HINDUSTAN LEVER LTD., BOMBAY

v.

THE MONOPOLIES & RESTRICTIVE TRADE PRACTICES COMMISSION, NEW DELHI & ORS.

April 7, 1977

[M. H. BEG C.J., AND A. C. GUPTA J.]

Monopolies & Restrictive Trade Practices Act, 1969 *s.* 2(*o*) *and* 2(*u*)—*Scope of—Stipulation in the agreement that the stockist "shall purchase and accept from the company such stock as the company at its discretion send" and as to the quantity of goods to be purchased by the stockist—If amounts to restrictive trade practice. Complaint to the Commission—Who could lodge.*

According to s. 2(o) of the Monopolies & Restrictive Trade Practices Act a "restrictive trade practice" means *inter alia* a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner.

The appellant, who was a manufacturer of consumer goods such as soaps and toilet preparations, entered into agreements with redistribution stockists for the wholesale distribution of its products. Clause 5 of the agreement, *inter alia*, provides that a stockist shall keep and maintain adequate stocks and shall carry out instructions and directions given by the appellant. He is prohibited from charging anything more than the stipulated maximum resale price. The last part of the clause provides that "the redistribution stockist shall purchase and accept from the company such stock as the company shall, at its discretion, send to the redistribution stockist for fulfilling its obligations under this agreement". Clause 9 prohibits the redistribution stockist from re-booking or in any way conveying, transporting or despatching parts of stocks of the products received by him outside the town except when he was so expressly directed in writing by the appellant. He shall also, whenever so required by the appellant, make available from the stocks such part as the appellant directs him to do.

On a complaint made to the Monopolies & Restrictive Trade Practices Commission by one of the stockists the Commission, after examining cls. 5 and 9 of the impugned agreement, held that the practice of resale price maintenance and full line forcing to which the original cl. 5 related, shall be discontinued and shall not be repeated. It directed deletion of the last sentence of cl. 5 and declared cl. 9 as void.

Dismissing the appeal to this Court.

HELD: The Commission was right in reframing cl. 5 in the way it did. Deletion of the last sentence of cl. 5 was essential to prevent possible misuse of the appellant's power so as to regulate the prices contrary to the express provisions in the clause. [465 B; G]

1(a) The last part of cl. 5 placed the redistribution stockist at the mercy of the appellant which could dictate to him what amounts of various commodities he "shall purchase and accept from the company". It also empowered the appellant to allocate send to the redistribution stockist only what it "shall, at its discretion, send to the redistribution stockist for fulfilling its obligations" under the agreement. [464 G]

(b) The word "shall" used in the clause did not bind down the exercise of the appellant's discretion by reference to any requirements of the consumers in a particular area in which the stockist might sell. The stockist was bound to accept and carry out the appellant's decisions. [464 H]

2(a) The contention that though the clauses gave power to the appellant to regulate trade, in practice they did not operate as restrictions, is not well-founded. It is not possible to isolate the terms of a contract from the practice. The appellant did not intend that the clauses in the agreement would be treated as

A dead letter. Although the practice of imposing restrictions under such clauses and the practice of introducing such clauses are separate practices, introduction of a clause like cl. 5 is itself a trade practice. Moreover, even if the power given in such wide terms was not meant to be exercised unreasonably, its presence in the agreement was a needless surplusage which could be used to impede freedom of competition and trade and this made it objectionable. [465 A]

(b) Inasmuch as the introduction of clauses in an agreement, taken by itself, is a practice it would be specious reasoning to separate the clauses in the agree-
B ment from action under the agreement and then urge that the clauses are innocuous and should not be modified. [460 H; 461 A]

3. From the definition of "restrictive trade practice" it is clear that if the introduction of the clause in itself is a trade practice and could be used to prevent, distort or restrict competition "in any manner", it could be struck down. The definition of "trade practice" is wide enough to include any "trade practice" if it is in relation to the carrying on of a trade. If the result of introduction of a clause is to restrict trade it would be struck by the provisions of the Act.
C [461 E-G]

4(a) Each type of business has its peculiarities, its own mode of operation, the special features relating to the market for it and the requirements of distribution of particular goods, to secure a just and equitable distribution consistently with the maintenance of freedom of competition so that prices are not artificially pushed up. [462 G]

(b) The *Telco* case is distinguishable from the present on the ground that in
D that case the manufacturer who had the monopoly of special quality trucks, had to provide specially trained and skilled personnel with special equipment and tools for their maintenance and running. Therefore, the agreements did not restrict trade or curtail competition. [462 H]

(c) In the instant case, the appellant could compel the stockist to buy the goods manufactured by it irrespective of whether the stockist wanted the goods or not. The appellant was under no obligation to render any service for the maintenance of the goods supplied. Secondly, the present is not a case in which
E the terms of the agreement were required to be explained by the facts to which they were meant to be applied. [463 C-D]

Tata Engineering & Locomotive Co., Ltd. v. *The Registrar of Restrictive Trade Agreements* [1977] 2 S.C.R. 685 distinguished.

