however, a security is created, it is invariably in the form of a floating charge (See The Encyclopaedia of Forms and Precedents, 4th Edn., Vol. 6 Para 25 at page 1099). It follows, therefore, that the secured debenture almost invariably contains a floating charge. In addition to the floating charge, debentures are frequently secured by trust deed also as had happened in the present case where specific property, land, etc. has been mortgaged to trustees.

Shri Ganesh made a submission that under clause (5) of the Prospectus, the company could deal with its assets and properties with-

A out the permission of debenture-holders or debenture trustees and that it could create future charges which would rank superior in priority. The concept of floating charge was invented by the Victorian Lawyers only because of its special advantages inasmuch as it leaves a company free to deal with its assets in the ordinary course of business and does not require the permission of debenture-holders or debenture trustees for dealing with them or creating further charges. It has been pointed out that the business of a corporation would be paralysed if it could not deal with its assets and create future charges, ranking superior in priority, and if it would have to obtain the permission of the debenture holders for doing so. (See the discussion in Palmer's Company Law; page 709 and 682) (See also the observations in *Re. Florence Land & Public Works Co.*, [1878] 10 Ch. 530; *Re. Colonial Trust Corporation,* (supra). In fact, in *Re. Florence Land's* case (supra), the Court observed that if the companies were not allowed to resort to floating charge, they would have to call the meeting of existing charge holders/debenture holders each time they intend to create future charge. The decision in *Re. Panama, New Zealand, and Australian Royal Mail Co.*, as indicated in Palmer's Company Law at page 708 is a landmark because it established the validity and the utility of a floating charge. In the instant case, if the permission of the debenture holders were required or is insisted upon to create future security, 2.5 million debenture holders would have to be informed and invited for meeting. The extravagant effects of this course would be colossal especially when a shareholders' meeting is also additionally called for the same body of persons. It is, therefore, incorrect to say that a floating charge creates an illusory charge because future securities can be created ranking in priority over it. The legal position is that a floating charge creates a present equitable right in favour of the debenture holders/trustees. It creates a present charge in the property/undertaking of a company even before the time of payment of the debenture arrives. The fact is that a company can deal with its property without the permission of debenture holders/trustees, before crystallisation by resorting to a floating charge on the undertaking (See the observations in this connection in *Re. Florence Land's* case (supra); *Re. Standard Manufacturing Co.*, [1891] 1Ch. 627; *Re. Borax Foster* v. *Borax Co.*, [1901] 1 Ch. 326 and *Creatnor Maritime Co. Ltd.* v. *Irish Marine Management Ltd.*, [1978] 1 WLR 966. This however does not mean that the company can keep on creating future charges with superior ranking without any let or hindrance because the debenture holders/trustees can any time move to crystallise the floating security if they felt that the security is in jeopardy.

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In the present case, there is no case to suggest or believe that ICICI (which is one of the most important national Government financial institutions), will not act effectively and promptly to ensure that the security in favour of the debenture-holders is not rendered illusory. Even Guidelines dated 14th January, 1987, has cast the responsibility of supervising, creating, monitoring and implementation of security in favour of debenture-trustees. The company cannot normally create a general floating charge ranking in priority to or *pari passu* with a prior floating charge unless the prior floating charge itself permits such a course. In this connection, reference may be made to the observations in The Encyclopaedia of Forms and Precedents, 4th Edn., Vol. 6 para 27 at pages 1102-1103.

It, therefore, follows that:

(i) A debenture is usually secured by floating charge only.

(ii) A company which creates floating charge has a right to create future security which may rank superior in ranking.

(iii) However, this right of the company may be restricted by agreement.

(iv) Where no restriction is provided, any future specific charge will rank superior to the earlier floating charge (Section 123 of the Companies Act)

(v) Again, where no specific provision is made in the earlier floating charge with respect to the ranking of future floating charge then any future floating charge will be inferior to the earlier floating charge. In this connection, reference may be made to sec. 48 of the Transfer of Property Act. The risk of floating charges can be controlled by creating legal mortgage in favour of debenture trustees as has been explained in "All About Debentures" by Sen & Chandreashekhar (pp. 66-67).

In the present case, a legal mortgage has been created by RPL in favour of the trustees in respect of its immovable and movable assets, except book debts, in respect of which financial institutions will hold a first charge on account of foreign loan. In the present case, RPL does not have any existing loans. Therefore, the charge in favour of the debenture holders is presently the first charge. No future borrowing is contemplated at this stage except the foreign currency loan to the

A extent of Rs. 84 crores. Therefore, the submission that the security is illusory cannot be accepted and the CCI is right that the apprehension is based on factually unsound and unfounded grounds. Even if the value of the foreign currency which has been sanctioned in principle by the three financial institutions, is taken into account, the assets coverage goes down at each stage and does not make any critical difference B to the value of the security of the debenture-holders under the Trust Deed. The purposes of borrowings, namely, term-loan borrowings, deferred payment credits/guarantees and borrowing for financing new projects do not, on analysis, raise any difficulty. There are sufficient in-built checks and controls. The company, being an MRTP company would have to obtain both MRTP permission for creating any security irrespective of its value and fresh CCI consent under the CCI Act, C except in case of exempted securities. Therefore, in our opinion, this submission is really in the nature of a red-herring. It was submitted that we should at least direct that the future security should not rank superior to the floating charge in favour of the existing debentures holders.

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Having regard to the factors which the investors should have taken into consideration, we are of the opinion that all relevant factors were borne in mind by the CCI. There is no substance also in the ground of discrimination. It is reiterated that Article 14 of the Constitution does not forbid reasonable classification. RIL is a promoter E company. It had conceived the projects, got them sanctioned and invested huge amounts of time and money in the process. It was open to RIL to undertake these projects on its own and not to make any public issue at all. The ground that there was non-application of mind because the CCI did not take into consideration the issue of G-Series is also without substance. Under Guideline 2(a) of the Guidelines of F 1984, capital could be raised only for setting up of new project. MEG, it was submitted, was not a new project for capital had been raised for it by RIL under G-Series. It was further submitted that the Controller did not ask RPL to get the bankers prior clearance certificate under Guideline II(v) of the Guidelines of January 14, 1987. Finally, the CCI did not take note of the fact that the application under Schedule I of G Rule III of the Capital Issues (Application for Consent) Rules did not contain the relevant information. The position of cost over-run has been explained. So there was no substance in the submission that it was not a new project. Secondly, it cannot be accepted that the CCI did not insist the bankers prior clearance certificate. These guidelines apply to "non-convertible debentures" or "partly convertible debenH tures". These do not apply to "compulsorily convertible debentures".

Even assuming that these are applied to "compulsorily convertible debentures", there was no need for the CCI to ask for the bankers prior clearance certificate because RPL was not issuing any new set of debentures. All requisite information had been furnished. A

Shri Ganesh as well as Shri Pagaria tried to submit that in order to protect the investors, a function, which they submitted, the CCI, in changed circumstances, should determine whether the project is profitable. Where a project has been appraised by an institution like ICICI, the Controller can safely assume that it is profitable and he need not engage in separate independent exercise of his own in this regard. The scope and nature of the Controller's powers and jurisdiction have to be determined in the light of the specific provisions of the CCI Act, its history, the debates, to which we have referred, the capital structure of the national economy and its over all direction, in higher priorities, are decided by the Government and the Planning Commission by formulating Five Year Plans. However, the capital structure and the direction of a particular industry is decided in terms of the provisions of IDR Act. That a particular industrial house may become a monopoly or otherwise have a restrictive and detrimental effect on the economy of the country, is the concern of MRTP Act. Therefore, the scope of the CCI under the Act is of a limited nature and must be kept in its proper perspective. It is true that he cannot, as was contended on behalf of the petitioner, be oblivious of the fact that small scale investors are coming into operation and there is a social obligation of the State to provide safe guidelines. Yet, each authority must circumscribe its work in the proper light. Unless, therefore, CCI acts perversely, irrationally or with procedural impropriety, his decisions cannot and should not be faulted on the ground that other consequences might follow. Of course, no other consequences have been indicated before us. B C D E F