5. If it was clear from the agreement that prices lower than the "maximum re-sale price stipulated" might be charged by the stockist, then, there was no reason why it was necessary to clarify by circulars, what the stockist was free to
F do under the agreement. Even if the appellant's practice of issuing circulars was established, it did not justify retention of cl. 5 in a form which could be used to compel the stockist to act at the appellant's behests. [465 F]

6(a) The last part of cl. 5 made it necessary for the stockist to purchase such goods and in such combination as the appellant might decide. Hence it would be struck by s. 33(1)(b) of the Act. [465 C]

(b) Inasmuch as the original cl. 5 gave the stockist the discretion to sell at lower than maximum resale prices the agreement was not struck by s. 33(1)(b).
G But, the deletion of the sentence was essential to prevent possible misuse of the appellant's power by resort to it. [465 G]

The Commission was justified in declaring cl. 9 as void and inoperative. [465 H]

7(a) The power to impose restrictions falling under s. 38 had to be justified by the appellant by actual proof of public interest which could not be better served without it [466 A].

H (b) Clause 9 gave the appellant an unreasonably wide power of deciding what is actually fair and equitable distribution which is more a part of the duty of governmental authorities entrusted with powers of rationing such consumer goods in public interest. Before any question of reasonableness of a power to

ration any goods is entrusted to any person or authority those goods must be shown to be scarce or in short supply and evidence establishing such a need has not been shown to exist in this case. [466 F-G] A

(c) The appellant was wrong in its contention that in holding cl. 9 to be invalid, the purpose of "equitable distribution" was overlooked by the Commission. This supposed limitation did not restrict the appellant's power to decide what to distribute. The appellant was left to itself to decide what is "equitable distribution". The clause conferred too wide a power and is unreasonable. [469 H] B

9. Under s. 55 an appeal lies to the Supreme Court only on one of the grounds mentioned in s. 100, C.P.C. It is necessary for the parties to formulate questions of law that arise for decision. [467 A]

10(a) The plea against use of "*per se*" rule referred to by the appellant means that on the assumption that a restriction is illegal in itself should not be made without examining its impact upon the particular trade involved. On the other hand the "rule of reason" envisages consideration of facts of each case so as to determine the context in which the restraint was imposed. [468 C] C

Board of Trade of the City of Chicago v. *United States of America* 62 Law Ed 231.

(b) In *Telco* case this Court accepted the correctness of the approach that no bald or simple test should be adopted in judging the legality of a restraint upon trade. Such a view has nothing to do with rules relating to interpretation of documents used in finding out the effect and intent of words used in a document. Whenever a court determines the meaning and effect of the words of a rule or a clause in an agreement it does not adopt what is termed as *"per se"* rule. All that the court does in such a case is to interpret the clause, the effect of which may become obvious on a bare determination of the meaning or may be seen from other evidence. Where that effect is not obvious, evidence may be led to show how the language used is actually applied to the facts to which it was meant to apply. [468 D-F] D

In the instant case, the Commission has correctly arrived at the conclusion that the clauses were unreasonable and illegal after taking into account the relevant factors. The rules of reason applicable to a case like the present are (i) the meaning of the impugned clause or clauses in an agreement must be determined according to law and (ii) the possible effects of such a clause upon competition in the trade to be regulated must be determined. [469 B-C] E

(c) Consideration of extraneous evidence is not required at all when the practice complained of is the introduction of clauses conferring wide powers, which may be used to impose restrictions contrary to the Act. In such a case the introduction of clauses constitute restrictive practice. Evidence of what is actually practised could only be relevant for purposes other than a determination of the meaning and the effect which follows logically or reasonably from such determination. [469 F-G] F

(d) No oral evidence could be led to adduce the meaning of the clauses in the agreement in view of ss. 91 and 92 of the Evidence Act. Section 92 proviso (6) is not applicable to the present case. [464 C] G

(e) It is unnecessary to admit extraneous evidence as to the absence of distortion of competition. The probability of the effect is only part of the rule of reason to be applied where extraneous evidence is admissible. [470 B]

(f) It is not possible to assume public benefit from a mere declaration of intention to exercise a power so as to benefit the public. On the evidence adduced it was not shown that this power was necessary so as to benefit the public. [470 D] H

(g) Actual benefit to the public is a question of fact on which findings cannot be reopened unless some error of law is revealed. No error of law in assessing evidence was disclosed. [470 E]

A (h) The confusion which may be created by using such terms as *"per se"* rule which could be applied to describe practices developed in other countries with different statutory provisions, should be avoided. [469 D-E]

10. Proceedings before the Commission are maintainable at the instance of a complainant whose motives in making the complaint are quite irrelevant. All that the Commission, and, on appeal, this Court, has to examine is whether a practice by a company of introducing clauses complained of in the agreements with the stockists, amounted to a restrictive trade practice. [460 D]

B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 680 of 1976.

From the Judgment and Order dated the 17th March, 1976 of the Monopolies and Restrictive Trade Practices Commission, New Delhi in R.T.P. Enquiry No. 11 of 1974.

L. M. Singhvi, Ravinder Narain, Talat Ansari and *Shri Narain* C for the Appellant.

L. N. Sinha, Sol. General, *B. Datta* and *Girish Chandra* for Respondents Nos. 1 and 2.

G. A. Shah and *N. Nettar* for Respondent No. 13

The Judgment of the Court was delivered by— D

BEG, C. J.—This is an appeal under section 55 of the Monopolies & Restrictive Trade Practices Act, 1969 (hereinafter referred to as 'the Act') against the order and judgment of the Monopolies & Restrictive Trade Practices Commission, New Delhi (hereinafter referred to as the 'Commission'), in proceedings started under section 10(a) (iv) of the Act against the appellant M/s. Hindustan Lever Ltd. E (hereinafter referred to as 'the Company'), upon information furnished by Bhogilal Manilal Shah of M/s. Shah Manilal Motichand & Sons of Poona (hereinafter referred to as the 'informant').

The informant was a redistribution stockist of the appellant company carrying on business regulated by the terms of an agreement, known as the redistribution stockists' agreement of the company, F found in a standard printed form, entered into with each stockist. The agreement has 23 terms or clauses in it. The clauses complained of are 5 and 9, which may be reproduced here :

> "5. The Redistribution Stockist shall use his best endeavours to maintain and increase the trade of the Products in the said town and for this purpose he shall at all times G keep and maintain adequate stocks of the Products in all its packings and he shall carry out all instructions and directions including those as to the maximum resale price which may from time to time be given by the Company or by the Company's accredited representatives in respect of the sale or resale or disposal by the Redistribution Stockist of stocks of the Products supplied to him in pursuance of this Agreement. The Redistribution Stockist is prohibited from charg- H ing in excess of the maximum resale prices stipulated by the Company, but he may, at his discretion, charge prices lower than the said maximum resale prices. The Redistribution

Stockist shall purchase and accept from the Company such stock as the Company shall at its discretion send to the Redistribution Stockist for fulfilling its obligations under this Agreement."

"9. In order to ensure equitable and reasonable distribution of stocks at fair prices, the Redistribution Stockist shall not rebook or in any way convey, transport or despatch parts of stocks of the products received by him outside the aforesaid town except when he is so expressly directed in writing by the Company. He shall also whenever so required by the Company make available from the stocks of Company's merchandise purchased by him such part as the Company directs him to do for purposes of resale on his behalf by the Company's employee."

It is alleged that the two clauses, set out above found in identical agreements entered into by the Company with its stockists, whose number is quite large, constitute or authorise restrictions which are unreasonable and illegal. Hence, it was submitted by the respondents that it must be struck down or modified so as to make the business and trade of the appellant company and its stockists conform to the requirements of law.

The Commission had accepted the case brought to its notice by the informant and made the following order :—

"(1). Clause 5 of the Agreement (Exhibit F) shall stand modified so that the following shall be substituted in place thereof :

"5. The Redistribution Stockists shall use his best endeavours to maintain and increase the trade of the products in the said town and for this purpose he shall at all times keep and maintain adequate stocks of the products in all its packings and he shall carry out the instructions and directions including those as to maximum resale price which may from time to time be given by the Company or by the Company's accredited representatives in respect of the sale or resale or disposal by the Redistribution Stockist of stocks of the products supplied to him in pursuance of this Agreement. The Redistribution Stockist is prohibited from charging in excess of the maximum resale prices stipulated by the Company but he may at his discretion charge prices lower than the said maximum resale prices".

"(2). The practices of resale price maintenance and full line forcing to which original clause 5 of the agreement related, shall be discontinued and shall not be repeated.

(3) Clause 9 of the Agreement (Exhibit F) shall be void.

(4) The practice of area allocation to which clause 9 of the Agreement (Exhibit F) related, shall be discontinued and shall not be repeated.

A (5) In all future price circulars or lists to be issued by the Respondents, it shall be clearly stated that the prices therein mentioned are maximum prices and that prices lower than those prices may be charged.

(6) This order shall come into force with effect from 1st July, 1976. On or before the said date, the Respon-
B dents shall intimate all Redistribution Stockists of the modifications in Clauses 5 of the Agreement (Exhibit F) and the voidity of clause 9 of the Agreement (Exhibit F)".