As a matter of fact, there was no allegation that the CCI acted *mala fide* or on extraneous considerations. The CCI applied its mind to the facts of this case and the factors in general. There was no undue haste. A statement was produced indicating that the application for grant of consent had been disposed after some time, but within the time frame in which such applications are normally disposed of. G

It may, however, be stated that being not statutory in character, these guidelines are not enforceable. See the observations of this Court in *Fernandez* v. *State of Mysore,* [1967] 3 SCR 636: Also see *R. Abdullah Rowther* v. *State Transport, etc.,* AIR 1959 SC 896; *Dy.* H

A *Asst. Iron & Steel Controller* v. *Manekchand Proprietor,* [1972] 3 SCR 1; *Andhra Industrial Work* v. *CCI & E,* [1975] 1 SCR 321; *K.M. Shanmugham* v. *S.R.V.S. Pvt. Ltd.,* [1964] 1 SCR 809). A policy is not law. A statement of policy is not a prescription of binding criterion. In this connection, reference may be made to the observations of *Sagnata Investments Ltd.* v. *Norwich Corpn.,* [1971] 2 QB 614 and p. 626. Also B the observations in *British Oxygen Co.* v. *Board of Trade,* [1971] AC 610. See also *Foulkes' Administrative Law,* 6th Ed. at page 181-184. In *Ex. P. Khan,* [1981] 1 All E.R. page 40, the court held that a circular or self made rule can become enforceable on the application of persons if it was shown that it had created legitimate expectation in their minds that the authority would abide by such a policy/guideline. However, C the doctrine of legitimate expectation applies only when a person had been given reason to believe that the State will abide by the certain policy or guideline on the basis of which such applicant might have been led to take certain actions. This doctrine is akin to the doctrine of promissory estoppel. See also the observations of Lord Wilberforce in *IRC* v. *National Federation,* [1982] AC 617). However, it has to be D borne in mind that the guidelines on which the petitioners have relied are not statutory in character. These guidelines are not judicially enforceable. The competent authority might depart from these guidelines where the proper exercise of his discretion so warrants. In the present case, the statute provided that rules can be made by the Central Government only. Furthermore, according to Section 6(2) of E the Act, the competent authority has the power and jurisdiction to condone any deviation from even the statutory requirements prescribed under Sections 3 and 4 of the Act. In *Regina* v. *Preston Supplementary,* [1975] 1 WLR p. 624 at p. 631, it had been held that the Act should be administered with as little technicality as possible. Judicial review of these matters, though can always be made where F there was arbitrariness and *mala fide* and where the purpose of an authority in exercising its statutory power and that of legislature in conferring the powers are demonstrably at variance, should be exercised cautiously and soberly.

We would also like to refer to one more aspect of the enforceaG bility of the guidelines by persons in the position of the petitioners in these cases. Guidelines are issued by Governments and statutory authorities in various types of situations. Where such guidelines are intended to clarify or implement the conditions and requirements precedent to the exercise of certain rights conferred in favour of citizens or persons and a deviation therefrom directly affects the rights so H vested the persons whose rights are affected have a clear right to