There was some argument before us on the question whether proceedings before the Commission were maintainable at the instance of a "complainant" who had reasons to nurse a grievance against the Company and whose motives could be questioned. It was pointed
C out that the agreement of the company with the informant had been terminated. The version of the informant was that this had been done because his firm had sold Vanaspati at the rate of Rs. 127/- per tin which was below the price of Rs. 129.05 per tin fixed by the Company. The informant stockist said that the price had to be reduced by him to remove public discontent. We think that the motives of the informant are quite irrelevant in such a case. All that the Com-
D mission, and, on appeal, this Court has to examine is whether what would undoubtedly be a "practice" by the appellant company, of introducing the two clauses complained of, in its agreements with its stockists, amounted to a restrictive trade practice.

The distinction sought to be made on behalf of the appellant, between a practice and clauses in a contract which give a company
E the power to regulate trade in a manner which may constitute a restriction, appears to be inconsequential here. We do not think that we can isolate the terms of a contract from the actual practice of the company. It is not the case of the company anywhere that the clauses in its agreement with its stockists are to be treated as dead-letter. Its case is that they do not operate as restrictions. The introduction of such clauses in so many agreements meant to regulate
F relations, either between a principal and an agent or the seller and the stockist who acquires complete proprietary rights in the stock of goods purchased, is itself a trade practice. The simple question before us is : Can powers conferred upon the company under such clauses be exercised in such a way as to constitute restrictive trade practices?

G It is true that the practice of imposing restrictions under such clauses is one thing and the practice of introducing such clauses is quite another thing. Both may constitute separate practices. Nevertheless, the introduction of such clauses into an agreement between the manufacturer and the seller who purchases and stocks his goods is in itself something practised. It is immaterial that the use of powers under such clauses may constitute another set of practices which de-
H pend upon the existence of such clauses as sources or springs. Inasmuch as the introduction of clauses in such an agreement is a practice, taken by itself, the question whether such a practice amounts to a restrictive trade practice or not could only be decided by considering

whether the clauses could be so used as to unjustifiably restrict trade? It would be specious reasoning, in such a case, to separate the clauses in the agreement from action under the agreement and then to urge that, as evidence of action under the clauses is meagre or even absent, the clauses are innocuous and should not be modified or struck down because we are only concerned with what is actually being practised under them or with the use that is being made of such clauses and not with what is permissible or possible under the clauses of the agreement of the kind before us. This argument seems to us to overlook the definition of "restrictive trade practice" contained in section 2(o) of the Act which lays down :

> "(o) "restrictive trade practice" means a trade practice which has, or may have, the effect of preventing distorting or restricting competition in any manner and in particular—
>
> (i) which tends to obstruct the flow of capital or resources into the stream of production, or
>
> (ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions."

It is clear from a bare perusal of the above-mentioned definition that it is not only the actual practice of a restriction under a clause which is struck by the provisions of the Act, but also a "trade practice" which "may have" the effect of restrictions falling within the mischief provided for. In other words, if the introduction of the clause in itself is a trade practice and could be used to prevent, distort or restrict competition "in any manner" it may be struck down. A trade practice is defined by section 2(u) of the Act as follows :—

> "(u) "trade practice" means any practice relating to the carrying on of any trade, and includes—
>
> (i) anything done by any person which controls or affects the price charged by, or the method of trading of, any trader or any class of traders.
>
> (ii) a single or isolated action of any person in relation to any trade".

This definition is wide enough to include any "trade practice" if it is in relation to the carrying on of a trade. It cannot be argued that the introduction of the clauses complained of does not amount to an action which relates to the carrying on of a trade. If the result of that action or what could reasonably flow from it is to restrict trade in the manner indicated, it will, undoubtedly, be struck by the provisions of the Act.

Reliance was sought to be placed by learned counsel for the appellant company on a recent decision of this Court in *Tata Engineering & Locomotive Co. Ltd.* v. *The Registrar of the Restrictive*

A *Trade Agreements, New Delhi*(1) (hereinafter referred to as the "Telco" case) where it was held :

> "The definition of restrictive trade practice is an exhaustive and not an inclusive one. The decision whether trade practice is restrictive or not has to be arrived at by applying the rule of reason and not on the doctrine that any restriction as to area or price will *per se* be a restrictive trade practice. Every trade agreement restrains or binds persons or places or prices. The question is whether the restraint is such as regulates and thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine this question three matters are to be considered. First, what facts are peculiar to the business to which the restraint is applied. Second, what was the condition before and after the restraint was imposed. Third, what is the nature of the restraint and what is its actual or probable effect".

It was also held there : "The question of competition cannot be considered in vacuo or in a doctrinaire spirit. The concept of competition is to be understood in a commercial sense. Territorial restriction will promote competition whereas the removal of territorial restriction would reduce competition. As a result of territorial restriction there is in each part of India open competition among the four manufacturers. If the territorial restriction is removed there will be pockets without any competition in certain parts of India. If the dealer in Kashmir is allowed to sell anywhere in India wealthy cities like Delhi, Bombay, Calcutta will buy up trucks allocated for Kashmir and the buyer in Kashmir will not be able to get the trucks. The other three manufacturers whose trucks are not in equal demand will have Kashmir as an open field to them without competition by Telco. Therefore, competition will be reduced in Kashmir by the successful competitor being put out of the field".

It is evident that in the Telco case this Court was considering the territorial restrictions placed upon the stockists of Telco in the light of the special facts and circumstances of that particular case. Each type of business has, undoubtedly, its peculiarities, its own mode of operation, the special features relating to the market for it, and the requirements of distribution of particular goods which may be the subject matter of an agreement so as to secure a just and equitable distribution consistently with maintenance of freedom of competition so that prices are not artificially pushed up. In the Telco case, the subject matter of the agreement was sale of trucks of a type in which the Telco had a monopoly inasmuch as no other firm produced trucks which were of such special quality and specifications. Hence, there was great demand for these trucks, which were in short supply. Again, for the maintenance and running of those especially designed trucks the manufacturer had to provide especially trained and skilled personnel and special equipment and tools so as to enable stockists to service and repair trucks distributed. Unless the manufacturers were able to impose restrictions upon sales outside the areas in which they had

(1) [1977] 2 S.C.R. 685.

established their stockist-cum-servicing suppliers, they could not at all render the kind of service they were giving in addition to selling. In other words, it was a mixed practice for purchase of trucks and provision of specialised service to the consumers, through the stockists. On the peculiar facts and circumstances of that case, it was found that the agreements did not, on the whole, result in restricting trade or curtailing competition.

A

B

The facts of the case before us are entirely different. We are concerned here with a manufacturer of mixed consumer goods of different varieties. The appellant company produces dehydrogenated oil (known in the market as "Vanaspati"), toilet preparations of various kinds such as soaps, shaving creams, toothpastes, and baby milk powder, and animal feeds. The soaps manufactured by it are undoubtedly the main type of goods supplied. But, it manufactures other type of goods too. It can, therefore, compel stockists to by them, whether stockists want these other goods or not, if the terms of the agreement are to be held to be binding and enforceable. The manufacturer is under no obligation to render any service in relation to maintenance of the goods supplied. The whole trade is completely unlike that of manufacture and sale of motor trucks for which the stockists, selling to the actual consumers, had to, as already pointed out, also have the services of the manufacturer's trained personnel for the purposes of maintenance and repair of the vehicles supplied. It would amount to an application of the law in a thoroughly doctrinaire fashion if we were to deduce some general principles, from the very different facts of the Telco case and attempt to apply them to those of the case now before us. Thus, the contention advanced on behalf of the appellant, against a doctrinaire approach in such cases, really weighs against the appellant company.

C

D

E

In the Telco case, the agreement could not be understood without reference to the actual facts to which they were sought to be applied. Those facts explained the nature of the special agreements for restriction or distribution of areas. In the case before us, the problem is entirely different. This is not a case in which certain terms of the agreement require to be explained by the facts to which they were meant to be applied. It is a clear case in which the meanings of the clauses are decisive. If these clauses are capable of being so used, on the meanings which appear unambiguously from them, as to undoubtedly restrict trade, the intention to so use them to restrict trade could reasonably be inferred without any difficulty. Otherwise, why have them ? No oral evidence could be led to deduce their meaning or to vary it in view of the provisions of sections 91 and 92 of the Evidence Act, the principles of which were, we think, rightly applied by the Commission. The Telco case, on the other hand, was one in which extraneous evidence could be led under section 92, proviso (6) of the Evidence Act which may be set out here with Section 92 :

F

G

H

> "92. When the terms of any such contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document, have been proved

A according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives-in-interest, for the purpose of contradicting, varying, adding to or subtracting from, its terms :

Proviso (6)—Any fact may be proved which shows in
B what manner the language of a document is related to existing fact".

The principle embodied in s. 92(6) of the Evidence Act, which was applicable in Telco case (supra), is not, for the reasons given above, applicable in the case now before us. Indeed, no attempt has been made by reference to any case law apart from the Telco case
C (supra), which we have distinguished above, to show that extraneous evidence could have been led here in order to apply s. 92 proviso (6) of the Evidence Act. In the Telco case this provision was not directly referred to, but, we think, that it could have been applied there. Thus, we think that the basic difficulty, placed before us by learned counsel for the appellant, in the way of examining the plain meaning and effect of clauses 5 and 9 of the Distribution Stockists' agreement, does not
D exist at all in the case now under consideration. We must, therefore, proceed to examine the meanings of these clauses from the point of view of what could be done by the Company under them. If what may be done under these clauses could be a restrictive practice as defined by the Act, it was enough to vitiate them. A clause having been introduced in an agreement entered into, as a part of the settled practice of the company, could be struck by the provisions of s. 2(o) of the
E Act, set out above, quite apart from what is actually done under it. We do not think that any other question is really relevant or need be considered by us at all in such a case. It is not a case in which we could be taken through the oral evidence, as has been attempted to be done, because that is shut out by an application of provisions of ss. 91 and 92 of the Evidence Act if all we need do is to interpret the
F agreement. We are unable to see why these provisions do not apply here.