approach the court for relief. Sometimes guidelines control the choice of persons competing with one another for the grant of benefits largesses or favours and, if the guidelines are departed from without rhyme or reason, an arbitrary discrimination may result which may call for judicial review. In some other instances (as in the *Ramanna Shetty,* case), the guidelines may prescribe certain standards or norms for the grant of certain benefits and a relaxation of, or departure from, the norms may affect persons, not directly but indirectly, in the sense that though they did not seek the benefit or privilege as they were not eligible for it on the basis of the announced norms, they might also have entered the fray had the relaxed guidelines been made known. In other words, they would have been potential competitors in case any relaxation or departure were to be made. In a case of the present type, however, the guidelines operate in a totally different field. The guidelines do not affect or regulate the right of any person other than the company applying for consent. The manner of application of these guidelines, whether strict or lax, does not either directly or indirectly, affect the rights or potential rights of any others or deprive them, directly or indirectly, of any advantages or benefits to which they were or would have been entitled. In this context, there is only a very limited scope for judicial review on the ground that the guidelines have not been followed or have been deviated from. Any member of the public can perhaps claim that such of the guidelines as impose controls intended to safeguard the interests of members of the public investing in such public issues should be strictly enforced and not departed from departure therefrom will take away the protection provided to them. The scope for such challenge will necessarily be very narrow and restricted and will depend to a considerable extent on the nature and extent of the deviation. For instance, if debentures were issued which provide no security at all or if the debt-equity ratio is 6000:1 (as alleged) as against the permissible 2:1 (or thereabouts) a Court may be persuaded to interfere. A Court, however, would be reluctant to interfere simply because one or more of the guidelines have not been adhered to even where there are substantial deviations, unless such deviations are, by nature and extent such as to prejudice the interests of the public which it is their avowed object to protect. *Per contra*, the Court would be inclined to perhaps overlook or ignore such deviations, if the object of the statute or public interest warrant, justify or necessitate such deviations in a particular case. This is because guidelines, by their very nature, do not fall into the category of legislation, direct, subordinate or ancillary. They have only an advisory role to play and non-adherence to or deviation from them is necessarily and implicitly permissible if the circumstances of any particular fact or law

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A situation warrants the same. Judicial control takes over only where the deviation either involves arbitrariness or discrimination or is so fundamental as to undermine a basic public purpose which the guidelines and the statute under which they are issued are intended to achieve.

But in the instant case, in the view we have taken, it is not B necessary to base our decision on this aspect. We find that the CCI has, in fact, acted in substantial compliance with the principles of these guidelines. He has acted objectively and *bona fide*. He has not acted in undue haste. No substantial prejudice or injury to the petitioners have been demonstrated. In the aforesaid view of the matter, we are, therefore, unable to interfere. In this connection, furthermore, a common sense view has to be adopted—See the observations in *Council of Civil* C *Service Unions & Others* v. *Minister for the Civil Service,* [1985] AC at 407. Public interest in this case does not require that we should interfere. In this case, there is no illegality in the decision of the Controller of Capital Issues. He has not exercised a power which he does not possess. There is also no irrationality. He has not acted in any manner D that no reasonable authority would have acted in the decision. There is no procedural impropriety in his decision. He has not failed in his duty to act fairly insofar as fairness was warranted by the justice of the situation.

In the aforesaid view of the matter, we are of the opinion that E there was no substance in the writ petitions and also in the civil suits covered by these transfer applications.

The main question, as mentioned hereinbefore, canvassed in these transfer petitions is whether the CCI has acted in the manner he should act in the present atmosphere of socio-economic development F in view of our constitutional commitments. The purpose of the Act must be found from the language used. The scheme and the language used, strictly speaking, do not indicate any positive role for the CCI in discharging his functions in respect of grant of sanction. But it has to be borne in mind that he is a part of a State instrumentalities committed to the endeavours of the constitutional aspiration to secure justice, G *inter alia,* social and economic, and also under Article 39(b) & (c) of the Constitution to ensure that the ownership and control of the material resources of the community are so distributed as to best subserve the common good and that the operation of the economic system does not result in concentration of wealth and means of production to the common detriment. Yet, every instrumentality and functionary of the H State must fulfil its own role and should not trespass or encroach/

entrench upon the field of others. Progress is ensured and development helped if each performs his role in the common endeavour. A

In that light it is true that as was contended by learned counsel appearing on behalf of the petitioners that in the changed socio-economic conditions of the country one who is charged to ensure capital-investment has to perform the social role in capital formation B and to protect the interest of the capital market, and to oversee the growth of industrialisation and investment in such a manner as to ensure employment and demand in the national economy to prevent wasteful investment and to promote sound methods of corporate finance. The guidelines are only a guide and nothing more. The application of mind by the CCI before sanction must be in the perspective C for which he is enjoined by the Act. He must endeavour to secure a balanced investment of the country's resources in industry, agriculture and social services. The Controller should perform the role of social control and fulfil the social purpose in conjunction with other authorities and functionaries. It is necessary for him in discharge of his functions to ensure that there is not too much concentration of parti- D cular industries in particular areas, and that there is a scientific development and proper investment in key and core projects.