Not much argument appears to us to be needed to demonstrate that the last sentence in paragraph 5 of the above mentioned clause places the redistribution stockist at the mercy of the company which can dictate to him what amounts of various commodities he "shall
G purchase and accept from the company" in the form of a total lot supplied to him. The company need only send to the redistribution stockists what it "shall at its discretion send to the Redistribution Stockists for fulfilling its obligations under this Agreement". The meaning and effect are obvious here. The introduction of the word "shall" does not bind down the exercise of the discretion by reference to any requirements of the consumers in a particular area which the
H stockists may convey to the company. Hence, if the stockists want to remain on the list of the redistribution stockists of the company. the stockist is bound to accept and carry out the decision of the company. Even if, in view of some other practice adopted by the company.

a power given in such wide terms was not meant to be exercised unreasonably, its presence in the agreement would be a needless surplusage which could, whenever the company wanted it, be used to impede freedom of competition and trade. This result was enough to make it quite objectionable. We, therefore, think that the Commission was quite right in reframing clause 5 in the way it did. We are unable to find any flaw in the detailed reasons given by the Commission for doing that.

The Commission rightly points out that, among agreements the registration of which is compulsory according to the provisions of Chapter V of the Act is, under section 33(1)(b) is "any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods". The last part of clause 5, as we have observed, clearly makes it necessary for the stockist to purchase such goods and in such combination as the company may decide. Hence, it would be struck by section 33(1)(b) of the Act. It has not been shown to have been registered under the Act.

It is also submitted on behalf of the respondent that clause 5 of the agreement infringes s. 33(1)(f) of the Act which requires registration of :

> "any agreement to sell goods on condition that the prices to be charged on resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged".

The Commission held that clause 5 of the agreement meant provision for "prices stipulated" and that it had been so treated by the company in its circulars stating that prices lower than the "maximum resale price stipulated" by the company may be charged. If that was so clear, there was no reason why the company should have attempted to clarify by means of its circulars what, according to it, the stockist is free to do under the agreement. Even if the practice of the company by issuing circulars is established, it does not justify the retention of clause 5 in a form which can be used to compel stockists to act on the company's behests whether reasonable or not. On the other hand, it justifies its clarification by an alteration of it in the manner directed by the Commission so as to make the clause covering price regulation also very clear. The order of the Commission modifying clause 5 only makes the position crystal clear. Inasmuch as clause 5, even before deletion of the last sentence of it by the Commission, expressly gives the stockist the discretion to sell at lower than maximum resale prices stipulated, the agreement was not struck by s. 33(1)(b) of the Act. But, the deletion of the last sentence was essential to prevent possible misuse of the company's powers, by resort to it, so as to even regulate prices contrary to express provisions found earlier in the clause.

Turning now to clause 9 of the agreement, we think that the Commission was right in rejecting the argument that evidence led on behalf of the company was enough to establish that clause 9 fell within one

A of the "gateways" provided by section 38 of the Act. A power to impose restrictions falling under this provision had to be justified by the company by actual proof of a public interest which could not be better served without it. The submission that section 38 could be applied here amounts at least to a concession that a clause conferring such wide power upon the manufacturer may be so used as to amount to a restrictive practice. It is the practice of putting in such a clause B which has to be justified.

The power given to the company under clause 9 is very wide. The manufacturer can compel the redistribution stockists to make available to the company any stocks purchased by the stockist. It also compels the stockist to take the permission of the company for conveying, transporting, or despatching parts of stocks of the products received C by him outside a specified town except when he is so expressly directed in writing by the company. It directly prevents him from doing so without the company's permission. If the stockist violates this condition the whole agreement can be revoked by the company so that the stockist loses his right to carry on business under the agreement. If what had to be justified is not how this power is actually used, but the practice of conferring such powers upon the company by placing the D stockist at the mercy of the company, the evidence of facts showing how the power is exercised could be relevant only very indirectly. However, if it could be shown that some facts did exist which make it imperative to confer such a power on the company for the benefit of the public, that may be relevant to establish the existence of a "gateway" under s. 38. But, it could certainly not be used to determine the meaning of a clause for which it is not necessary here to go E beyond the language of the clause involved. We are primarily concerned in this case, as we have repeatedly emphasized, with the clear meanings of the two clauses.

As the Commission pointed out, it is immaterial that a purchaser from outside may be able to get round clause 9 by purchasing across the counter from the stockist inside a town. The clause itself, however, F gives to the company an unreasonably wide power of deciding what is actually fair and equitable distribution. The Commission very rightly points out that this is more properly a part of the duty of governmental authorities which may be entrusted with powers of rationing such consumers' goods if this is found to be necessary in public interest. However, before any question of reasonableness of a power to ration any goods is entrusted by any method to any person G or authority those goods must be shown to be scarce or in short supply. That was the position in the Telco case (supra). Evidence establishing such a need has not been shown to exist. And, in any case, it has to be a very exceptional set of facts indeed which could justify lodging of such a power in the manufacturer. The Commission has dealt with a good deal of evidence to justify its conclusion that the need to justify the lodging of such a power in the company has not H been established. We see no reason to disturb it.

Under the provisions of section 55 of the Act, an appeal lies to this Court only on one of the grounds mentioned in section 100 of the

Code of Civil Procedure. It is, therefore, necessary in all such cases for counsel to clearly formulate and direct our attention to only questions of law which arise so that these may be decided. It is not permissible to go over the whole range of evidence led as was attempted before us.

Learned counsel for the appellant when asked by us to formulate the questions of law which arise mentioned the following questions :

Firstly, whether the Commission was right in applying what he described as the "per se" rule as opposed to "the rule of reason". It was submitted that the correct rule which should have been applied is stated in *Board of Trade of the City of Chicago* v. *United States of America*, as follows (at p. 237) :

> "Every agreement concerning trade, every regulation of trade, restrains. To bind to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences".

We find no objection whatsoever in adopting the rule indicated above in cases to which it applies. That was a case in which a rule adopted by the Board of Trade of the City of Chicago (supra) prohibiting offers to purchase during the period between the close of the call and the opening of the session on the next business day for sales of wheat, corn, oats, or rye at a price other than at the closing bid, was challenged. Hence, questions relating to effects of the rule arose so as to determine its reasonableness. Such questions could not be determined without examining evidence of facts to which the rule was meant to apply and findings as to how it operated. The issue was whether the rule, having regard to the facts to which it was to be applied, offended against the Anti-trust laws. The Government's case was thus stated by Mr. Justice Brandeis (at p. 237) :—

> "The Government proved the existence of the rule and described its application and the change in business practice involved. It made no attempt to show that the rule was designed to or that it had the effect of limiting the amount of

(1) 62 Law. Ed. p. 231.

A grain shipped to Chicago; or of retarding or accelerating shipment; or of raising or depressing prices; or of discriminating against any part of the public; or that it resulted in hardship to anyone. The case was rested upon the bald proposition that a rule or agreement by which men occupying positions of strength in any branch of trade fixed prices at which they could buy or sell during an important part of the business day B is an illegal restraint of trade under the Anti-trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition".

C Apparently, Dr. Singhvi means, by his plea against the use of a "per se rule", nothing more than an assumption, that a restriction is illegal in itself, should not be made without examining its impact upon the particular trade involved. As contrasted with any such assumption what the learned counsel describes as "the rule of reason" was stated in the earlier passage quoted above giving the nature of facts to be considered so as to determine the context in which the restraint D was imposed. This Court accepted the correctness, in the Telco case (supra), of the approach that no bald or simple test, divorced from the context or surrounding circumstances, should be adopted in judging the legality of a restraint upon trade. Such a view, applicable to actual restrictions imposed, has really nothing to do with the rules relating to interpretation of documents which are used in finding out the effect and intent of words used in a document. It is after a difficulty of interpretation, if any, is resolved and a rule or a clause in an E agreement is found to have either a clear meaning or to be ambiguous that its effect can be considered. No doubt that effect has to be examined to determine how a restraint actually imposed affects trade. It is one thing to say that the impact of the restraint imposed on trade should be considered with reference to the nature of the trade or business to be regulated. It is quite another to say that the effect F cannot be gauged, sometimes, even by a bare examination of the meaning of a clause giving power to impose restraints apart from other evidence of what its actual effects are or may be. In some cases, the effect itself is given primarily by the clear meaning of the language used in the clause which is alleged to infringe the law. We do not think that any "per se rule", if we may use this somewhat quaint expression, is adopted whenever a Court determines the meaning and G effects of the words of a rule or a clause in an agreement. All that the Court does in such a case is simply to interpret the clause, the effect of which may become obvious on a bare determination of the meaning or may be seen from other evidence too. Where that effect is not obvious, as we have already indicated, evidence may be led to show how the language used is actually applied to the facts to which it was meant to apply. That is also a recognised rule of interpretation. It H is the function of Courts to indicate and explain the varying facts and circumstances to which different rules of interpretation may apply. Where meaning and intent of language used is given by the words used nothing more is needed.