The present petitions have perhaps brought to the fore for the first time a public interest aspect of the issue of shares and debentures. In the past decades, investors in shares and equities constituted a very E limited section of the public and consisted of two extreme types —*either* persons who could shrewdly appraise the merits of each issue and take a considered decision *or* persons who just wanted to invest and get a return for their moneys but were indifferent to the terms and conditions of such investment. The position has changed in recent years. There has been a vast increase in the number of members of the F public who have surplus money to invest; the size of the issues has assumed macro-proportions; and the types of instruments are also becoming more and more sophisticated. Enterpreneurs, with legal and expert assistance at their command, could easily trap unwary investors and the development of a public interest lobby that can scrutinise issues carefully and advise prospective investors on their comparative G merits and demerits may not be entirely undesirable. It is also perhaps necessary that the CCI, in considering the grant of consent to such issues, should have these aspects brought to his notice. We think that it may be too cumbersome to have a provision that the details of every proposed application for consent should be publicised to the maximum extent by the CCI, that objections and comments from the public H

A should be called for, that there should be a public hearing before the CCI before grant of consent and that the CCI should pass a reasoned order granting or withholding consent. That would also delay the whole process of approvals which should be as expeditious as possible. But we have no hesitation in saying that some procedure has to be evolved to ensure that the CCI gets the benefit of the comments, B suggestions and objections from the public before arriving at his decision whether to grant consent or not and, if so, on what terms and conditions. Perhaps, evolution of certain rules in this respect could be examined at this juncture of industrial growth in our country. But having regard to the facts and the circumstances of the case in view of the various facts mentioned hereinbefore, we are of the opinion that C there was no undue haste. There was proper application of mind that the sanction was for a new project. Sufficient security for the debentures as was enjoined to be ensured before sanction has been ensured in the facts and the circumstances of this case and the guidance provided by means of guidelines has been substantially complied with. There has been no infraction as such of the norms required D to be followed in granting the sanction. The challenge to the sanction, therefore, must fail.

Before we conclude, we must note that good deal of argument was adduced that these applications in different High Courts in civil suits were not genuine and properly motivated, but were *mala fide.* E Even though these might not have been to feed fat an innocent object, it was apparent that it was to feed fat a grudge in respect of a competitive project by a competitor. Anyway, in the view we have taken, it is not necessary to decide the *bona fides* or *mala fides* of the applicants. Shri Nariman, when he moved the application initially, had suggested that we should lay down certain norms as to how the courts in different F parts of the country should grant injunction or entertain applications affecting an all-India issue or having remifications all over the country. Except that before the courts grant any injunction, they should have regard to the principles of comity of courts in a federal structure and have regard to self restraint and circumspection, we do not at this stage lay down any more definite norms. We may also perhaps add that it G may be impossible to lay down hard and fast rules of general application because of the diverse situations which give rise to problems of this nature. Each case has its own special facts and complications and it will be a disadvantage, rather than an advantage, to attempt and apply any stereo-typed formula to all cases. Perhaps in this sphere, the High Courts themselves might be able to introduce a certain amount of H discipline having regard to the principles of comity of courts

administering the same general laws applicable all over the country in respect of granting interim orders which will have repercussion or effect beyond the jurisdiction of the particular courts. Such an exercise will be useful contribution in evolving good conventions in the federal judicial system. A

On the 9th September, 1988, when we transferred these matters, we directed respondent no. 3 to deposit a sum of Rs.1 lac to be held if the petitioners were made to spend unduly. Having considered the facts and circumstances of the case, we do not think that we would be justified in ordering disbursement of this sum to the petitioners whose cases have been transferred or the plaintiffs whose cases have been transferred. The sum should, therefore, be refunded to the respondent no. 3. B C

All the writ petitions and the suit fail, and are dismissed. In the facts and the circumstances of the case, there will be no order as to costs. D

G.N. Petitions dismissed.