Furthermore, the Commission held that, taking into account the nature of goods or the business to be regulated by the agreement under consideration, the clauses, as they stood, were not permissible. It had applied the rule of reason in arriving at the conclusion that, upon the facts of a business in commonly used consumer goods of several varieties, which are not shown to be scarce, clauses under consideration having the obvious meaning and effect which their language carried with them, are unreasonable and illegal. We are unable to see how any law laid down in American decisions, dealing with Anti-trust laws, or in English cases, dealing with agreements in restraint of trade, lay down rules of reason at variance with the ones we are applying here. The rules of reason applicable to a case like the one before us may be simply stated as follows : Firstly, the meaning of the impugned clause or clauses in an agreement said to offend the law must be determined according to law; secondly, the possible effects of such a clause upon competition in the trade to be regulated must be determined. We think that the Commission had rightly applied these rules and found the clauses to be capable of misuse. We think that this was enough to vitiate the impugned clauses.

We would like to make it clear that we are really concerned only with the law as we find it in our own statute and can only examine evidence in the light of our own law of evidence. We think that the confusion which may be created by using terms—such as "per se" rule—which could perhaps be more usefully applied to indicate doctrines or to describe practices developed under very different sets of circumstances in other countries with statutory provisions couched in language which differs from that before us, should be avoided so far as possible.

Secondly, it was submitted that we should look at evidence of what takes place in the trade under consideration rather than clauses 5 and 9 of the agreement we have considered. We have already indicated the correct procedure in such cases as the one before us. Indeed, we think that a consideration of extraneous evidence is not required at all when the practice complained of is the introduction of clauses conferring wide powers which may be used to impose restrictions contrary to the Act. In such a case, the introduction of clauses constitutes the restrictive practice. Hence, their interpretation is all that we are really concerned with here in accordance with our law. Evidence of what is actually practised could only be relevant for purposes other than a determination of the meaning and the effect which follows logically or reasonably from such determination.

Thirdly, it was submitted that, in holding clause 9 to be invalid, the purpose of "equitable distribution", which imposes a limit on the powers of the company, was overlooked by the Commission. For the reasons already given, we do not think that this supposed limitation reasonably restricts the company's power to decide what to distribute. The company is left entirely to itself to decide what is "equitable distribution". An interpretation of a document, according to well established rules, cannot be dispensed with by labelling it as an application of a "per se" doctrine. We think that the clause, as it stands,

A confers too wide a power and has to be struck down wholly as unreasonable on that ground.

Fourthly, our attention was sought to be drawn to the absence of evidence of distortion of competition and the presence of evidence that competition prevails in the market despite these clauses. We have
B already held such oral evidence to be really unnecessary for judging the possible effects of the clauses. The probability of the effect is only part of the rule of reason to be applied where extraneous evidence is admissible. In the instant case we are only, as already indicated above, concerned with a reasonable and natural interpretation of the clauses of the agreement and their reasonably possible effects.

C Fifthly, it was submitted that there was clear evidence of public benefit from an equitable distribution in actual practice so that the requirements of a "gateway" under s. 38 were satisfied. We cannot assume public benefit from a mere declaration of intention to exercise a power so as to benefit the public. We are not satisfied, on the evidence actually adduced and placed before us, that this power was necessary so as to benefit the public.

D

Furtherfore, we cannot reassess evidence. Actual benefit to the public is a question of fact on which findings cannot be reopened unless some error of law is revealed. No error of law in assessing evidence is disclosed. This is an additional reason for not disturbing the findings of fact recorded by the Commission.

E

Sixthly, it was submitted that the Commission had ignored the last sentence of clause 9 in interpreting it. We have, however, considered it and find that, far from making clause 9 more acceptable and reasonable, the last part of it makes it more objectionable and unreasonable inasmuch as it enhances the powers of the Company.

F Learned counsel for the appellant company has pointed out that the order of the Commission was to come into force from 1 July 1976, so that the appellant company had nearly four months to rewrite the agreements which are over four thousands in number. He prays for extension of time for six months from today for executing fresh agreements. It is not really necessary for us to fix any particular time within
G which the company will print or get new agreements executed on freshly printed forms in accordance with law. That is a matter for parties themselves to each agreement to decide and work out. All that we need make clear is that all agreements which are operative and binding between parties will be so interpreted now as if clause 9 was not there at all and clause 5 was there only in the modified form which omits the last sentence from clause 5 as it originally stood.
H However, if the company wants to complete any formalities for bringing each individual agreement into line with the law as declared by this Court it may do so; and, it will file, within six months from today an affidavit showing that it has done this. The requirement to file

such an affidavit showing compliance will ensure that the company has taken due steps to inform each stockist of the correct legal position. The time given for doing this will not, however, authorise it to act under those parts of the agreement which this Court has declared to be illegal. A

Subject to the observations made above we uphold the Commission's order and dismiss this appeal with costs. B

P.B.R. *Appeal dismissed.*